

Boom! Lawyered: Rapid Reaction—Why the Supreme Court’s Texas Abortion Decisions Are Infuriating

Jess Pieklo:

A week ago, he didn't know what abortion was and now...

Imani Gandy:

Looks like the caveman lawyer got a little education in the last week.

Imani Gandy:

Hello, fellow law nerds. Welcome to a very special reaction episode of Boom Lawyered, a Rewire News Group podcast, hosted by the legal journalism team that is looking at snow falling from the sky, literally right now. Very exciting. Very, very exciting. I'm Rewire News Group Senior Editor of Law and Policy, Imani Gandy.

Jess 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 thank an abortion provider today. And the Boom Lawyered podcast is part of that mission. So a big thanks to our subscribers and a welcome to our new listeners.

Imani Gandy:

We have got so much great stuff going on on our social channels that I just need to take a moment.

Jess Pieklo:

Please do.

Imani Gandy:

To shout out our social media manager Anagha, and to say that you really ought to go follow us on all of our channels. @RewireNewsGroup on Twitter, we've got so many great threads. We've got threads about goings on in states like Arkansas and California. We've got amazing Instagram swipe throughs, especially if you missed any of the shenanigans from the Dobbs hearing, which was only last week somehow.

Jess Pieklo:

How?

Imani Gandy:

I don't *know* how, but you should go and check out the Instagram. I mean, our Instagram is popping. Twitters popping. Booties popping. It's all fantastic. Also, we're in the middle of our end of year fundraising campaign. And we really need your help to raise \$20,000 by December 31st. Now, if you love this podcast and you want to support Boom Lawyered, please head over to RewireNewsGroup.com/donate and give a gift of any size today, any size. It all helps.

Jess Pieklo:

It does. It all helps. So, Imani.

Imani Gandy:

Yeah.

Jess Pieklo:

Yeah. You know, we got a couple decisions today related to SB 8 and Texas and well there's a lot of procedural stuff in there, which frankly feels like a personal attack because you know how I feel about procedure and civil procedure.

Imani Gandy:

I will take on all of the civil procedure burdens and lift them off your shoulders. So you can focus on cerebral stuff, real American values.

Jess Pieklo:

This is why we are a dream team.

Imani Gandy:

Exactly.

Jess Pieklo:

Okay. Because this is how we support each other, but let's hit the bottom line first. Imani, did anything change for abortion access in Texas today?

Imani Gandy:

In a word, no. And that's infuriating, because this opinion that we got was just pages and pages of honestly uninteresting rhetoric about enforcement mechanisms and sovereign immunity. And *Ex Parte v. Young*, and whether or not people can sue state officials, if those states are violating their constitutional rights. Which seems like the answer should be yes. But somehow this court came down on, "I don't know, maybe." And that seems odd given the fact that the underlying law is unconstitutional. So they let that underlying law stay into effect while they went on some cerebral mind hunt about civil procedure.

Jess Pieklo:

Oh, we have so much to talk about. Okay. So if nothing materially changed for pregnant people in Texas, what was the most significant outcome of today's Supreme Court rulings?

Imani Gandy:

That we all know for sure that the conservative Supreme Court justices are a bunch of bitches.

Jess Pieklo:

Oh, I think though that's really true. I mean, we're going to dive into what the court did today, in the two cases that were before it, Whole Woman's Health versus Jackson and USA versus Texas for justice. It wasn't great, but it wasn't just great for pregnant people, it was really not great for federalism and like there's a lot there. There's a lot.

Imani Gandy:

So let's talk about US v. Texas first, because when you said federalism, you got a little glint in your eye and I know you've got things bubbling up. You've got things to say. So first let's talk about US v. Texas. What are the main takeaways from that decision?

Jess Pieklo:

Yeah. So for folks who may not remember, because it's been like, what, five lifetimes ago, since we had these oral arguments? No, actually it was like a month ago, truly.

Imani Gandy:

Which is wild.

