

Imani Gandy: Hello, fellow law nerds. Welcome to another episode of "Boom! Lawyered," a Rewire News Group podcast hosted by the legal journalism team that is pretty jazzed about the fact that Democrats held the Senate. So let's see those jazz hands people, those spirit fingers. I'm Rewire News Group's editor at large, 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 a Gen Z voter today. And the "Boom! Lawyered" Podcast is part of that mission. So big thanks to our subscribers, and welcome to our new listeners and viewers.

Imani Gandy: So, last week's midterms.

Jess Pieklo: Mm-hmm.

Imani Gandy: Wow, they went a lot better for Democrats than I thought they were going to.

Jess Pieklo: Right?

Imani Gandy: You know, there was this talk about a red wave and a red tsunami, and I actually heard someone on Twitter refer to it as red spotting.

Jess Pieklo: I saw someone call it a pregnancy scare.

Imani Gandy: That's just fuckin' hysterical is what that is. However, despite Democrats' success, I think that last week's midterm solidified what we've been saying all season, right? And that is this Supreme Court is the vehicle through which the white supremacist project of white dominance is going to be realized, right? The relegation of women and other potential pregnant people to second class citizenship; the continued attacks on trans people, trans kids, and gender affirming health care; the erasure of marginalized people just generally. That is how this is going to get done. The Supreme Court is getting this done.

Jess Pieklo: Yeah, yeah, and Imani, I agree with you like 8,000% because after last week, it's pretty clear that if the midterms are any indication, it's not the will of the people. They pretty resoundingly rejected this nonsense, right? But we've got a captured Supreme Court that we've seen already this term is taking up cases to strip away rights that it has no business taking up. And now we've got the midterms that show that we're really in a battle between the democratic will of the people and a captured federal judiciary that is intent, like you said, on imposing its own version of this white Christian project on America. And that's what we're gonna talk about, right? SCOTUS versus the people, dun-dun-dun!

Imani Gandy: SCOTUS versus the people, dun-dun-dun! Rawr!

Jess Pieklo: It's like the worst "SVU" ever.

Imani Gandy: Totally. "Ripped from the headlines." So, you know, as I said, conservatives predicted this red wave, this red tsunami, but when all of the votes are counted, and count's still happening, it is still going on, which—

Jess Pieklo: Totally normal.

Imani Gandy: Totally normal. Stop freaking out. There's nothing to indicate that there are any election shenanigans going on. But you know, it's likely that Republicans will take back the House, even though Democrats are shockingly close, which would be truly the best performance in midterms I would say in modern history. But, even if Republicans do take back the House, it would be by a much smaller margin than the talking heads that Fox News would've had you believe or Republican strategists appearing on CNN would've had you believe.

And Democrats held the Senate. That's a thing that happened.

Jess Pieklo: It's, you know, the fact that conservatives even performed as well as they did in this midterm election, though, Imani, is thanks to the Supreme Court, right? We talked about that a little bit in this podcast already, but it's a case, *Merrill v. Milligan*, that case permitted racial gerrymandering to be used in this election. And boy oh boy, was it used in this election!

Imani Gandy: Boy howdy, was it used. Yeah, you're absolutely correct. And let's just do a quick recap about *Merrill v. Milligan*. We did a podcast on it, you should go back and listen to it. But for those of you who are just getting into this right now, *Merrill v. Milligan* is a case in which Alabama drew some very racist maps, right?

Jess Pieklo: So racist.

Imani Gandy: Despite the fact that 27% of the population in Alabama is Black, somehow Alabama Republicans could only come up with one majority Black district, right? Just one. And Black folks, NAACP, voters were like, "Hey man, we're pretty sure you could probably find another one." And so they did. They drew up some maps that showed that there could be two majority Black districts. And so what SCOTUS did, what Alabama did is what Alabama's wont to do, they went and complained to the Supreme Court.

And in February of this year, it's still 2022, right? Time is a flat circle. Yeah, February of this year, the Supreme Court essentially suspended the prohibition in the Voting Rights Act on racial gerrymandering, right? Historically, the Voting Rights Act has prohibited states from drawing racist maps. Could you imagine if the Voting Rights Act was like, "It's cool, draw all the racist maps you want, America."

Jess Pieklo: We're down with this.

Imani Gandy: That's not what the VRA does. The VRA prohibited drawing racist maps like the ones we saw in Alabama. And you know, in addition to Alabama, there are Republicans in other

states like Florida, Georgia, Louisiana, South Carolina, Texas, that all packed Black and brown voters in as few districts as possible and then sprinkled Black and brown people across the vanilla districts in the rest of the state, like so many sprinkles on an ice cream sundae, right? Just like, here's some for you. Here's some Black people for you, couple Black people over here, couple Latino people over here, and it's just, even though there were some judges, some federal court judges that found that these states had drawn racist maps, right?

