

Boom! Lawyered: The Supreme Court Ghosts *Roe v. Wade*

Imani Gandy: Hello, fellow law nerds. Welcome to an emergency episode of Boom! Lawyered, a Rewire News Group podcast, hosted by the legal journalism team that's just like, "What the hell man, just why? Why are you targeting us, Texas?"

I'm Rewire News Group senior editor of law and policy, Imani Gandy.

Jessica Pieklo: And I'm Jess Pieklo, Rewire News Group's executive editor.

Rewire News Group is the one and only home for expert repro journalism that inspires you to support abortion providers and patients in Texas. And the Team Legal Podcast is part of that mission. So a big thanks to our subscribers, and a welcome to our new listeners.

So, whoa. Like, man. Okay. So, so much is happening. First of all, folks, go over to Rewire News Group's Twitter feed. We are breaking news left, right, and center with what is happening in Texas, the Supreme Court, and abortion rights and access. We are crushing it over there.

So much is happening. It's moving so fast, and that's where you're going to find all of it. So please, if you're not right now, follow us over @rewirenewsgroup on Twitter.

Because look, the landscape has changed. It's going to be changing every day from here on out, and that's where you're going to find the latest.

And please, please, please sign up for our newsletter, because we've got a big announcement coming up, and you're going to find it there. So ... Oh, God. Imani?

Imani Gandy: I just—

Jessica Pieklo: Did you get a nap in? Let me ask you that. Did you take a nap?

Imani Gandy: I did. I took a 20-minute nap, and I have to say that considering that the two of us now both live in Boulder, the fact that we weren't together last night counting down the end of abortion rights and the end of *Roe v Wade* was really just poor planning on our part.

Jessica Pieklo: Yeah. Yeah, it was.

Imani Gandy: That said, I truly didn't expect what happened to happen last night.

Jessica Pieklo: Okay.

Imani Gandy: Right? I've been saying for a while, I'm going to enjoy this year, because this is basically the last year of democracy, the last year of abortion rights. Because I was assuming that we had until at least the Court heard the Mississippi case before they were just going to gut Roe.

Imani Gandy: But no! They just decided to up and do it just randomly, without doing anything at all. Jess, can you please just explain to me what the hell happened last night?

Jessica Pieklo: Yeah, because it is quite possible that folks woke up and are like, "Wait, did something happen at the Supreme Court?" Because you know what? A lot of folks in media aren't talking about it. And everything that went down last night happened under cover of darkness. So let's get to it.

Imani Gandy: Yes.

Jessica Pieklo: Last night, the justices refused to intervene in the fight over Texas's six-week abortion ban. And that let it take effect. That means that right now, on the books in Texas, there is a six-week abortion ban.

Imani Gandy: A six-week pre-viability abortion ban, which ostensibly are...

Both: ... unconstitutional.

Imani Gandy: But now, who the hell knows? So the law is called SB 8. It bans abortion at six weeks' gestation, which is before most people even know that they're pregnant. It's literally two weeks after a missed period. And considering a lot of women, a lot of people with uteruses don't really have regular periods.

You miss your period for two weeks, especially in a pandemic under stress, you're not really going to think about it. So it effectively is a total abortion ban in Texas.

That's bad enough. Then Texas did something really diabolical by outsourcing enforcement of the law to what Andrea Grimes, one of my favorite people, likes to call, "any random motherfucker." Right?

Any person in the country who has beef with abortion can go find someone in Texas who is either providing abortion or aiding and abetting an abortion, and then sue them civilly. And if they sue them and they win, they get \$10,000 for their trouble.

Texas has created a mercenary society based on abortion bounty-hunting. And it is absolutely unconscionable.

Jessica Pieklo: I'm still trying to wrap my head around "beef with abortion."

Imani Gandy: Well, you ain't got beef with abortion? "Yo son, I got beef with abortion. Meet me in the school yard, three o'clock high. Bitches!" I don't know what I'm talking about.

