

Boom! Lawyered: Abortion Rights Are in Chaos. What Now?

Imani Gandy: Hello, fellow law nerds. Welcome to another emergency episode of Boom! Lawyered, a Rewire News Group podcast hosted by the legal journalism team that wishes the Supreme Court would just get it to-goddamn-gether.

I'm Rewire News Group's 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 take to the streets after what the court just did. And the team legal podcast is part of that mission. So a big thanks to our subscribers and a welcome to our new listeners.

Y'all, we are launching a brand new newsletter. I'm writing it. It's called The Fallout. And it's exclusively dedicated to making sense of all of this post-Roe chaos. Because, Imani, let's face it, some stuff is happening.

Imani Gandy: Yeah. A little bit. A little bit.

Jessica Pieklo: Okay? There's some drama.

Imani Gandy: A little bit of drama.

Jessica Pieklo: There's going to be more drama for the courts.

Imani Gandy: Definitely more drama.

Jessica Pieklo: There's going to be more terrible bans coming from even more states.

Imani Gandy: God.

Jessica Pieklo: And honestly, God knows what else. So if you want to stay on top of everything, all you have to do is subscribe. Go to rewirenewsgroup.com/fallout. That's rewirenewsgroup.com/fallout. This is exclusively about this zeitgeist, the moment in time. Coming in hot every week, you don't want to miss it.

Imani Gandy: And there's no one better to do it than our own Cassandra of the courts here-

Jessica Pieklo: I mean ...

Imani Gandy: ... our resident court whisperer. So honestly y'all, this is not a newsletter you're going to want to miss. Please subscribe.

So last night I decided to take it a little bit easy. I had myself a nice bath-

Jessica Pieklo: I was proud of you. Good self-care.

Imani Gandy: ... I got into bed. Self-care. Got into bed around like 10:00 PM, thought, "I'm going to get a good night's sleep. I'm going to check Twitter, see what's going on." Checking Twitter, scrolling Twitter. And I swear someone in a private DM group I had said, "Hey, Imani, have you read the opinion yet?" And my immediate reaction was, "What?"

And so I went immediately to your Twitter to find out that the Supreme Court had just dropped an order, basically at midnight Eastern, while I was trying to get some freaking sleep. And I'm personally offended. But also the order is really, really bad. Really, really bad.

Jessica Pieklo: Yeah. So let me start off by first of all apologizing. Because last night I too was on Twitter. I was not making good decisions like Imani and engaging in self-care. I was staying up late and yammering about the internets as I am wont to do.

And I made a joke about the Supreme Court dropping an opinion to ruin our Labor Day weekend on a Friday evening. And literally, the very next thing that happened was this opinion. So as the resident white lady, I feel like I manifested something I did not mean to do. And I want to apologize to everybody from the bottom of my heart.

Imani Gandy: It's all right, Jess.

Jessica Pieklo: We've been through a lot. 2021 was already more than we signed up for.

Imani Gandy: Yeah.

Jessica Pieklo: And Imani, especially to you, I'm sorry. You were bombarded with like 800 messages. So I'm glad our friendship can survive this.

Imani Gandy: You know, Jess, it's quite all right. We have been through a lot. And I don't blame you for this. Yeah, I was trying to get some sleep and you just had to pop off on the Twitters, knowing how you actually have a tendency to manifest such things. But it's okay. I love you. We're going to get through this together.

But let's talk about what the court did.

Jessica Pieklo: Mm-hmm [affirmative].

Imani Gandy: Just tell me what the court did and why it's so outrageous?

Jessica Pieklo: Well it went completely off the rails, for starters. It functionally overturned Roe vs. Wade in the dead of night. That's not what the opinion says, but that's the effect of the opinion. And so let's get into it.