For example, a federal judge in Georgia declined to impose new maps because the court in Milligan in this emergency application in February of this year had basically said, "You know what? We're gonna wait until after the midterms because these maps are just too close to the midterms." And I don't know if you recall this, we talked about Justice Kegstand, Brad McBeer, who had this dissent, this opinion that basically said, "You know what? We have to be mindful of the Purcell doctrine." And the Purcell doctrine is a jurisprudential principle that says you really shouldn't muck about with election rules when it's too close to the election. But here's the thing. Alabama drew these racist maps like a whole-ass year before the midterms.

There was plenty of time to redraw the maps, plenty of time to implement them. In Texas, for example, racist maps which reduced Black and Latinx representation, even though those populations have grown over the last decade, those racist maps were used. Same thing happened in South Carolina and in Louisiana. Get this, in Louisiana, a federal judge struck down a racist gerrymandered map, and the Supreme Court reinstated it. Re-instated. So Louisiana, which otherwise would not have run its election on racist maps, ran its election on racist maps because essentially disenfranchisement has a friend in SCOTUS. Like, disenfranchisement.

Jess Pieklo: I was just gonna say, why am I now hearing Randy Newman?

Imani Gandy: It's a Randy Newman thing. ♪ You've got a friend in SCOTUS ♪ ♪ Black people don't and they can't vote in SCOTUS ♪ I'm sorry, but like, that's a "Toy Story" reference, I think. Is that "Toy Story?" You've got a friend in SCOTUS. Someone who's got musical skills, please write that. We need that jingle.

Jess Pieklo: I'm still, I'm still working through the image that you painted of Black and brown voters as the funfetti in our democracy.

Imani Gandy: Exactly. Just drop them from the sky, psh.

Jess Pieklo: I mean, but seriously, as you were going through that history, not just of the case, but like the impact. What the Supreme Court really did by allowing one state out of the jump to implement its racist map was all the other states that followed. And you're ticking these states off, you're like, Texas, Florida, Georgia, and I'm sitting here going, Huh, you know what those states all have in common? It turns out that they are pretty important when it comes to things like abortion rights.

Imani Gandy: Yeah.

Jess Pieklo: Civil rights.

Imani Gandy: Yeah.

Jess Pieklo: Democracy, if that's your thing in general.

Imani Gandy: If that's your jam.

Jess Pieklo: But really, there could have been potentially a progressive wave, but for the Supreme Court allowing states to run elections on these maps, just to give it a go, we'll see what happens.

Imani Gandy: Just the one time, what's that gonna hurt?

Jess Pieklo: It's just a soft rollout, really.

Imani Gandy: Soft rollout of racist maps. It's a soft grand opening!

Jess Pieklo: But truly, so that's one very specific way that the Supreme Court has put its thumb on the scales of this midterm election. But I think there's another, and that is the way in which its decisions, and just being like a terrible fascist turd has galvanized voters, right? Like, it galvanized turnout around things like we're seeing abortion, guns, climate change. And in my opinion, Imani, this is really the battle that's gonna define generations here, right? Can any progressive policy stand with this Supreme Court?

Imani Gandy: I'm gonna go with no.

Jess Pieklo: Survey says no!

Imani Gandy: Because I mean, what do we have in this court? An illegitimate body.

Jess Pieklo: Yeah.

Imani Gandy: And Republicans are using this illegitimate court as a legislative body, not even as a judiciary, right? As you said, they're taking cases they have no business taking. They're substituting their own version of facts or the facts that were found by the actual fact finders in the lower courts. It's just whatever these FedSoc people wanna do, they've got the FedSoc Six on the court just waiting, champing at the bit, to do it.

Jess Pieklo: Totally, totally. And we can use abortion, the issue of abortion as, like, a send up on this, because it is so clear, right? In this election, the anti-choice advocates, community activists, they got wrecked.

Imani Gandy: Wrecked!

Jess Pieklo: Flattened, flattened!

Imani Gandy: They did, they got fileted.

Jess Pieklo: Destroyed! They fucked around and found out, if you will. But truly, the abortion rights wave that started over the summer in Kansas continued to play out through states across the country. And it really sets up this dichotomy that we're talking about of the Supreme Court versus the will of the people. All right, we're gonna get into that, but I'm gonna say, Imani, not all abortion victories at the midterms are the same. But let's talk about what happened, 'cause it is super exciting. California ballot initiative. Go California, right?

Imani Gandy: Hallelujah California.

Jess Pieklo: Voters there approved a measure that protects abortion and contraception, right? Like, massive capstone to a huge legislative push in that state.

Imani Gandy: Yep, and then there's Michigan.

Jess Pieklo: Michigan!

Imani Gandy: There's a ballot initiative in Michigan. Voters approved amending the Michigan constitution to explicitly protect the right to abortion, thus ensuring that the state's pre-Roe abortion ban cannot go back into effect. They tried, they lost, and then the voters were like, "Naw dog, we're puttin' this shit in the Constitution. And if you wanna fix it, you have to amend the Constitution. Good luck with that."

Jess Pieklo: Naw dog, we're putting this shit in the Constitution. I want that on a mug. That's too good. But I mean, Vermont.

Imani Gandy: Yeah.

Jess Pieklo: Vermont approved ballot measure amending its state constitution to protect abortion rights and, quote, "ensure that every Vermonter," Vermonter, that's a term?

