

# Boom! Lawyered: A Totally Off-the-Rails Look at SCOTUS Gone Rogue

Jess Pieklo:

"Here's the decision on the Roe anniversary!"

Imani Gandy:

Oh, my god. Could you imagine if they did that? Oh, no.

Marc Faletti:

Oh, my god. That shit is the darkest timeline, Jess. Thank you so much for that.

Imani Gandy:

That's the darkest thing I've ever heard.

*[theme song]*

Imani Gandy:

Hello, fellow law nerds. Welcome to the year-end episode of Boom Lawyered, a Rewire News Group podcast hosted by the legal journalism team that wishes you a merry Christmas and a happy Abortion New Year. I'm Rewire News Group's 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 keep some Plan B on hand just in case.

Imani Gandy:

Just in case.

Jess Pieklo:

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:

There is so much cool stuff on our website right now. I don't even think you understand. So I'm just going to let you know. We've got a lot of great stuff on our website. Caroline Reilly, our legal fellow, continues to crush it. She put out a really great holiday gift ideas to thank the abortion activist in your life. And it includes things like a Netflix gift card for self-care and a vibrator for similar reasons. I mean, that's our Caroline.

Jess Pieklo:

Totally.

Imani Gandy:

That is Caroline's vibe. That's her jam. Also, I wanted to remind you that we've got this amazing special edition called The Gathering Storm.

And it's all about the ways in which this post-Roe world is going to be steeped in the criminalization of pregnant people and the ways in which states are using child endangerment laws and chemical endangerment laws and all of these nonpregnant people-targeted laws to actually ensnare pregnant people. It's great. Your editor's note was fantastic.

Jess Pieklo:

Oh, thank you.

Imani Gandy:

Really, really, really right on. I have a pretty good piece if I'm going to toot my own damn horn.

Jess Pieklo:

Your piece is smoking.

Imani Gandy:

And frankly, it's excellent. So please go check it out. The artwork is amazing.

Jess Pieklo:

Yeah, really.

Imani Gandy:

It's so fantastic.

Jess Pieklo:

Proud of us.

Imani Gandy:

I'm proud of us just generally. This has been a difficult year. And we put out a lot of really good content. So while you're on break, poke around [rewirenewsgroup.com](http://rewirenewsgroup.com). There's a lot of cool stuff there.

Jess Pieklo:

There is.

Imani Gandy:

Also, I wanted to give a fan shout-out. But this fan shout-out is more of an organization, a huge, just a behemoth in the abortion world, the Guttmacher Institute.

Jess Pieklo:

What?

Imani Gandy:

I know. They actually tweeted, "What we're listening to on the latest episode of Boom Lawyered. @angryblacklady and @hegemommy recap this week's SCOTUS argument in the case on Mississippi's 15-week abortion ban. Don't miss it." Three down emojis, one in each color; brown, light brown and white. And then "#abortionisessential." I love that.

The Guttmacher Institute, like I said, it's a giant of an organization. They've been doing abortion statistics, abortion legislation. I mean, they're the go-to spot for a lot of this stuff. And it's great that they're listening to us. And thank you, Guttmacher.

Jess Pieklo:

Yeah, truly. So, Imani.

Imani Gandy:

Yes.

Jess Pieklo:

I am really proud of you for taking some time off this week, truly.

Imani Gandy:

Oh. Well, thank you.

Jess Pieklo:

We've worked really hard. And, you know, we come from this law firm background. So time off is-

Imani Gandy:

It's really dicey.

Jess Pieklo:

... really not in our wheelhouse, right?

Imani Gandy:

Yeah.

Jess Pieklo:

We just don't know how to take time off. But what happens when we take time off is that all the abortion news happens.

Imani Gandy:

So much. Why?

Jess Pieklo:

Like all of it. And sometimes, it all happens in one day.

Imani Gandy:

Yeah.

Jess Pieklo:

Here we are getting ready to do our year-end podcast and getting all excited to close things out. I'm starting to vision board 2022 and what that's going to look like and manifest some cool shit in our lives. And then, oh, my god. Everything happened. And I feel like I should catch you up, maybe.

Imani Gandy:

Yeah, because I spent this week just... I think for the first time in maybe five years, I didn't check Slack.

Jess Pieklo:

Proud of you.

Imani Gandy:

I just didn't do it. I said, "If you need to contact me, text me. I'm not checking Slack." It felt weird. I had to check Slack the next day.

Jess Pieklo:

You did. Listeners, it didn't last.

Imani Gandy:

It did not last.

Jess Pieklo:

Anyway, we tried. But enforcing your boundaries is important. So I'm going to give you the TLDR of everything that happened yesterday because, literally, it was a week's worth of news in maybe two hours.

Imani Gandy:

Oh, fantastic. This is exciting. This is great.

Jess Pieklo:

Hold on to your butts.

Imani Gandy:

All right.

Jess Pieklo:

All right. So first of all, SCOTUS cannot stop messing with abortion in Texas.

Imani Gandy:

Wait, what do you mean? We did that thing already.

Jess Pieklo:

No.

Imani Gandy:

We did the SCOTUS thing already.

Jess Pieklo:

They won't stop, Imani. I'm telling you.

Imani Gandy:

What?

Jess Pieklo:

We got an order this week in Whole Woman's Health v. Jackson.

Imani Gandy:

No. Jess, no. We already did SB 8 a month ago, three weeks ago?

Jess Pieklo:

Eh, time.

Imani Gandy:

We had oral arguments. Remember how we did that whole thing?

Jess Pieklo:

So it won't stop. There is an order. Gorsuch is causing problems.

Imani Gandy:

Ah, Christ.

Jess Pieklo:

So listen to what happened. Okay. So you know when the Supreme Court issues a ruling, right? There's some lag time afterwards, right? It doesn't necessarily immediately go into effect.