Justice Alito said, "Hey, you know what? If you want to challenge this law, bring a different lawsuit, plaintiffs." And that's the nugget of why he's letting this take effect. And the conservatives went happily along with him. So everybody, Susan Collins, the folks who were like, "You know what? Brett Kavanaugh wouldn't do in secret what he could do in daylight." I'm going to call bullshit on that because he just did in secret, that thing.

So they said that this law can take effect. The Supreme Court, the conservatives went out of its way to say that they weren't saying anything about the merit. So the conservatives went out of their way to say, "We're not saying we think it's constitutional, just that we're going to let it take effect because we don't know the answer to this."

And Elie Mystal was on Twitter and had the best response to this, which is, "If the highest court of the land does not know the answer to this law, then you don't let it take effect. You pause it and let the courts figure out what the hell is going on." Right?

Imani Gandy: Right. Yeah. And that's truly the bottom line. Any reasonable justice, any reasonable group of justices, would have said, "Wow, this law is a bit of a clusterfuck. Texas has purposefully enacted an unconstitutional pre-viability abortion ban. And then through procedural jiggery pokery has insulated that law from challenge. So why don't we take a beat, pause this law, and then just figure out what the hell is going on?"

Jessica Pieklo: Yeah.

Imani Gandy: But Alito decided that he wasn't going to do that. I don't know, this is all very confusing. So he just basically threw up his hands and was like, "Eh." And he was-

Jessica Pieklo: Yeah. He's like, "I'm on the Supreme Court, how the hell do I know?" Meh."

Imani Gandy: Right, exactly. And Sonia Sotomayor's dissent was just basically like, "Bitch, what?"

Jessica Pieklo: Yes.

Imani Gandy: I mean, honestly, I think the first sentence was, "This court's order is stunning."

Jessica Pieklo: Yeah.

Imani Gandy: And it is stunning. Because what Texas has done is it's implemented a patently unconstitutional law based on the court's own precedent.

Jessica Pieklo: Mm-hmm [affirmative].

Imani Gandy: And considering that the court kept saying, "Well, we're not deciding this on the merits." You already know what the law is, you are the Supreme Court. You know what you have said in the past. You know that you have said that these six week bans are unconstitutional. You know that every federal court in the country has said that these six week bans are unconstitutional.

So this idea that, well, now you can't do anything because Texas did this weird finagling and tried to insulate the law from challenge, it's absolutely preposterous.

Jessica Pieklo: Mm-hmm [affirmative].

Imani Gandy: So Sonia Sotomayor was fuming. Elena Kagan was fuming in her nice white lady way.

Jessica Pieklo: Yeah.

Imani Gandy: She was just kind of like, "Excuse me, what the hell is this?"

Jessica Pieklo: Yeah. That's exactly it. I actually hear that in her voice.

Imani Gandy: Right? Right? Right? Like, "Excuse me, what the hell is this?"

And even John Roberts, in terms of the procedure of it, was like, "What?" But we don't really like John Roberts because he doesn't really care about the constitutionality of it, he just wants the process to look nice and pretty.

Jessica Pieklo: Yeah. So I got to talk about John Roberts here, because I'm already seeing this and we know. So, dear listeners, John Roberts is no friend to abortion rights.

Imani Gandy: Nope.

Jessica Pieklo: Okay? We just need to get that out of the gates. And, yes, John Roberts is an institutionalist, kind of, right? He's an-

Imani Gandy: What do you mean by institutionalist?

Jessica Pieklo: Oh, thank you for asking me, Imani. I'm so glad. An institutionalist ... in this paper, I will describe ... No

Imani Gandy: The dictionary defines institutionalist as ...

Jessica Pieklo: So, Roberts, you hear this all the time. He's the guy who calls balls and strikes. He's just an umpire. He believes in the power of the institution. The idea that the United States Supreme Court is the highest court of the land, should command the respect of all of the other institutions, carry itself with the dignity that befits the office. All of that. That is his public-facing appearance.