Jessica Pieklo: We are just off the rails already...

Imani Gandy: Verklempt.

Jessica Pieklo: ... because of all of this. Verklempt is it. It is bad! Imani is absolutely right. We've got abortion vigilantes out there, now empowered to enforce a state ban on abortion at six weeks. And it's a mess.

Imani Gandy: And not only that, they outsource enforcement to private citizens and divested enforcement from public officials, right?

Jessica Pieklo: Yeah.

Imani Gandy: Normally when a state like Texas passes an unconstitutional pre-viability abortion ban, abortion clinics will lawyer up, file a lawsuit, seek an injunction. That injunction will be granted because six weeks, it's pre-viability and that's unconstitutional. Then the litigation goes forward and everyone can argue about whether or not it's unconstitutional or whether it is.

But Texas has removed that possibility. Texas is saying you can't sue Governor Greg Abbott. You can't sue Attorney General Ken Paxton. Because these public officials have no authority under the law to enforce the law. So you can't sue someone for doing something that the law says they're not permitted to do.

It's really just a dismantling of the way litigation is supposed to work. And quite frankly, a dismantling of democracy in Texas.

Jessica Pieklo: And that point that you made is so important because it's effectively, I've been calling it a poison pill in this statute, because it has allowed it to take effect in weird ways.

Because it's not like folks didn't try to challenge it, right? That's how we got here.

Imani Gandy: Right.

Jessica Pieklo: Advocates sued to block the law. But through some procedural shenanigans related to this outsourcing of enforcement, the Fifth Circuit has managed to stall out the timeline of anybody being able to get an injunction in this case.

They stepped in and said, "Nope, the enforcement mechanism means that likely this isn't going to go forward, and we're going to sit on it." And they're still sitting on it.

Imani Gandy: They're still sitting on it.

Jessica Pieklo: So advocates ran to the Supreme Court and said, "This is not right." Filed an emergency petition with the justices, and asked for a temporary order just to basically let their lawsuit go forward. Let a district court hear arguments, hear on the merits of what Texas is trying to do here.

And guess what? The Supreme Court didn't issue that order last night.

Imani Gandy: Yeah.

Jessica Pieklo: And the Supreme Court still hasn't issued that order. And that's what lets the law take effect. That means that right now, there is limbo for this litigation. There is nowhere for it to go until the Fifth Circuit acts.

I mean, that's basically a soft reversal of Roe vs. Wade on the shadow docket. Or, as I like to nerdily call it, a pocket veto of your right to an abortion.

Imani Gandy: Jess really loves that pocket veto stuff. And our producer's like—

Jessica Pieklo: Our producer's shaking his head at me.

Imani Gandy: Get out.

Jessica Pieklo: And I don't care. That is good stuff. Yes, it is. Nerds unite.

Imani Gandy: But I know that there are a lot of people who are just confused about what happened at the Fifth Circuit.

Jessica Pieklo: Yeah.

Imani Gandy: So I do want to try to explain it as best I can. It's going to get procedurally frisky, which I know Jess hates, but I like it. And maybe I can make you listeners like it.

So advocates filed this lawsuit against two sets of defendants—against government defendants, Ken Paxton, Governor Greg Abbott; then they also filed a lawsuit against individual defendants.

The government defendants filed a motion to dismiss and asserted sovereign immunity. "We're public officials. You can't sue us. We're immune from suit."

This individual defendant, this guy Mark Dickson, who has basically been running around screaming about how he's going to be one of the guys who's going to be enforcing this law.

He's going to be harassing providers and "aiders and abettors of abortion" to basically harass them and impel them to stop performing abortions, or helping people get abortions. He's not a public official.

Jessica Pieklo: Right.

Imani Gandy: He can't assert sovereign immunity. So what the District Court did is it said, "Okay, fine. I'm going to stay the case as to the government defendants," because the government defendants went and appealed to the Fifth Circuit Court of Appeals.