Imani Gandy:

Right.

Jess Pieklo:

Well, like we talked about with SB 8, this issue, this ruling that they issued in the providers' challenge was weird in part because the case got there in a weird way on this rocket docket. There was the original challenge. And then the Fifth Circuit came in and was like, "No. You guys are moving too fast on this whole lawsuit business. We're going to sit on it for a while." And that's how it got to the Supreme Court.

So it's really screwy. After the big ruling came down, the providers were like, "Hm, what do we do? Literally, Supreme Court, what do we do? And can you tell us pretty quickly what we do? Where do we go? Where does this case go next?"

So that was the order that they issued this week. The Supreme Court basically said, "We're going to skip the usual process and let this case proceed quickly. However, we're going to send it to the Fifth Circuit for it to proceed quickly."

Imani Gandy:

We already did this. They issued an order. I mean, I'm still stuck on that. Is this unusual to later be like, "Oh, by the way, here's some more stuff I forgot to say," to have a caveat order?

Jess Pieklo:

Yeah, it is unusual. And it'll get more unusual because the Texas law involves this really wacky private enforcement mechanism that we've been talking about forever that nobody's ever seen of. Imani, this is a novel issue of state law. So do you know what that means? It means we have to have the Texas Supreme Court say something about it.

Imani Gandy:

That's not good.

Jess Pieklo:

It's not good. So, listeners, here's what's going to happen. The Texas Supreme Court is probably going to get this case.

And they're going to sit on it. And they're going to think a long time about whether or not that private enforcement mechanism is fine or not. And that's bad.

Imani Gandy:

Wait, I have to stop you for a minute. So you're saying this case is going to end up in front of the Texas Supreme Court so that the Texas Supreme Court can decide whether, under Texas law, if this SB 8 enforcement mechanism is screwy.

Jess Pieklo:

Yeah.

Imani Gandy:

That's what you're saying.

Jess Pieklo:

Yeah. And until the Texas Supreme Court decides that, providers-

Imani Gandy:

They can't proceed in the Fifth Circuit.

Jess Pieklo:

... can't proceed at all.

Imani Gandy:

Oh, for Christ's sake.

Jess Pieklo:

They can't proceed in the Fifth Circuit. They can't proceed in the district court, literally.

Imani Gandy:

What? That's terrible. It was already bad. How did they make it worse?

Jess Pieklo:

I mean, truly, they did. Give Gorsuch credit, I guess, in the worst possible way for, "Here, we're going to go ahead. And, sure, providers. You can have your day in court, maybe eventually."

Imani Gandy:

But six years from now.

Jess Pieklo:

In 2028.

Imani Gandy:

Oh, my god. This is what happens when we can't take time off, Jess.

Jess Pieklo:

I know, truly.

Imani Gandy:

For the next 10 months, we cannot take a day off.

Jess Pieklo:

But truly. So we will be revisiting this issue over the course of the year because it's not going away in Texas. States are trying to pass copycat laws. So whether or not these kinds of private enforcement mechanisms are hunky dory as far as the court is concerned is an open question to be solved in 2022. Thanks a lot, Neil Gorsuch.

Imani Gandy:

Oy oy oy.

Jess Pieklo:

However-

Imani Gandy:

All right. So that's it, right? We can move on to the-

Jess Pieklo:

No.

Imani Gandy:

No. That's not it. Of course, that's not it. I'd be foolish to think that was it.

Jess Pieklo:

I got some good news, though, Imani.

Imani Gandy:

Good news?

Jess Pieklo:

I got good news for you.

Imani Gandy:

As in good news, the opposite of bad news?

Jess Pieklo:

Legitimately good news related to abortion.

Imani Gandy:

Holy shit snacks. All right. Hit me.

Jess Pieklo:

Okay. On Thursday, the FDA loosened restrictions around medication abortion.

Imani Gandy:

What?

Jess Pieklo:

Really big deal. But it's also a mess, sorry.

Imani Gandy:

Oh, Jesus. The highs are so high. And the lows are so low.

Jess Pieklo:

I whipsawed you pretty quick on that. I am so sorry.

Imani Gandy:

It's a rollercoaster, this podcast episode.

Jess Pieklo:

I am so excited also because, you know what this means, I get to talk a little bit about-

Imani Gandy:

Oh, my. Sexy admin action.

Jess Pieklo:

It's the administrative procedure action.

Imani Gandy:

A little arbitrary and capricious, baby, how you doing?

Jess Pieklo:

I'm going to unzip my sweater for a little agency action.

Imani Gandy:

She's literally unzipping her hoodie. She is stripping to agency law, woo.

Jess Pieklo:

All right. So I did just do a woo and shimmy on the year-end podcast. It's been a year. All right. So here's what happened. The FDA loosened restrictions around medication abortion, like I said.

Under the old regime and up until COVID, patients had to go in person to pick up abortion pills. And that's just silly, really, truly. You don't need to physically show up to pick up a pack of pills. You can mail that shit, right?

Imani Gandy:

Yeah.

Jess Pieklo:

FDA agrees, said, "Yo, the science is pretty clear. We don't need to have people come in, in person, and require that." So that's wonderful.

Imani Gandy:

So, yay.

Jess Pieklo:

FDA permanently removed that requirement. Misoprostol can now be distributed by pharmacists at any, quote-unquote, "certified pharmacy." And that includes mail-order pharmacies and brick-and-mortar pharmacies. So this is a big deal because mail-order pharmacies are great. Brick-and-mortar pharmacies sometimes are really, truly the easiest place for people to go pick up a script. So good news there.

Imani Gandy:

But I have a question because I haven't been completely tuned out.

Jess Pieklo:

Yeah.

Imani Gandy:

Wasn't there a Texas medical abortion ban that went into effect last week? So how is that going to work?