And so he joined his liberal colleagues in dissenting in letting this law take effect. But he didn't join in anything they said about, "Hey, this nonsense is unconstitutional." His point was like, "Gosh, you guys on the Fifth Circuit, you keep acting out of order. And that's really going to make things uncomfortable for me at the country club. So could you simmer down? The golf game is going to get awkward if I keep explaining why you don't respect my authority-

Imani Gandy: "Respect my authority."

Jessica Pieklo: ... And I can't have that." That's what Justice Roberts said last night about this, is he wants the lower courts to get in line and follow the process. Which is exactly what he did in June Medical Services, by the way.

Imani Gandy: Absolutely.

Jessica Pieklo: This is his MO. He doesn't vote for substantive abortion rights. He will vote for the procedural stuff that makes it seem like he's reasonable.

So if you read anything, if you see anything, if you hear anything that says Roberts is a moderate, that Roberts was doing anything good in this opinion, listeners, I need you to take a breath in and then breathe that nonsense out. Because there's not a shred of truth to it. It's just not.

Imani Gandy: Absolutely.

Jessica Pieklo: All right. Thank you.

Imani Gandy: Absolutely.

Jessica Pieklo: I feel so much better now.

Imani Gandy: I know you do. I knew that you needed to get that out.

Jessica Pieklo: I've been working on that. I had that inside. I've been holding onto that for a while.

Okay. So, yeah.

Imani Gandy: So let's talk about whether or not Texas is absolutely ultimately screwed or whether or not this law can still be blocked.

Jessica Pieklo: Yeah. There's some big questions, I bet, that folks have. And I'm guessing this is one of them.

So, I don't know, is Texas permanently fucked, Imani?

Imani Gandy: I mean probably, but not necessarily right away.

Jessica Pieklo: Okay, that's the most lawyerly answer you've given me on anything. I've never heard you lawyer me as much as you just did.

Imani Gandy: But it's true. Abortion is effectively banned in Texas right now because the Supreme Court let this law go into effect. The case is still being litigated in district court and in the Fifth Circuit. So there are still goings-on in those courts.

So it's possible that the law could still get blocked by the district court. And it's possible that the Fifth Circuit could uphold it. But honestly, folks, we are in a whole new brave world, a whole new crappy world, where the rule of law and procedure and the way things are normally done don't really matter anymore.

Jessica Pieklo: Yeah.

Imani Gandy: So can the law still be blocked at some point down the line? Sure. Who knows when that's going to happen, however. Because there was supposed to be a preliminary injunction hearing. That got canceled. We don't know if that's ever going to be rescheduled or if the district court is going to have to hold an entire trial on SB 8, and therefore this law will be in effect for six months to a year. Who knows?

And then, on top of that, we still have this Mississippi case hanging out there in the ether, that for some reason the court still has not decided whether it's going to hear, or not, this term. And so it's just this sort of procedural constitutional timey wimey wibbly wobbly morass.

Jessica Pieklo: Yes.

Imani Gandy: Clusterfuck, if you will.

Jessica Pieklo: And so we've talked about this procedural point on the podcast before. And we dove way into it in the other series, We'll Hear Arguments. But one of the things that is going to have to happen, and we're starting to see it, are individual challenges by individual people. And this was Alito's point in letting the law take effect, is, "You're not really facing a threat yet. So come back to court when you are."

So normally, in the before times, like when the courts functioned, people would file a lawsuit and the court would block it writ large. They challenge it on its face. So on the face of the law, it blocked everybody.

Now we're going to have to see individual providers, individual abortion funds, folks who are on their own, shouldering the cost of litigation to get the law blocked. But not as to everybody, just as to them. So an individual provider is going to have to bring a lawsuit and say, for example, "Hey, Greg Abbott, knock this off. Hey, Texas Right to Life, knock this off." And a court is going to then have to issue an order that says, "Leave them alone. Don't try to enforce this law against this individual person."

That is a waste of time, a waste of resources. That is not how the Constitution works, Imani.