Jess Pieklo:

It just, I can't, everything is on hyper speed. So USA versus Texas, that's the Biden administration's challenge to SB 8. And so they came in and sued under the force of the Department of Justice and said, we're swooping in, and it is our role to defend the rights of people in Texas who have had them stripped away in SB 8. Texas has effectively banned abortion.

Jess Pieklo:

So they got a preliminary injunction. That was great. Texas does what Texas does and appealed it to the Fifth Circuit immediately. And the Fifth Circuit does what the Fifth Circuit does and immediately paused that great injunction. So USA versus Texas goes up to the Supreme Court and the Supreme Court grants it. And then today, in like a one-paragraph order, they go, "whoops!"

Imani Gandy:

It was "jk!"

Jess Pieklo:

“Guess we shouldn’t have done that. See ya later!”

Imani Gandy:

I mean, all it said is “improvidently granted,” which that's it. How Jess, how? please explain to me how it was improvidently granted, if the same issues were at issue in the other case, in Whole Woman's Health versus Jackson. Help me understand.

Jess Pieklo:

I can't. We should ask Sam Alito to answer this question, truly, it's maddening. Like what happened in USA versus Texas is the federal government came in and said, “Hey, we have a federalism problem here. We have a state that is trying to create a regime to circumvent the federal constitutional rights of Texans. That's a problem.”

And one of the roles that the federal government can serve is swooping in and defend those rights. The Fifth Circuit was like, “yeah, we got to think about that. We don't know if that's really the case.” And apparently the Supreme Court doesn't either. So that's really stressful because you know what, this is a green light for other states to pick up this kind of regime and not just related to abortion. Right? Like Texas has got a whole bunch of nonsense happening with voting rights right now. Where is this going? I don't know.

Imani Gandy:

But like, I don't understand how we can get a case like this to the highest court of the land, involving a truly novel enforcement mechanism, that was crafted specifically to avoid judicial review. And it's at the highest court of the land, and the highest court of the land is like, “I don't know. We don't really get it.”

Jess Pieklo:

Yeah. And it's even like one step further. So you said, aren't they effectively the same issues before the Supreme Court, in both the Whole Woman's Health versus Jackson, and the Biden administration's challenge? And they are, but they're not. Which is why this order is really stressful for me, like intellectually. And like all of us in the country.

So here is what's going on. You know, the Biden administration sued the state of Texas, right? Providers sued individual defendants. So they're not even truly the same parties here, like, on the level, like it's not. And the Supreme Court is like, “yeah, whatever, that's a detail, like who cares?” So now this case is just like twisting in the wind at the Fifth Circuit. It's just going to stay there until the Fifth Circuit acts. So it's got to go through all of the normal, really slow walked appellate procedures in order to even get the initial appeal heard.

So the Supreme Court conservatives have effectively just hit the pause button on what was the main avenue to have SB 8 blocked entirely. Right? Like the Biden administration was, this was the lawsuit that

had the greatest chance for a sort of facial injunction for everybody involved. And now we're kind of screwed.

Imani Gandy:

But honestly I don't understand how that can be. Because the Biden administration said Texas is violating the rights of Americans. There's this constitutional right, and Texas has said, "you don't have this constitutional right anymore if you live in Texas." That's a federalism issue. That's a supremacy clause issue. How is it that the court just ignored that? How is it the court just said "improvidently granted," without explaining why or how?

Jess Pieklo:

I think because, you said that the conservative Supreme Court justices are a bunch of bitches?

Imani Gandy:

Is it really that? It's the bunch of bitches theory?

Jess Pieklo:

I think. I mean, because they can, truly. So that case is just going to go through the regular, like I said, appellate procedure. It's going to go to the Fifth Circuit. It's going to get heard by a bunch of Trump judges who will find a way to, I don't know, not let the federal government enforce the rights of citizens, when state officials try to come up with some cockamamie scheme to circumvent them. It's a dark place we're going.

Imani Gandy:

Oy oy oy.

Jess Pieklo:

So let's talk about Whole Woman's Health versus Jackson now.

Imani Gandy:

Must we?