Jess Pieklo:

Yeah. So, like I said, it's a mess. And a big theme, I think, for the next year will be federalism.

Imani Gandy:

Oh, my lord.

Jess Pieklo:

Oh, we're going to have a big fight between the federal government and the states because, yeah, Texas passed this law that basically bans medication abortion up at seven weeks. Other states, I think there are 19 on record right now that have telehealth bans that also gum up the works of this. So truly, this is a permanent easing of restrictions for folks who are in abortion-friendly states, for those that are not gerrymandered. But it is also an opening, right?

Because, federalism fight, I don't have a whole lot of hope for what the federal courts will do there. But I do know that folks are creatively thinking around new ways to challenge some of those telehealth rails to think of exciting and creative new ways to get abortion pills in the hands of folks who will have difficult times, even under this new regime, accessing it. And also, I mean, just more people having access to medication abortion, even if it's in states that are not gerrymandered politically, is a good thing, right? Borders are fluid. I might need to drive somewhere. I'm just saying.

Imani Gandy:

Absolutely.

Jess Pieklo:

It's a brave, new world. And that genie's not going back in the bottle.

Imani Gandy:

No, it's not. That is really good news. I like that.

Jess Pieklo:

Yeah. And, I mean, look. We've got the Dobbs case. There's so much we still have to talk about. It's not like this is a panacea. But to have a federal agency say unequivocally, "It is safe, the science behind this is clear when it comes to medication abortion," That's a big fucking deal, to quote the president.

Imani Gandy:

It's a big fucking deal. That's one more mark in the column of "Democrats and Republicans aren't the same" because you can bet your bottom dollar that a Republican administration is going to *[cutting sound]* that immediately.

Jess Pieklo:

Yeah. Now, could the Biden administration have done more and loosened up restrictions even more? Yes, they could have. They should have. But, hey. I'm taking this.

Imani Gandy:

This is a good first step. A really, really good first step. All right, Joe. That's good news, Joe. All right. Well, so if you love us, and I know you do, we've been busting our asses off this year, please give us money. We need money. This next year is going to be the most pivotal year in abortion rights in 50 years, honestly.

Jess Pieklo:

Easily.

Imani Gandy:

And Jess and I are... we are here. We are ready to cover it for you. We are more equipped than, I think, anyone else in the country to do it in a way that is fact based and not going to make you want to jump out a window because it's going to be a difficult year.

If you want to keep us in your ear holes and in your faces, virtually speaking, please go to [rewirenewsgroup.com/donate](https://rewirenewsgroup.com/donate). That's [rewirenewsgroup.com/donate](https://rewirenewsgroup.com/donate). We need you. And you need us, frankly. It's a mutual thing, synergy.

Jess Pieklo:

It is. It's synergy. We've got it. All right. I can make my margarita, right?

Imani Gandy:

You can make a margarita. You going to make a margarita right now?

Jess Pieklo:

Yeah.

Imani Gandy:

Okay. Go for it. While you do that, I'm going to introduce the next part of the show. We're going to do something a little bit different. We are going to have just a random cis white guy interview us about how we think this year went, what the state of abortion rights are and the like.

Just kidding, he's not a random cis white guy. He's our cis white guy, Marc Faletti. He's our producer. He's been our producer for four years, working, toiling behind the scenes, helping us tighten up the show. We love him.

We need to get out of our heads for a while. And he's not a lawyer. And so he's really good at asking questions that we think non-lawyers will want to know, which is why our show is so good, quite frankly and why it appeals to non-lawyers.

Jess Pieklo:

Listeners, he herds us cats.

Imani Gandy:

He does. We are lawyers that need herding. And this is our herder, our cat herder, Marc Faletti. Welcome to the show.

Jess Pieklo:

Welcome, Marc.

Marc Faletti:

Hey-oh. Yeah. And I heard there was a topic where there weren't enough white guys talking. So I got to get in here right away.

Jess Pieklo:

Definitely.

Marc Faletti:

Me and Chris Hayes, we're out here having all kinds of thoughts. No. I'm just kidding. Hey, let's normalize a few white guys, maybe, weighing in discreetly on this issue.

Jess Pieklo:

Yeah, agree.

Marc Faletti:

Yeah. I should probably do some kind of bro abortion podcast on the side or something.

Imani Gandy:

Brobortion.

Jess Pieklo:

Brobortion?

Marc Faletti:

That's just cringe all around.

Jess Pieklo:

Abortion for bros.

Imani Gandy:

Yeah, it's pretty cringey.

Marc Faletti:

Ah, thank you guys for having me, though. It's fun to be on the mics with you for a change.

Jess Pieklo:

I love this.

Imani Gandy:

Yeah, this is great.

Jess Pieklo:

This is great.

Marc Faletti:

Yeah. Cool. So I did have a lot of questions about how all of this went because I always find that there's so much to keep track of that it can be difficult to distill the main takeaways. So I want to start with this question. If you had to sum up the year of abortion and the courts in a single headline, what would it be? Imani, I'd like to start with you.

Imani Gandy:

I'm going to go with... I mean, I already used "bunch of bitches" last time. So I don't want to go with the federal courts are basically a bunch of bitches. But I might have to do that because the Supreme Court has... my nicer way of saying it, the more safer word would be Supreme Court goes rogue because they've gone rogue when it comes to abortion.

They've clearly made it obvious that they don't consider abortion a constitutional right, which is why they've let SB 8, the Texas law, languish for three months now, nearly. So, A, they're a bunch of bitches. B, they've gone rogue.

Marc Faletti:

Gone rogue. Jess, you haven't shared your headline. You guys haven't shared these headlines with each other yet.

Jess Pieklo:

No. I mean, truly, abortion, what the fuck happened? I know we can't swear in our headlines. But the theme for me for this year truly is that we are on this accelerationist timeline.