Imani Gandy: And on top of that, just because there's a particular provider or abortion fund that knows that a particular abortion snitch is coming for them, so they go into court and they get a TRO against that particular abortion snitch. There could be abortion snitches just circling in the ether. So literally they don't know who is coming for them. And that is the point of the law.

In some cases you might be filing lawsuits on a daily basis.

Jessica Pieklo: Yeah.

Imani Gandy: We just don't know what the deluge of lawsuits is going to look like. It's anarchy. It's pure chaos.

But I have a question for you.

Jessica Pieklo: Too bad.

Imani Gandy: Too bad. Podcast over.

Jessica Pieklo: Sorry.

Imani Gandy: So we know that after Texas goes, the rest of the nation ... in a lot of cases, when it comes to abortion laws.

Jessica Pieklo: Yeah.

Imani Gandy: So what are the other states that are going to likely be the first copycats to pass this same law? And not just the six week ban, but the six week ban with this private enforcement mechanism that makes it nearly impossible to challenge in court.

Jessica Pieklo: Yeah, it's that private enforcement mechanism that's the sticky wicket here. Because we have six week bans already; Tennessee's got one, Oklahoma's got one. So there are states that already have that level of gestational restriction out there.

I think it's important to remember the other states in the Fifth Circuit, right?

Imani Gandy: Mm-hmm [affirmative].

Jessica Pieklo: Because the Fifth Circuit is really what got us here. So states that I am looking to immediately: hey there, Mississippi.

Imani Gandy: Hey girl.

Jessica Pieklo: Hey there, Louisiana. We have every reason to think that folks in Louisiana and Mississippi will do this because they know they can, the Fifth Circuit's going to hold it up. They're just going to look at Texas and say, "Look, Texas' law has been on the books forever. We're cool too."

I'm also looking at Arkansas. I'm looking ... I mean, Missouri.

Imani Gandy: Mm-hmm [affirmative].

Jessica Pieklo: Tennessee.

Imani Gandy: Yeah. Tennessee.

Jessica Pieklo: Any-

Imani Gandy: North Dakota, South Dakota. North Carolina, South Carolina.

Jessica Pieklo: Yeah. And honestly, any state that is conservatively gerrymandered is going to look at this enforcement mechanism as their golden goose. Right?

Imani Gandy: Mm-hmm [affirmative].

Jessica Pieklo: That is really the thing that they are hoping. And so, honestly, it doesn't even have to be a six week ban, maybe we'll get a reason ban and they're going to leave private enforcement for a reason ban up to third-parties. That is not outside of the realm of possibility.

So immediately, the states in the Deep South, for sure. And then any state that is gerrymandered conservative.

Imani Gandy: Yeah. It really drives home the importance of voting rights and the way in which voter suppression and these abortion restrictions are sort of going hand in hand. Because Texas just recently passed a voter suppression law.

If these laws are going to be determined by state courts, then it matters how those state courts are formed. In some cases, these judges are appointed. And whatever, you get a Republican governor, they're going to appoint Republican people, what have you. But in a lot of cases, judges are elected. And so that means that people need to become a little bit more aware of how judicial elections occur in their state. I think that's a really critical point.

Jessica Pieklo: Mm-hmm [affirmative]. That's such a smart point. I could not agree more.

Imani Gandy: I have another question for you.

Jessica Pieklo: What gives, Imani? That's my question.

Imani Gandy: So does this JWHO case, does the Mississippi case even matter anymore? I mean, because we've been losing our minds about the Mississippi case for months. We thought that that was going to be it. And then suddenly, out of nowhere, the Supreme Court's just like, "Eh, we're just going to overturn Roe with a shadow docket. So what happens with JWHO?"

Jessica Pieklo: Yeah. So the JWHO case absolutely does still matter and here's why. I mean, in some ways it feels like a formality, because what happened this week was the Supreme Court conservatives absolutely telegraphing what they plan to do.