This guy Dickson also decided to appeal to the Fifth Circuit Court of Appeals, even though under a procedural rule, which I'm not going to get into, he's not permitted to. He didn't assert sovereign immunity. Therefore, he's not permitted to do this sort of intermediate immediate appeal of a basic essential pretrial order.

So now what he's saying is that he is entitled to be in the Fifth Circuit, that he is entitled to be subject to the Fifth Circuit's jurisdiction just as the government defendants are, simply because he also thinks that the government defendants should have sovereign immunity.

Jessica Pieklo: What?

Imani Gandy: Yeah! He—

Jessica Pieklo: Wait, hold on, hold on. He's basically saying, "Yeah, me too"?

Imani Gandy: Yeah. That's exactly what he's saying. He's like, "Yeah, I know I don't have sovereign immunity because I'm not a public official. But if you go ahead and litigate this lawsuit against me, and an injunction is granted, that blocks the law against me."

But it also blocks the law against everyone, including these government defendants who are immune and who are still trying to fight for this law. So he's basically saying, "Sure, I'm not a public official, but they are. So I'm just going to go ahead and hitch my wagon to their star." It's absurd.

Jessica Pieklo: There is no "You get them, girl" defense in the law.

Imani Gandy: Right, it's like, "Go girl, me too." You can't be another defendant's hype man. That's what this guy, Mark Dickson, wants to be. He wants to be like one of

those dudes when you go to a hip-hop show, they're just behind Jay Z going, "Yeah"...

Both: "... yeah, yeah, yeah."

Imani Gandy: "Throw them up! Throw them up! With your hands in the air." You can't do that in court. That's not how it works.

Jessica Pieklo: Oh, God.

Imani Gandy: This should've been an easy thing. The Fifth Circuit should have said, "No, get out of here. The District Court can still enjoin this law as to you. Therefore, it enjoins the law writ large."

But the Fifth Circuit didn't do that, because the Fifth Circuit is chock-full of Trump judges and chock-full of other Republican-appointed numpties who hate abortion, and will do anything to decimate it. Even if it means essentially destroying democracy in the State of Texas.

I've never heard of the "Yeah, me too" defense in appellate court. That's just ...

Jessica Pieklo: I'm just imagining a lineup of defendants right now. And they're like, "Yeah, yeah."

Imani Gandy: Just like with their pants sagging and gold Flava Flav clouds. Being like, "Yeah, yeah, yeah. Go get them. Yeah, yeah." I mean, stop it. What is happening here, people?

Jessica Pieklo: For crying out loud.

Imani Gandy: I need to go on another small rant, if you will pardon me. But you're going to like this one.

Jessica Pieklo: You know what? All bets are off now, Imani. We are in a brave new world; rant away.

Imani Gandy: I want to talk about the fact that Jess and I have been on this beat for a decade.

Jessica Pieklo: Oh, I didn't know where this was going.

Imani Gandy: We have been covering reproductive rights, abortion rights, and the law for a decade. Together we've been doing it for about six years, but we've been working in the same environment for 10 years.

So if there is anyone on this God's green internet who understands what is going on with this law, it is Jess and me and the rest of us at Rewire News Group.

How do I know this? Because last night while Jess and I were frantically trying to inform everyone that Roe was officially dead, and that Texas had basically banned abortion, there were local reports from people saying, "No, no, no, there's a state case. And this state judge already blocked the law." Let's talk about how that's not true.

Jessica Pieklo: Yeah.

Imani Gandy: And let's talk about how the reporting is wrong and how it's dangerous. Because these reporters who don't understand what they are reading when they're reading these legal documents are leading their listeners, their watchers astray. Okay?

Michelle Simpson Tuegel, she is the attorney who won the settlement for the gymnasts who were abused and assaulted by Team USA doctor Larry Nassar, right?

Jessica Pieklo: Yeah.