Imani and I have been covering abortion rights and the courts for 10 years now. That's a long time. And we've been talking about the slow, steady drum beat of the rollback of access in the states, the stacking of the federal courts.

And then really, this year, it felt like that was when it all snowballed. And we were braced for Dobbs. We knew that was going to happen. And then Texas. So truly, abortion, what the fuck?

Imani Gandy:

I like that.

Marc Faletti:

Do you think this has happened faster than you would have predicted six months ago, Jess? Is this timeline worse than you thought even when we were preparing for all of this?

Jess Pieklo:

Yes, it is. I mean, I figured that there would be acceleration. But I did not anticipate truly the way that Texas would just lay the gas straight on. And we knew the ban was bad. Imani and I covered the ban over on the website. And we talked about this on the podcast when a lot of folks in media didn't even have it on their radar. So we knew that SB 8 was bad.

I did not anticipate the federal courts going off the rails to the degree that they did. And I do really think that's the Barrett nomination and confirmation in reality. There are a lot of judges who saw an opening and decided to take it. And unless there is some way to push back against that, they're going to continue to do that. Abortion is just the opening.

Imani Gandy:

I just want to "yes and" that and say that also states saw an opening when Barrett was nominated because Mississippi filed its original cert petition saying, "Hey, can you examine our ban under current law?" And then Ginsburg dies, Barrett ascends to the court. And when they file their merits brief, it's, "JK, we want you to overturn Roe and Casey."

Jess Pieklo:

Exactly.

Imani Gandy:

So there's a lot of people just looking for loopholes and just engaging in legal shenanigans in order to get this result.

Marc Faletti:

So to take us back to your headline then, Imani, do you think the court has gone even more rogue than you thought? Or is this about what you expected after the Barrett nomination?

Imani Gandy:

They've still gone even more rogue than I thought. I think the SB 8 enforcement mechanism was so bizarre that any nonpartisan court, any non-captured court would have said, "This is bonkers. We're going to block this law. And then we'll figure the rest of this stuff out," right?

Jess Pieklo:

Mm-hmm (affirmative).

Imani Gandy:

And we now know, with California, the California governor has just announced that they're going to do a similar thing with gun control, with ghost gun kits and assault rifles. They're going to turn over enforcement of no assault rifles and no ghost gun kits to the public. The Supreme Court is going to block that in a heartbeat, in a heartbeat.

So it just lays bare the hypocrisy that we all know is there. But it's more hypocritical than I thought it was going to be. And that says a lot, I think, and nothing good.

Marc Faletti:

Well, let's recap these two cases in a little more detail because, like I said, there's a lot to follow. And, even as we talked about up top with ya'lls news update, it never stops changing either. So, Imani, let's check in on the status of the Dobbs case first because we haven't talked about that too much yet. Where are we at in the process? And what do you think we'll remember the most a year or so from now about what has happened so far?

Imani Gandy:

Well, right now we are 16 days past oral arguments. Leading up to oral... let me just backtrack a little bit. The case is about a 15-week gestational ban out of Mississippi. Generally, as you know if you listen to this podcast, pre-viability abortion bans are unconstitutional. There should have been no conversation about that.

Instead, what we got was, "Well, Barrett's now on the bench. Can you just overturn Roe and Casey?" And the court was like, "Eh, sure. We'll take a look at that." And so I think that's where we are.

We are in a place where Roe is functionally nullified in Texas. And, as Jess often says, in the Mississippi case, the court is going to have to show its work. It's going to have to explain why it is it's just been sitting on its hand in Texas, why it is that it doesn't consider abortion to be a constitutional right. And a year from now, I mean, I think we're going to be living in a world where either Roe is outright overturned or where abortion rights are just thrown back to the states, thrown back to these gerrymandered and voter-suppressed republican states, which is not good.

Marc Faletti:

So are we going to hear from them on Dobbs in any way before we get a decision? Or is that mostly put to bed from a procedural standpoint?

Imani Gandy:

It's put to bed from a procedural standpoint. We are going to hear from the court on Dobbs, my prediction is, June 21. No. June 24, 2022.

Jess Pieklo:

Wow.

Marc Faletti:

Wow.

Imani Gandy:

I looked at the calendar. That's the last Friday in June.

Marc Faletti:

Well, I hope that wasn't a massive jinx we just did. It's like, "Oh, we're definitely not going to hear from them on this." Just like, "Oh, wait."

Jess Pieklo:

"Just kidding, here's the decision on the Roe anniversary."

Imani Gandy:

Oh, my god. Could you imagine if they did that? Oh, no.

Marc Faletti:

Oh, my god. That shit is the darkest timeline, Jess. Thank you so much for that.

Imani Gandy:

That's the darkest thing I've ever heard.

Jess Pieklo:

I'm so sorry. And given my Cassandra of the Courts role, can we rewind the tape and eat those words?

Imani Gandy:

Yeah. You need to bottle that back in. That shit is scary, good God.

Marc Faletti:

Oh, my god.

Jess Pieklo:

I'm so sorry. I'm muting myself. Goodbye.

Marc Faletti:

No. Unmute yourself because I have questions for you, Jess, about SB 8. So that's where we were on Dobbs. Let's talk about SB 8.

Marc Faletti:

You just told us up top that SB 8 is now tangled up in all these procedural weeds. And Texas Supreme Court now gets to have its say about the enforcement mechanism, maybe. And Fifth Circuit's involved. I guess my question at this point on Texas SB 8 ban is, can this get any messier?

Jess Pieklo:

Oh, Marc, this is abortion. It can always get messier. Yeah, it can. So when we talk about abortion lawsuits, we're usually talking about federal courts. We're talking about the federal law, the constitutional right to abortion.