But you've talked about the shadow docket, right? The shadow docket is that place where the Supreme Court does business outside, even further outside of the public eye. And so the conservatives need JWHO to finalize what they started this week on the shadow docket in Texas.

And that is a depressing-as-hell thought. I'm going to give us all a moment to just sit with it and let that sink in. But that's true, because JWHO is going to be a substantive look at Roe. Can states ban abortion before viability? That's a substantive look at Roe.

Imani Gandy: Yep.

Jessica Pieklo: What happened this week in Texas didn't get to any of those questions because they just let it take effect. So this is going to be the time where conservatives have to show their work. They are going to have to show what they are doing. They can't do it in the shadows. They're going to have to spill ink and explain their thinking.

So, to that end, the case absolutely does matter. Also, because whatever they come up with is going to basically start the next front of battles in the states as well. If, for example, the court says rational basis applies to all abortion restrictions, including those to advance fetal life, then, I mean, we're going to see all manner of restrictions get cooked up and enacted while Roe still stays on the books.

That's a different landscape for us than we're even talking about right now. So those are some real big points as to why I think the JWHO case matters.

Imani Gandy: I'm just [crosstalk]-

Jessica Pieklo: My turn. My turn.

Imani Gandy: No. No. I'm done.

Jessica Pieklo: I have questions.

Imani Gandy: Okay, hit me.

Jessica Pieklo: Is there any hope of a federal law that would enshrine the right to abortion?

Imani Gandy: With this Congress and these Democrats? What kind of crack are you smoking my friend?

I mean, look, at this point, the only way to save abortion rights is for the federal government to do something. And since we know that really the only way to really, really enshrine the right to abortion is legislatively. Congress is going to have to pass some sort of law.

I recall Kamala Harris having ideas about using the same sort of rubric that the Voting Rights Act did, this sort of pre-clearance requirement; where if the state of Texas is trying to pass abortion restrictions that are absolutely ridiculous, they've got to go through the DOJ first. And the DOJ is going to be the one to say, "That abortion restriction is fine. That abortion restriction is not fine."

But for that to happen, we need a functioning Congress, and we need Democrats that are willing to think outside the box, that are willing to be bold. And do we have those Democrats right now? I don't think that we do.

On the other hand ... and I said a while ago that President Biden has the opportunity to be a really transformational president. And at the time I was saying that with respect to calls to expand the court.

Jessica Pieklo: Mm-hmm [affirmative]. Yeah.

Imani Gandy: Of course, that is all being stymied by this filibuster nonsense. In order for anything to happen, we need to nuke the filibuster. And I don't know how many more rights need to be stripped away from the American people before President Biden puts Joe Manchin in a goddamn headlock.

Jessica Pieklo: Yeah.

Imani Gandy: You know what I mean? Joe Manchin needs to be in a headlock, and Kamala Harris needs to sit on Kyrsten Sinema until they get their shit together. It's absolutely ridiculous.

And so, Elie Mystal ... we've mentioned him before in this podcast. He's a friend of the podcast and he is absolutely on it. And he's one of those guys, he has a really good command of the law. So he can think outside the box. And today he published a piece that talks about the ways that President Biden can get around the Supreme Court and get around Texas. And it involves basically federalizing doctors, and then having those federal doctors perform abortions in Texas.

So these vaccine centers have popped up everywhere, right?

Jessica Pieklo: Yeah.

Imani Gandy: Abortion centers should pop up everywhere, federally run-

Jessica Pieklo: And might get that Abortionplex, finally.

Imani Gandy: We might actually get that Abortionplex; where you can get your abortion, get a mani pedi, get a latte, and get the hell out.

Jessica Pieklo: So this may be tilting at windmills, but I want to say this because we are very frustrated with the folks who should be on our side on this. But also, you know what? Dammit, this is turning into a human rights crisis. And we need Republicans to recognize that it's a human rights crisis that they are creating, specifically.