Imani Gandy: Not a woman I'd want to mess with.

Jessica Pieklo: No.

Imani Gandy: She filed a lawsuit against Texas Right to Life and their legislative director, John Seago. Now, Texas Right to Life is the organization that was behind that hilariously disastrous tip line where they posted a website and said, "Anyone in the country, if you have any information about people who are performing abortions or aiding or abetting abortions, let us know. So we can go and sue them and get the 10 grand bounty."

So Michelle Simpson Tuegel says, "Wait a minute, I don't want you jackasses suing me." So she went into state court and asked for a temporary restraining order against Texas Right to Life and John Seago, their legislative director, saying, "You can't sue me under this law."

Jessica Pieklo: Right.

Imani Gandy: Excellent lawsuit, brilliantly worded. She won her temporary restraining order yesterday.

Jessica Pieklo: Yep.

Imani Gandy: Then we had a bunch of reporters reporting this as, "Because she won this temporary restraining order, that the law was blocked."

Jessica Pieklo: Right.

Imani Gandy: Absolutely not.

Jessica Pieklo: It's not.

Imani Gandy: She won the temporary restraining order against Texas Right to Life and John Seago. Those two entities cannot sue her. They can sue any other provider, any other clinic, any other abortion fund, clergy, whomever is considered an aider and abetter.

You really need to be clear on this fact. Please don't pay attention to reports if you don't think they're right. Or if they contradict what Jess and I say, because Jess and I are going to be right. And if we ever get something wrong, we are going to correct it immediately. And that is critical. It's just critical. Oy.

Jessica Pieklo: Because it's like I said, these are uncharted waters. So there are going to be a lot of questions. And honestly, the longer this law stays on the books, the more dangerous it's going to be for abortion providers and patients. Not just in Texas though, across the country. Right?

Imani Gandy: Right.

Jessica Pieklo: Because we know that what happens in Texas doesn't stay in Texas, Imani.

Imani Gandy: Yeah.

Jessica Pieklo: Right now, providers are trying to comply with the law. They're trying to get their patients access to care in the ways that they can in compliance with the law.

But what does this mean for the rest of the country? This isn't just going to be isolated to Texas, is it?

Imani Gandy: Oh, absolutely not. What we're going to see is that every state that has one of those trigger laws that says, "As soon as Roe v. Wade is overturned, abortion is banned" ... Roe v. Wade hasn't been officially overturned. But what the Court has essentially signaled is that they are fine with this private enforcement bounty hunting scheme.

That means all of these states—there's about 24 states that I would imagine, within weeks or whenever their next legislative sessions go into session—are going to be introducing bills with that same enforcement mechanism. So essentially, this entire country is going to become a nation of abortion snitches.

And what's particularly problematic about the way that Texas wrote this law—and you know, I got to say, it's clever to the point of being diabolical. It truly is.

Because not only does it essentially set up a mechanism whereby abortion providers and funds and other people in the abortion pipeline can be harassed ad infinitum—the law says that one abortion provider can be sued by multiple people for providing the same abortion.

That means if Dr. Jane Doe performs an abortion on one person, 25 people from states all over the country can sue her over that one abortion. Number one.

Jessica Pieklo: They're going to dogpile lawsuits.

Imani Gandy: They're going to dogpile lawsuits. Number two, that lawsuit can be filed anywhere in the State of Texas. Any of the 254 counties in the State of Texas.

That means if you are an abortion provider in western Texas, someone from Alaska can sue you in state court in eastern Texas. Meaning you have to drive hundreds of miles to go defend yourself in a court that is in a shitty venue.

And normally when you have this situation—you've seen Law & Order or any of those docu-dramas where...

Jessica Pieklo: I have seen Law & Order, as a matter of fact, Imani, a couple of times.

Imani Gandy: You've heard that people talk about, "Oh, well, we need to get a change of venue, because this venue isn't proper because the jury has been biased by media coverage or what have you."