What is going to get messy about SB 8 in the short term is that this is all going to be existing in state court. So in addition to the news update that I gave at the upfront of the show, there are also lawsuits in state courts by individual providers challenging the enforcement mechanism to try and create some windows of opportunities for them to still deliver care. So that's good. And they're having some success there.

But it's reinforcing a patchwork of opinions and decisions. And so one provider has an injunction against this particular terrible anti-choice group from enforcing the SB 8 ban but not against this one. And so it's just going to be a very tumultuous time for people trying to deliver care, trying to access care, trying to help folks that do.

And then also, because this is my job, it creates a lot of opportunity for the state courts and also the federal courts, when the Fifth Circuit jumps back into this, to craft bad law. One of the things that I will say that I am worried about with all of the gaming that is going on procedurally with the SB 8 challenges is that the anti-choice movement is trying to craft an argument that abortion isn't an essential service, right? So what do I mean by that? The longer it is more difficult and effectively impossible to get abortion care in a state like Texas, the "easier," quote-unquote in scare quotes, it will be for anti-choice lawyers to go to the Supreme Court if they don't overturn Roe v. Wade and Dobbs and use Texas as a case study.

So I really do feel like there is nonsense happening from the anti-choice movement. And they are using the legal levers to facilitate that end. So I do expect it to get messier.

And I expect it to get messier when states like Ohio or Missouri or Alabama pass copycat bills because then we may end up in a spot where we have one state saying the enforcement mechanism is okay, another state saying the enforcement mechanism isn't okay. Conflict of laws between those states all involving a federal constitutional right, this is truly uncharted legal waters. Imani's laughing at me.

Imani Gandy:

No, because I like conflicts of law. And I like civil procedure.

Jess Pieklo:

I hate this. This is my nightmare.

Imani Gandy:

I know it is. And agency law is mine. So that's why we're a good team.

Jess Pieklo:

Yeah. Can we go back to the Administrative Procedure Act, please? I want to talk more about arbitrary and capricious.

Marc Faletti:

So now that California has the enforcement mechanism applied to a law on guns, and then Florida was like, "If a school talks about race, you can sue the pants off them using the same thing," do you all have any thoughts about this enforcement mechanism spilling out past abortion at this point? Because it's still unknown as to whether this is viable or not.

Imani Gandy:

Honestly, before the WOKE Act or whatever that it was that Ron DeSantis introduced that allows people to sue schools that teach their kids that MLK had a dream once, before that, I would have said no. I would have said, "This was a ploy specifically in order to banish abortion," and this year basically before the court was able to do it in the Dobbs case. And so I was always under the impression that once abortion was banned or criminalized or once states were permitted to ban or criminalize it, there would be no need for this weird enforcement mechanism because conservatives don't want that turned on them.

But then here comes Ron DeSantis with the WOKE Act. And all of this stuff is connected. This assault on public education is definitely connected to low contraception rates and high abortion rates. Kids can't get evidence-based sex education in schools. And so it's just the assault on public education is absolutely a repro justice issue.

And so I can 100% see anti-choicers, because the anti-choice movement is steeped in white supremacy and was born of segregation or born of integration and the backlash against integration, I could see them moving over to this whole critical race theory panic because they're not going to have abortion to rally votes in 2024 or even 2022. Right, they won't even have that in 2022. So they're going to have to pivot to something else. And I think what that thing is, is going to be critical race theory and public education. But I don't know.

Jess Pieklo:

Yeah. I want to "yes and" Imani because I'm really... "excited" is not the right word. But this question, I think, is important because from a historical perspective, as a country, we've been here before. And what we're seeing is a resurgence of what are functionally private militias to enforce what during reconstruction was white-landed interests. And that's functionally the same thing here.

Imani Gandy:

It's the abortion KKK.

Jess Pieklo:

It really, truly is. And so what we are seeing is a backlash to a bunch of social progress. And the only way to enforce that backlash is through private mercenaries.

And so I think Imani's right. We will see that bleed into other areas where those forces align. That's why we won't see it applied in blue states when they try to pass a similar enforcement mechanism to apply to gun manufacturers.

But we absolutely will see mandates on what teachers can teach in the class in terms of anti-critical race theory and enforcing that kind of thing. I expect it will bleed into some of the anti-trans spaces too. This is applying surveillance philosophy to marginalized communities broadly.

Imani Gandy:

Voting rights, I can see people going up to elections.

Jess Pieklo:

They're already. I mean, functionally, yeah.

Imani Gandy:

They're functionally there. So give them the power of the state and let them loose. And, of course, that's not going to apply to when the Black Panthers show up at some place in Philadelphia. It's only going to apply to the red hats when they have to show up to some place in Philadelphia.

Marc Faletti:

Yeah. That seems like the running theme with this enforcement mechanism is it's going to be allowed to be in place for whatever the Supreme Court deems laws they like versus the ones that they don't or the people that they don't like will not get those private mercenary exemptions.

Imani Gandy:

Yes.

Marc Faletti:

Super fun, super fun. So this mechanism is totally unique to SB 8. And then you've got Dobbs over here, which is also about a different ban at a different time of pregnancy from a different state. Imani, what would you say is a common thread that ties these two cases together? Because I feel like we're always talking about them at the same time. But they're so much different. What unites these two cases?

Imani Gandy:

I think what unites them is the other lack of regard for patients, for the people who are harmed by these laws, because what struck me so much about the SB 8, the hearing and the ruling, was the concentration on the procedural portion, the sovereign immunity portion, talking about *Ex Parte v. Young*. SB 8 is a case about abortion. But we didn't really hear about abortion.

And even more so in Dobbs, Dobbs was the direct challenge to Roe. I kept saying SB 8 was a direct challenge to Roe because they actually asked the court to overturn Roe. Just the court didn't actually pay attention to that particular bit of it.