The idea that folks are still with kids gloves with this. I'm sorry, we could pass federal legislation, not just if the Democrats were on board but if just a couple Republicans were on board too. And that shouldn't be that hard.

And if it is, if it is, then we need to call that out. If it is, then we need to specifically say, "This Republican senator is okay with people dying from bad health care, or dying from a lack of health care," and name it. Sorry.

Imani Gandy: Cough, cough, Susan Collins, cough, cough. I mean, honestly.

Jessica Pieklo: Yeah.

Imani Gandy: And you're actually right. I am going to retract my statement a little bit. Because, yeah, with this Congress, we probably could get it done. But it would take a lot of pressure from the public. It would take a lot of going back to Susan Collins' absolutely absurd comments about Brett Kavanaugh, and saying, "Lady, you were the one who said that you still wanted to protect abortion rights. And you didn't think that Brett Kavanaugh was going to be the guy to destroy them." Right?

Jessica Pieklo: Yeah.

Imani Gandy: "Now, you have been proven different. So here's this legislation that you can sign. You can put your money where your mouth is, you can say to your constituents and to the country. You've been saying all along that you do support abortion, that you are pro-choice, now's the time to show it. Get Collins ..."

Jessica Pieklo: Sponsor that legislation, Susie.

Imani Gandy: Yeah. Do it. Do it. I mean, it's really the only way, besides some sort of federal national response.

Jessica Pieklo: Yeah.

Imani Gandy: And Biden did say that he's open to a discussion about what he can do to preserve access to abortion in Texas. So even him saying that is a positive development.

But my God, I did not expect to be at this crisis point today.

Jessica Pieklo: Today. I thought-

Imani Gandy: Literally today.

Jessica Pieklo: Literally. I thought I'd have a weekend maybe.

Imani Gandy: Yeah, it's too much. It's too much.

So, once again, Jess and I are going to be here on the ones and twos, keeping you informed of whatever's going on when it comes to this abortion law and literally any abortion law. If you want to support us, you can donate. Please do. Rewirenewsgroup.com/donate.

We are out here every day trying to bring you the most accurate information and to explain to you what is going on. We know that a lot of people right now are becoming activated around this issue. I saw Amy Hagstrom Miller on TMZ.

Jessica Pieklo: What? That's amazing.

Imani Gandy: Yeah, on TMZ. I mean, that's reaching people who probably have never really thought about abortion law before.

So now is the time for you to talk to your friends and be like, "Hey, have you heard of this podcast Boom! Lawyered? Do you want to know what's going on?" We can explain it to people who are just coming to this issue now.

Jessica Pieklo: Yeah.

Imani Gandy: And honestly, there's no shame if you haven't been activated up until now.

Jessica Pieklo: That's okay.

Imani Gandy: There's no shame if you didn't even know about it until today, because the Supreme Court did it under cover of night.

But you know now, you should tell your friends. We're going to be around the clock. And your monetary donations, your support, even a tweet, helps us.

Jessica Pieklo: Certainly.

Imani Gandy: It makes it possible for us to do this work. And we really, really appreciate it.

So on that note, once again I'm going to say you should subscribe to Jess's new newsletter, rewirenewsgroup.com/fallout. She is going to be bringing you all of the hot goss when it comes to abortion law and the Supreme Court.

Jessica Pieklo: Abobo hot goss.

Imani Gandy: Yeah, abobo hot goss.

And if you want to talk to us a little bit more informally, you can find me on Twitter, @AngryBlackLady. You can find Jess on Twitter, @Hegemommy, H-E-G-E-M-O-M-M-Y. Follow @RewireNewsGroup on Twitter. Follow @RewireNewsGroup on Instagram.

And aside from that, see you on the tubes I guess?

Jessica Pieklo: See on the tubes, folks.

Imani Gandy: All righty.

Speaker 3: Boom! Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. Marc Faletti produces the show.