Jess Pieklo:

Imani, what is going on with that decision? Because that's really the marquee decision. Like, what the court did in US versus Texas is bad, but this is where the rubber meets the road.

Imani Gandy:

You know, as I said earlier, the fact of the matter is, the nugget of this case is this underlying six week abortion ban, that is unconstitutional under current law. Sure, that's probably going to change June 2022. But right now, this law is unconstitutional. And the justices don't care. That bothers me. Two, what

bothers me, and what I need to say out loud, very clearly, so all my homies, all my listeners, all my fellow law nerds understand, John Roberts does not care about abortion.

Jess Pieklo:

Nooo.

Imani Gandy:

Right, his opinion reads real reasonable, it really reads like "oh, we don't want to have this happening. We don't want Texas to come in. This is actually chilling the right to abortion." He actually said, "it's chilling the right to abortion." And I know some people are going to read that and be like, oh my God, does Roberts care about abortion? No, no, he does not. And here's how I know he does not. He actually said it in his opinion, I'm going to read this out loud because my response was: really, bitch? Here's what he said.

Jess Pieklo:

Oh, I love this. This is good.

Imani Gandy:

Here's what he said, "The clear purpose and actual effect of SB 8, has been to nullify this court's rulings. It is however, a basic principle that the constitution is the fundamental and paramount law of the nation. And it is emphatically the province and duty of the judicial department to say what the law is." Citing Marbury v. Madison. And then he goes on to say, "The nature of the federal right infringed does not matter. It is the role of the Supreme Court in our constitutional system that is at stake."

Did you hear what he just said? He said that the nature of the right being infringed, the right to an abortion, does not matter. What really gets his goat, what's really creaming his twinkie, is the fact that the role of the Supreme Court in our constitutional system is at stake. His role, his authority has been breached by these people who were just running around, banning abortion, going to the Fifth Circuit, having the Fifth Circuit do what it's going to do. Come to the court and begging for emergency relief. Roberts doesn't like that. He doesn't like his authority being infringed upon. He don't give a fuck about abortion.

Jess Pieklo:

No.

Imani Gandy:

He said so.

Jess Pieklo:

He said so. He said it, out loud.

Imani Gandy:

Out loud with his lips, with his face hole. Oh my God, it's infuriating.

Jess Pieklo:

So, the thing that I want to get off my chest is that even though the court ruled that the abortion providers and other claimants, in this case, could move forward with some of their claims against some of the defendants, this isn't a win. This isn't a win. Like that's good. That's good, that the initial lawsuit can proceed. Because guess what? As Imani said, A, this law is unconstitutional as hell, and B, like we are here on a motion to dismiss. We hadn't even gotten to any of the substance of anything. This was absolutely just about gumming up the work. So great. Their lawsuit can proceed. That is literally just the norm.

Imani Gandy:

It's the bare minimum.

Jess Pieklo:

That is the bare minimum. And guess what's going to happen? Here's a prediction, because the big kahunas in this case, like Paxton's, the attorney general, like all the big name defendants, the court said they can't get sued in this. Just a couple of the officials in the medical board who can enforce it. You think the Texas lawmakers aren't going to, what call a special session and amend SB 8, to make sure that those folks who are on the hook can't do any enforcement, to keep them off? We know they're going to do that. It is an invitation for fuckery. Justice Sotomayor said so herself, in her opinion.

Imani Gandy:

Yeah. I mean, as said Justice Sotomayor, she really is writing dissents that are going to be read by future generations, by future justices. I mean, the fact that she invoked the Civil War and John Calhoun, and the fact that Neil Gorsuch hated it so much that he went hard in on Sonia, for about a paragraph. Talking about how her comments about the Civil War and invoking slavery cheapened the discussion, or what have you. It doesn't cheapen the discussion because this is exactly the same sort of shit that was going on back then. Right? States saying that they could nullify federal law, federal law saying Black people are free now. Sorry, white folks. They thought that they could just nullify that law. It's the same thing. And so Gorsuch is like, "oh my God, well, I never, this is horrible, I do declare." I mean, come on, man.