But in Dobbs, we had this direct challenge to Roe. And even then we didn't hear a whole lot about harm to patients, harm to pregnant people, the importance of abortion. It took Sonia Sotomayor was the one to say, "Hey, wait a minute. When are we going to talk about the women who are affected by this? When are we going to talk about the pregnant people that are affected by this?"

And so we lawyers tend to get in our heads a lot. And we like to talk about the law as an abstract thing. And one of the things that irritates me is when I read articles from other legal scholars. I'm not going to name names on here. But other legal scholars that write for other, more conservative outlets, they're just circle jerking each other. They're just talking to each other about really interesting things about sovereign immunity and Ex Parte v. Young and the things that people don't care about.

No one cares about the civil procedure portions of these case. They care about the bits that are affecting people. And I wish I could get more legal scholars, more legal pundits, more journalists and the court itself to care more about harm to people.

Marc Faletti:

Well, Jess, what then, I guess as we come out of this recap on these cases, do we want to keep in mind that is unique or, I guess, uniquely terrible about each of these cases or crises with SB 8 and with Dobbs?

Jess Pieklo:

This is a great question. So let me start with Dobbs. What I think I would really hope folks understand that's uniquely terrible about the Dobbs case is that it is, from tip to tail, a piece of political action. There was nothing organic or natural about the way that the Mississippi 15-week ban came into existence, was passed or the way that the court decided to intervene and step into the dispute here. We've talked about this on the podcast a bunch.

There is zero conflict in the federal courts as to whether or not laws like Mississippi's are unconstitutional. They are. They are patently unconstitutional until the Supreme Court formally overturns Roe v. Wade, which they have not yet done so. So they shouldn't have taken the Dobbs case from the beginning. But they did.

And then when they took the case, when the state of Mississippi presented its presto chango on the question that Imani talked about from, "Hey, just uphold our ban under existing law," to, "Hey, rewrite existing law entirely," the Supreme Court should have pumped the brakes. But it didn't. It moved forward. And all of those things are huge, uniquely terrible red flags about the Dobbs case that should frankly give us all a really good sense of where the court is going on this. So there's that.

What is uniquely terrible about SB 8 is the fact that the Supreme Court allowed this case to take effect on the shadow docket. And we talked about that also. The status quo in SB 8 would have been to block this case before it took effect and to give the lower courts the opportunity that now they're getting to examine things like this enforcement mechanism because it's brand new.

And in legal circles, the status quo is really conservative. We do not like to rock the boat. The status quo is maintaining the most conservative position possible. The status quo would have been to keep procedure in place.

But Sam Alito and the conservatives upended the status quo. And by doing that, it was a shadow overruling of Roe v. Wade. That is not how our federal courts can work. And that showed us that, as far as at least abortion rights and maybe other rights that the court conservatives don't like as well, they are fine upending them under cover of darkness with no transparency and no accountability to anybody.

Marc Faletti:

Well, damn. On that note, let's dig in further about these people with no accountability and whatnot because, as you guys know, I love ranking things. And I want to talk about some of the worst and best people who were involved in all of this incredible... "drama" doesn't do it service because it's truly

life-and-death issues that are playing out in real time in front of us. So, Imani, I do know that there were a lot of bad actors in 2021 on abortion. But if you had to pick one person to nominate as the villain of the year, who would it be?

Imani Gandy:

I'm going to go with Jess's white lady nemesis, Amy Coney Barrett, because, number one, she shouldn't be on the court in the first place. I just want to reiterate this. She should not be on the court in the first place. Ruth Bader Ginsburg's body wasn't even cold yet when Mitch McConnell called everybody up and was like, "Hey, we got another seat." People were already voting. So it's really unconscionable.

And, sure. I'm sure if some president came up to me and was like, "Hey, want to be on the Supreme Court," I know people are voting, I'd probably be like, "Yeah, all right. Great." I understand the self-interested-ness of it. I understand that. But it doesn't make it suck any less particularly because she's going to be that fifth or sixth vote because... I don't know. I don't want to get too far off the field. But she's going to be either the fifth or sixth vote to overturn Roe. And Jess has talked about this a lot. And I don't know what the answer to her question is. So I hope I'm not stealing her thunder here.

But she talks a lot about her fear that Amy Coney Barrett is going to be the person that writes the opinion and writes it from a feminist lens. And I think I have signed on to that theory, especially in the wake of oral arguments, listening to Amy Coney Barrett talk about safe-haven laws and talk about, "Well, sure. Yeah. You career ladies want to have jobs and go work on Wall Street or whatever. But just take 10 months and gestate this baby for the state. And then toss it at the firehouse. And then you can go right back to being a career woman or whatever it is you sinners do."

I mean, that's the feminist lens that we're going to get. And that's prevailing, "We don't need abortion anymore. Who needs abortion? Women are free. We're free."

I'm going to hate so much reading that opinion should she be the one to write it. I mean, I'm going to hate it if Alito or Thomas writes it too. But I'm going to really... my uterus is going to hate it if she writes it.

Jess Pieklo:

Yeah. I mean, it's hard not to argue with that. I had a tie, though. And the tie was between Sam Alito and Jonathan Mitchell, who was the architect of the private enforcement mechanism ban in SB 8, former Scalia law clerk and just all-around choad. Not a fan of that dude for a lot of reasons Imani talked about when she... when you were talking about the thing that threads these cases together. And that's the harm.

One of the things that has been so frustrating, even in progressive circles, is the fact that the existential threat to abortion rights is being treated like an intellectual exercise, like a law school final. And it's not. It is very real. People's lives are absolutely in the balance here. And so to think that this is like, "Oh, I'm just going to do a law review note on this cool, little fascist scheme," that's terrible.

But Sam Alito is truly the bad guy for me this year because his hand prints are all over the upending of Roe on the shadow docket. He did this with public unions and telegraphing to the conservative movement how they can go through the courts to bust public unions and even private sector unions, doing the same thing on abortion rights by helping facilitate SB 8 taking effect on the shadow docket. And then just I don't know. He's Sam Alito.