People change venue all the time for myriad reasons, including that the court is just too goddamn far away, and I can't defend myself...

Jessica Pieklo: Yeah, I can't defend myself over there...

Both: It's inconvenient...

Jessica Pieklo: ... is a legitimate reason to change venue.

Imani Gandy: Texas has disallowed any venue changes when it comes to abortion laws. You can't change venues. That's number two.

Number three. And this is actually probably the most infuriating for me as an attorney.

If you are an attorney and you choose to represent a provider who is being targeted by one of these abortion snitches; and as part of your defense of that abortion provider, you say that this particular law, SB 8, is unconstitutional; you have to win every single claim that you bring. Otherwise, you are jointly and severally liable automatically for the other side's attorney's fees.

Now, let me explain to you how weird that is. Usually when you file a lawsuit, people are responsible for their own attorney fees.

Jessica Pieklo: You pay your own way.

Imani Gandy: You pay your own way, except in certain circumstances, when it comes to consumer statutes or if a state is trying to dissuade people from filing frivolous nonsense lawsuits.

Jessica Pieklo: Okay.

Imani Gandy: Right?

Jessica Pieklo: Mm-hmm (affirmative).

Imani Gandy: Here, what is happening is that lawyers are being told, "If you raise these claims and you don't win all of these claims, we're going to make you pay the other side's attorney's fees if your client can't pay them."

Usually attorney's fees and costs, those are paid by the client, by the actual plaintiffs—not the plaintiff's attorneys. And these costs can be upwards of hundreds of thousands to millions of dollars.

So how is an attorney going to want to represent a client and challenge an unconstitutional abortion law if the downside is bankruptcy, right?

Imani Gandy: Losing their practice because they can't afford to pay these fees that the Texas Legislature has foisted upon them. And this only applies to abortion laws.

So Texas knows that these laws are unconstitutional, and they are trying to dissuade attorneys from challenging them by saying, "If you challenge us, we're going to force you to pay about a million dollars to do so."

Jessica Pieklo: Ugh ... my stomach hurts. Okay. So can I have a rant? Can I do a rant now?

Imani Gandy: Please.

Jessica Pieklo: I have a rant.

Imani Gandy: Great, I'd love to hear it.

Jessica Pieklo: I'm going to ... Oy, I'm going to channel my Roy Kent. Imani, you mentioned that we have been in this space covering these laws for a long-ass time, right?

Imani Gandy: Yeah.

Jessica Pieklo: So I want to remind folks that many, many moons ago, Texas passed a 20-week abortion ban. 20 weeks. That sounds so generous at this point, compared to where we are at.

Imani Gandy: Right.

Jessica Pieklo: The 20-week abortion ban stayed on the books. And it stayed on the books for a variety of reasons. One of them being that at the time, there wasn't anybody in the State of Texas that was providing abortions at 20 weeks, so there wasn't a provider who had standing for it.

And at the time, Imani and I were freaking out, because we were like, "This is really bad." A 20-week ban is an unconstitutional pre-viability abortion ban, should not be on the books. But because it stayed there, what did it do? It allowed other states to look to Texas and say, "Hey, guess what Texas did?"

Imani Gandy: Yeah.

Jessica Pieklo: "They passed a 20-week abortion ban and they kept it on the books. So our 20-week abortion ban should also stay on the books."

Imani Gandy: Yeah.

Jessica Pieklo: And what happened in conservative and gerrymandered states, 20-week abortion bans became the new normal. Then we saw ever more restrictions happen.

So keeping a six-week abortion ban on the books, even if this is temporary, even if there's a new lawsuit that gets filed and it gets blocked, is going to give conservative lawmakers in other states more ammunition to argue to Trump judges that their six-week ban should also stay on the books while this fight continues.

We will be in a space where we don't even have a final ruling yet, but we will have a whole host of unconstitutional, pre-viability abortion bans stacking up across the country.