Jess Pieklo:

Truly. And for the listeners who may not know of all of the segregationists, Calhoun was like one of the worst.

Imani Gandy:

Worst.

Jess Pieklo:

So like Justice Sotomayor choosing Calhoun there, and effectively using him as a stand-in for Mitchell, the dude who crafted this whole regime, the Scalia clerk, the buddy who went up there and was like, “no, it's really cool, what we're doing.” It was fire and yeah, she pulled no punches.

Imani Gandy:

And she's going to keep pulling no punches. I mean, I'm honestly making it my policy to read her opinions first, just to ground myself in reality and what the law should be. Because yes, the great thing about the Supreme Court is there are supposed to be diversity of thought. But there's no diversity of thought. We have six people, all thinking in the same way. And then three other people who are hitting other issues. And that's not the way the court's supposed to work. It's just not. I got to ask you a question. I know it might irritate you, but I got to ask.

Jess Pieklo:

Okay.

Imani Gandy:

Of all the word salad issued by the conservative justices, whose was the most alarming?

Jess Pieklo:

Oh. Gorsuch's, truly. Like, I agree with everything that you said about Roberts and I definitely want to just “yes and” that. But, Gorsuch had the majority opinion here. And it's the most alarming because it is going to get picked up as this win framing. And we know that this is going to get then reiterated when the court ultimately strikes down Roe versus Wade, which they will do in Dobbs. I mean, they functionally telegraphed that by not blocking SB 8 in any way, shape or form today. Like that is there on the table.

So by coming up with these nonsense justifications and all of these trappings of procedural, I don't know, like it's just the trappings of procedure. Gorsuch is able to shield the reality that the conservatives are letting a patently unconstitutional law take effect and just avoid that. He just avoids that question entirely. And I don't know that folks will necessarily be able to cut through all of that. And it's a model that can get applied to other places. So, that sucks. That really sucks.

Imani Gandy:

And one other thing I wanted to mention about Gorsuch is he raised the point that, you know, it's possible for these defendants to raise the unconstitutionality of SB 8, as an affirmative defense in the lawsuit.

Jess Pieklo:

Oh my God.

Imani Gandy:

But as Sonia Sotomayor pointed out, and as I've written before extensively, Texas changed the way civil procedure works in the state, specifically to make it harder for providers to find attorneys who will defend them. Remember me talking about this? You know, if you're an attorney in Texas and you're going to defend a provider and you're going to say in defense of that provider, SB 8 is unconstitutional, you have to win every single claim that you bring saying that SB 8 is unconstitutional. If you lose any of the claims, you are automatically liable for the other side's fees.

This is wholly unusual, because attorneys generally bring multiple causes of action because you throw everything at the wall to see what sticks. That's what all attorneys do. By telling these attorneys, they have to limit the number of causes of actions that they raise, and then that they have to win every single one of them or else they're liable for the other side's fees. That is basically threatening every attorney who has the audacity to defend an abortion provider. It threatens them with bankruptcy. It threatens their livelihood.

And I know a lot of people are like, ah, screw lawyers, who cares if their livelihood is threatened? We're not talking about lawyers working in big firms, right? Skadden Arps, or Simpson Thacher. We're talking about lawyers who have small practices, who have dedicated their lives to defending abortion providers. We're also talking about organizations like Center for Reproductive Rights. But in Texas, there are lawyers, Michelle Simpson Tuegel, the lawyer who was responsible for essentially taking down Larry Nassar, the abuser for the USA gymnastics team. This is a woman who counsels women, who counsels pregnant people, who counsels abuse survivors. And part of that counseling is abortion. By threatening her with bankruptcy, you are making it difficult for her to help other vulnerable people. She's not out there making money for Exxon or BP Oil. You know what I mean? And that attack on lawyers, these do-gooder lawyers, is really despicable. And the fact that Gorsuch is like, just pretends that that's not a thing that's happening, is so disingenuous.