Imani Gandy:

Yeah, little Sam Alito, little angry man.

Jess Pieklo:

Pew, pew, pew. Finger guns, Sam Alito.

Imani Gandy:

Yeah, exactly. He's definitely got finger guns.

Marc Faletti:

Well, let's wash that taste out of our mouth and talk about some people who are fighting back against these nefarious plans and bad actors. Imani, let's start with you. Who inspired you the most in this fight in 2021?

Imani Gandy:

People like Lauren Underwood, people who are just going hard when it comes to improving the birth outcomes of Black women, you know? I just think that's... yeah. I mean, I'm going to keep my answer short. Representative Lauren Underwood, every single person who signed onto the MOMnibus bill, I don't like the name. But I really like the content.

Jess Pieklo:

We got to talk about that name, guys.

Imani Gandy:

We got to workshop that name. But it encourages me at a time when you can go on Twitter and see disaffected people talk about, "Democrats don't care about abortion," you know what I mean?

Jess Pieklo:

Mm-hmm (affirmative).

Imani Gandy:

I got into it with Susan Sarandon a little bit last week because she was like, "Well, Democrats don't care about abortion rights. Otherwise, they would have..." blah, blah, blah, blah, blah. And it's like, you know what? I'm not here to stan all Democrats.

But I am here to stan the ones who are... well, not stan but to support and to admire and to speak out in favor of those who really do care about abortion rights, those who have been working towards it. Kamala Harris is another person really working towards making this place a less hostile birthing environment for Black and brown people. I think that's really, really important.

Jess Pieklo:

Yeah. And I love that answer, Imani, because it also connects the fact that abortion and birth are all one part of the reproductive spectrum, right?

Imani Gandy:

Mm-hmm (affirmative).

Jess Pieklo:

You can't improve outcomes without treating the whole thing. That's good. Lauren Underwood's awesome. Come on the podcast.

Imani Gandy:

Yeah, come on the podcast if you're listening.

Marc Faletti:

Well, Jess, what about your inspiration? Where does it come from? Who brought you some hope in 2021?

Jess Pieklo:

I want to give the biggest shout-out to all of our abortion providers right now; Dr. Moayed, Dr. Leah Torres, the folks who, particularly in the South and Midwest, are there every day not only delivering care but frankly giving a big middle finger to all of the anti-choice lawmakers, anti-choice forces and just doing it. Their livelihood and families are under threat, under surveillance. And they wake up every day and do that.

And they've got clinic staff who support them. And so when I'm having a bad day, I'm like, "Well, hell, if these folks are getting up and doing their job, I can suck it up because all I have to do is yell on the internet by comparison." So that is much easier. But truly, it's the folks who are in the weeds giving care every day. Thank you.

Imani Gandy:

Yeah.

Marc Faletti:

Well, let's look ahead a little bit to 2022 because I feel like you got to do that when you're wrapping up one year and moving into the next because this train doesn't stop, apparently. That's what I took away from your news update at the top anyway. So, Imani, can you give me a prediction, one prediction at least for 2022?

Imani Gandy:

Well, Roe's going down, baby. Roe is going down. And I keep saying that because not to make people feel bad but really to get us all, people who are abortion rights enthusiasts, to get us all to a place where we know that's going to happen or at least prepare ourselves for that eventuality because I can see a world where the court tries to troll us and be like, "See, we didn't end abortion. We're doing it next year."

But aside from that, I really want to get us to a place where we all accept this reality. And then we can move forward in productive ways, because what I don't want to see is us spending the first three to four months of next year just whinging about how it's not fair because it isn't fair. And we all know it's not fair. But there are a lot of folks who have been working really, really hard. And so if we just listen to them, I think we can get through this.

Marc Faletti:

Do you think people will be clear that Roe is screwed? Or will this come in that backdoor way where they're going to try to pretend like somehow they're going to resolve Dobbs in favor of the Mississippi ban and do all of that? But it's actually going to be overturned, but everyone's going to have room for all the conservative-ish pundits to claim that maybe this is all okay.

Imani Gandy:

I mean, they're already doing that. There are already op-eds in The Washington Times... The Washington Times.

Jess Pieklo:

I'm sure there are op-eds in The Washington Times, honestly.

Marc Faletti:

That's some real next-level conservatism.

Imani Gandy:

Yeah, seriously. The New York Times, excuse me, and The Washington Post where people are like, "Yeah. Well, you know, I mean, I don't see the court overturning Roe v. Wade. But I can see them siding with Mississippi." You cannot. The Supreme Court of these United States cannot side with Mississippi without overturning Roe v. Wade. It can't be done.

So I understand that overturning Roe v. Wade sounds scary and momentous. But just siding with Mississippi on this little ban doesn't sound so bad. No. It's bad. It's all bad. So let's all just breathe that in, exhale it and then move forward.

Marc Faletti:

So we're going to get the overturning of Roe. But it's going to be couched probably in this false language of compromise.

Imani Gandy:

Yes.

Marc Faletti:

That's what I'm taking away from this.

Imani Gandy:

Yeah.

Marc Faletti:

All right. Well, great. Okay. Well, that's the worst of both worlds, as I hear you say that. Where the overturn happens, but there is enough cover to minimize the amount of people who will be aware of this and be outraged about it and take action around it.

That's a little alarming. So that part of the house is on fire. Jess, do you have a prediction for 2022?

Jess Pieklo:

Stephen Breyer still isn't going to retire.

Imani Gandy:

Ah, God.

Marc Faletti:

Why start now, right?

Jess Pieklo:

Seriously.

Imani Gandy:

And then McConnell's going to hold his seat.