Imani Gandy: Yeah.

Jessica Pieklo: It's a fucking nightmare.

Imani Gandy: It is.

Jessica Pieklo: But it's not necessarily over. As I mentioned, the case has stalled out at the Fifth Circuit for the time being. But that doesn't mean it's over. Individual providers

and allies can file their own challenges. They can kickstart that process all over again.

But because of this enforcement provision that Imani keeps talking about, there's not a real clear path to the kind of order blocking the six-week ban that we're used to reporting on, that we're used to talking to y'all about on this podcast. That enforcement mechanism is really mucking things up.

Imani Gandy: Right, because basically it says you can't sue the government, even though the government passed this unconstitutional law and then outsourced enforcement to literally everyone else in the country. Anyone else in the country.

And here's what really bothers me, particularly about Texas Right to Life, and then I'll stop yapping. Texas Right to Life puts up this tip line. They're saying, "We want tips from all over the country about who you think might be involved in abortion."

That seems like a pretty naked power and money grab to me. Because if they're getting tips from other people and they're the ones filing the lawsuits, then they're the ones that get the \$10,000 bounty. So it's just like they're crowdsourcing harassment against providers so that they can make more money.

Jessica Pieklo: It's always a grift, Imani. It's always a grift.

Imani Gandy: It's always a grift if you just scratch underneath the surface, you'll find a grift every time.

Jessica Pieklo: There's also the possibility that the Supreme Court justices could wake up and decide to act. They could eventually get around to weighing in on what's going on. I mean, that is a possibility that's still lingering out there.

But here we are with Dobbs vs. JWHO. J Whoop!

Imani Gandy: J Whoop!

Jessica Pieklo: That is an abortion ban case that's actually on the docket. They don't have to shadow docket anything with that. There's going to be arguments, there's briefs filing. The real-deal direct threat to Roe vs. Wade is currently on the docket, and we're waiting to find out when they're going to schedule those arguments.

The Court gave us a really good indication of what they think of that case. Don't you think, Imani?

Imani Gandy: Yeah. And as you pointed out to me yesterday, the Mississippi case is about a 15-week ban. Texas already has a 15-week ban on the books, and the Fifth Circuit just said it's okay.

Jessica Pieklo: And if you have questions about what is happening on the ground with these lawsuits, with the state of abortion rights and access, please make sure you're following Rewire News Group's Twitter account. That is where we are doing all of this reporting right now, because things are moving so fast, that's where folks are getting their news.

If you want to know what the latest is happening in your state, across the country, definitely check out our Twitter feed. It is, as the kids say these days, lit.

Imani Gandy: It is lit. And not to toot my own horn, but I've been kind of running a lot of the Twitter feeds. So it's got a little bit of that Angry Black Lady razzle-dazzle. So you're definitely want to go hit that Follow button over on Rewire News Group.

And on that note, I think we need to start drinking early. I mean it's only 9:30, but ...

Jessica Pieklo: Maybe a mimosa.

Imani Gandy: I mean, what the heck, right?

If you have any questions about any of this stuff, please hit us up on Twitter. I'm @angryblacklady. Jess is @hegemommy. Follow Rewire News Group on Twitter and on Instagram. If you want to donate, you can go to rewirenewsgroup.com/donate.

You know, we need your money to help keep this Boom! Lawyered ship afloat. Jess and I, we got our fingers plugging holes in the SS Abortion, and it's just sinking like the Titanic. Help us out, put a finger in a hole. That is something I should not have said out loud.

Jessica Pieklo: Imani Gandy ... this is a family program.

Imani Gandy: Okay. I think that's enough for me. What are we going to do, Jess?

Jessica Pieklo: On that note, folks, we'll see you on the tubes.

Imani Gandy: We'll see you on the tube, putting holes in ... God, I got to stop. It's bad news. See you on the tubes, folks.

Boom! Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. Marc Faletti produces the show.