Jess Pieklo:

Exactly. And why I think his opinion of all of the nonsense that came from the conservatives is the most dangerous, because it just completely ignores that fact. It literally just brushes the reality aside when we know he knows that that's the reality.

All right, question for you, of those conservatives' opinions, whose was the pettiest or most cringeworthy for you?

Imani Gandy:

I mean, I'm going to have to go back to Gorsuch. Going so hard at Sotomayor and pretending like Reconstruction and Civil War never happened. I mean, he's like, "oh, you're cheapening the institution." Motherfucker, the institution's already cheap. Like there's no cheapening a lawless court.

Jess Pieklo:

And I feel like we have to just address the fact that Justice Thomas would have literally let nobody sue.

Imani Gandy:

Yeah. Right. I like barely read his opinion. I was like, yeah, yeah. Whatever.

Jess Pieklo:

He was just like, no, this is awesome! Like a week ago, he didn't know what abortion was. Right? And now...

Imani Gandy:

Looks like the caveman lawyer got a little education in the last week.

Jess Pieklo:

To me, it's just like, really? Clarence?

Imani Gandy:

Yeah. Clarence is a mess. So Cassandra, my Supreme Court whisperer, what is going to happen in each of these cases next? Please help me, help me, help me. Help me.

Jess Pieklo:

Yeah, okay. So nuts and bolts for the providers' case, for Whole Woman's Health. That goes back to the district court, so the trial court. They get their day in court. I'm hopeful that, at the trial court level, they're going to get an order that blocks SB 8, because you know what, a six week abortion ban is unconstitutional. Like it just is. So I'm also guessing though, that Texas is going to appeal that order, immediately, because that's what Texas fucking does. It's going to go to the Fifth Circuit. Fifth Circuit is going to find a reason to make sure that that preliminary injunction blocking SB 8 doesn't happen.

So basically we are going to be in that pipeline. And thanks to this nonsense order on the Biden administration's case, that one's just, like I said earlier, twisting in the wind at the Fifth Circuit. That's just going to sit there and go through an appeal. So the bottom line is there's a lawsuit that's going to move forward. And I'm guessing Texas is going to find a way to both appeal whatever good decision comes out of that, and in the meantime, amend SB 8 to make it impossible to sue. And the conservatives will be fine with that too. So that's my real, super rosy prediction happening right now. If you had to call this though, Imani, would you call today a disaster? A win? Something in between? Where are we? Where are we landing?

Imani Gandy:

I mean, I feel like it was just a disaster, to be frank. You know? I mean, I get a sense that there are going to be a lot of people who are like, oh, it's not so bad, it was kind of a win. The case can go forward. But you and I are litigators. The case should always be allowed to go forward! That's the bottom line, like surviving a motion to dismiss is not a big deal.

Jess Pieklo:

No, it's truly not. It's like, good job guys.

Imani Gandy:

Yeah. Now go litigate. Get in there buddy, and go litigate slugger! I mean, it's not that big of a deal. So the fact that the court just let SB 8 stay in effect saying, "Hey Roe versus Wade, we don't care, we're going to abolish that in a little less than a year anyway." It's not good. It's not good. And I'm not here for people trying to convince other folks that it is good. Kind of good. No, it's not good. None of it.

Jess Pieklo:

It's not. It's not.

Imani Gandy:

So that's Jess and Imani's rosy predictions for the Supreme Court. Bing. If you want to talk to us about any of this stuff, you can follow me on Twitter at @AngryBlackLady. You can follow Jess on Twitter at @hegemmy. H-E-G-E-M-O-M-M-Y, shoulder shimmy. And you should follow all of our social channels. @RewireNewsGroup on Twitter and on Instagram. Hell, check out our YouTube channel. Our happy hour is there. You can go look at the happy hour. It was so fun. Someone needs to give us a show, because the happy hour was amazing. And aside from that, what are we going to do, Jess?

Jess Pieklo:

We're going to see on the tubes, folks.

Imani Gandy:

See you on the tubes, folks.

Speaker 3:

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