Jess Pieklo:

Yeah, no. Honestly, that's the endgame here. Mitch McConnell recently was like, "I don't know what I would do if there was an open Supreme Court seat and the midterms went our way. Who's to say, really? That's a move-along question." No. We know what Republicans are going to do.

Jess Pieklo:

Democrats have not done a good job on pushing the courts issue and the existential threat to our democracy as a result of it. And I don't think Stephen Breyer gets it. And I think he's doubling down. So I don't think he's going to retire next year.

Imani Gandy:

I feel like he's doubling down in backlash. He knows everyone wants him to retire. And he's like, "No. I'm not doing it."

Jess Pieklo:

Exactly. He's stomping his foot.

Marc Faletti:

Did you take any hope away from Elizabeth Warren coming out and expanding the court by four seats?

Jess Pieklo:

Yeah. I love it. But how's it going to happen with Manchin and everybody else? We are back in the same circular place that we are. Until folks get serious about the big structural problems that we have in Congress right now, none of these things is getting through. And I don't want to be a downer. That's not Doomsday stuff. That's just a clear-eyed look at the land. Yes, let's add four seats. But we got to get a mechanism to get that passed first.

Marc Faletti:

Yeah. It's a little tricky, a little muddy water between here and there.

Jess Pieklo:

A little bit.

Marc Faletti:

A little scary. So let's not end on those down notes. Jess, do you have a hope for 2022?

Jess Pieklo:

One of the things that has been consistently inspiring to me throughout a very difficult year is the ways in which the abortion rights and access communities have continued to really work together and support each other. What I am seeing now is a push in grassroots spaces to really think creatively and outside of the box in terms of delivering access to care. And that is hopeful for me because the courts aren't going to save us.

And we don't have a lot of clear pathways even from the federal government to do much now to stem the immediate crisis. And so the people in these spaces that are dedicated and do this work, they are undeterred. And if they are undeterred, I am undeterred.

Imani Gandy:

Yeah. I mean, honestly, this is the one question we have the same answer for because mine is that more people become activated. And instead of trying to branch out on their own and do their own thing, they plug into the existing abortion access infrastructure that's already in their state. A lot of it is led by women of color, badass women who have been working so hard under the most difficult circumstances with practically no resources. Like Jess said, if they're undeterred, I'm undeterred.

I'm living comfortably here. My job, as Jess said, is just yelling on the internet and educating people. These are folks who are dealing with patients in crisis. They are dealing with providers who are stressed and trying to make those connections. And I feel like the courts aren't going to save us. But grassroots organizers might. Black women just might even though it shouldn't be our fucking job. Ah, sorry.

Marc Faletti:

No. I mean, that's a great point. And before we get out of here, first of all, thank you both for letting me hop on for a few minutes and ask you all my burning questions as we wrap up this year. And the second thing I want to say is thank you because I hope I speak on behalf of our thousands of listeners that you're not just answering my questions. You're answering all of their question every week.

You've given so much energy. You've provided a platform for people to learn so much material. And it's just not boring with you guys. And that makes such a difference. And I just really appreciate everything you've given to this podcast, to the listeners, to the whole experience of analyzing this incredibly critical moment in American history.

Jess Pieklo:

Aw, Marc.

Imani Gandy:

Well, you're going to make us cry, Marc. Jesus Christ.

Jess Pieklo:

Thanks, man.

Marc Faletti:

I didn't do it, though. I failed at the end. I wanted tears.

Imani Gandy:

No. I have a little tear. There's a little tear.

Jess Pieklo:

I'm all verklempt.

Imani Gandy:

Thank you, Marc. That really means a lot. And also, on our end, thank you for being the great producer that you have been.

Jess Pieklo:

Truly.

Imani Gandy:

I don't know why we're acting like we're ending this podcast. It's just the year end. We're not dying or anything, people. But I do want to say that Marc has been so integral when it comes to corralling us, making sure that we are delivering this information in a way that is understandable and in a way that's fun. So let's give ourselves a round of applause.

Marc Faletti:

Well, thank you.

Jess Pieklo:

He puts up with so much shit. You guys have no idea.

Marc Faletti:

No. It's not true. It's one of the most fun jobs you could possibly have is producing this pod. And obviously, even though we're in this dark moment, I appreciate how much you all turn to opportunities for a little bit of hope, a little bit of silver lining even as we stare down and do not look away from the impending clouds that are pouring in and threatening quite a bit of rain.

Imani Gandy:

Well, Marc, do you want to do our outro, take us out?

Marc Faletti:

Oh, my god. Yeah. Look, if you want to talk more about this, you can find Imani on Twitter, @angryblacklady. You can talk to Jess on Twitter, @hegemommy, H-E-G-E-M-O-M-M-Y. I didn't sing it, though. Maybe I should sing it. H-E-G-E-O-M. Wait, no. I misspelled it.

Jess Pieklo:

You misspelled it.

Marc Faletti:

I'm already off course. See, this is way hosting is harder than it looks, you all. But for real, follow Rewire News Group. We're on Instagram. We're on Twitter. We're on Facebook. All @rewirenewsgroup. Tons of stuff going on there.

Our social media editor is absolutely killing it. This is the perfect time to get on board with those platforms. And if you want to find me for whatever reason, you can find me on Twitter, @marcfaletti. That's Marc with a C, F-A-L-E-T-T-I. Thanks, you all.

Jess Pieklo:

Ask him about the MCU when you find him.

Imani Gandy:

Ask him about his Marvel Cinematic Universe podcast, yeah.

Marc Faletti:

No. Oh, my god.

Imani Gandy:

We're plugging your podcast, damn it.

Marc Faletti:

It's my little side thing for fun. But, look. What are we going to do?

Imani Gandy:

See you on the tubes, folks.

Jess Pieklo:

See you on the tubes, folks.

Imani Gandy:

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