Imani Gandy: Vermontian?

Jess Pieklo: Vermontian? No, Vermonter, it says Vermonter in my script. "Is afforded personal reproductive liberty." And I talked about this in the newsletter "The Fallout." It is not an easy process what folks in Vermont did. This is a multiyear, multi-legislative session process. So a campaign was afoot for years and years and years. Big snaps to Vermont there.

Imani Gandy: Yeah, we've got Kentucky, which rejected a ballot measure that would've amended the constitution to state that there is no right to an abortion in the Kentucky constitution. And voters were like, "I don't know, man. Fuck you, there might be," right? There's not necessarily one, but there goddamn well might be.

Jess Pieklo: Absolutely.

Imani Gandy: And Montana also, they rejected a ballot initiative requiring medical intervention to save "babies born alive." And as you and I know, and have for a long time, Jess is sinking into her chair out of camera. But "born alive" isn't a thing. Actually "born alive" is a thing. It's called birth.

Jess Pieklo: It's called birth, people.

Imani Gandy: It's called "born alive" in the context that Republicans and anti-choicers like to use it. Like, if you're "born alive," you're fuckin' born, man. Congratulations, you made it out of the uterine Bastille. There's no abortion, any sort of abortion-related anything that has something to do, I just, it's just, it's very frustrating. It's very frustrating. But.

Jess Pieklo: I mean, so apologies in advance for everybody who's gonna have to listen to me prattle on and on and on about how Kentucky is a purple state because Kentucky is a purple state and this is very exciting and I will be talking all about it. But the other thing is, Imani, people really like voting on abortion rights and access.

Imani Gandy: Yeah.

Jess Pieklo: They really like it. Like, it's super, super popular. And I'm starting to see folks, you know, respond to be like amazing, abortion's super popular, put it on every ballot.

Imani Gandy: Why is that not a good idea? Shouldn't you put on every ballot?

Jess Pieklo: I just, maybe not, maybe not. Like I hate, I'm sorry.

Imani Gandy: Don't apologize.

Jess Pieklo: I hate to be that person.

Imani Gandy: It's a safe space, Jess, it's a safe space.

Jess Pieklo: I am. I, so, OK, I don't wanna lawyer this but I'm gonna lawyer this because I'm Jess and that's what I do. So, you know, Kentucky, Montana, amazing decisive victories. These are defensive votes, right? These are not voters affirmatively embracing abortion rights the way voters in Vermont and California did. All right? They are voters, Kentucky, Montana, they're rejecting additional attacks. That's a hold the line vote if you will, right? So they're just not the

same. It's an apples and oranges comparison. And not all state Democratic parties are here to support pro-abortion measures. I wish that were not the case, but it is true. Voters may be there, but the party folks may not themselves. And so I worry about the idea of running something the equivalent of like a 50 state strategy in places where the apparatus is not there to support it.

So for example, Ohio, Florida, the Dakotas, love you folks. Your state Democratic party needs some work before I think you can get a really good pro-abortion ballot initiative with success rather than something that's gonna take the wind out of sails in some important times. So I'm just saying, I'm not saying it's impossible, but it's just, I know we're all caught up in the fact that it went better for Democrats and progressives than we anticipated. I was personally braced for a really bad showing and what that meant.

But I just, I want folks to take a second and be like, all right, let's enjoy the win, let's build off the victories, but let's build off that strategically and not rush in and just assume that that's a thing that we can do.

Imani Gandy: And conservatives are hilarious about this too. Like the way they're trying to sort of rationalize the fact that they did really poorly, saying things like, "Well, yeah, sure, in California, in Montana in Kentucky and these other places, all these places abortion was on the ballot, abortion won. But Marco Rubio and Ron DeSantis are pro-life, quote-unquote 'pro-life' and they won their races. So we're still in it guys." Seriously, Marco Rubio and Ron DeSantis are gonna be your bellwethers of how successfully your movement is doing?

Jess Pieklo: Absolutely.

Imani Gandy: You guys thought you had it on lock after Dobbs and you don't.

Jess Pieklo: Absolutely, absolutely. And so we're gonna see Democrats and progressives really making an effort to protect and expand abortion rights and access to the states where they can. But Imani, I think we're also gonna see conservatives look to those states and do a run up to SCOTUS on "personhood." Like, I think the "personhood" battle now becomes a statewide battle in the short term. And this is kind of terrifying.

Imani Gandy: You gotta explain what you mean by that. You gotta flesh that out for me.

Jess Pieklo: OK, so you know, while we're wrestling with the future of abortion rights and access, the conservative movement in this country knows that they have the federal judiciary on lock. And that means that they can, as you said at the beginning of the show, treat it as a legislative body. It's not a law-making body in the sense of explaining the law. It is a law-making body in the sense that conservatives now use it to institute policy that is anti-democratic and extremely unpopular, i.e. all the abortion they just tried to pull, right?

Imani Gandy: Right, right.

Jess Pieklo: So they will do that with some kind of "life begins at conception" in one of these exceptionally rigged states, in a state like Florida. We're already seeing it, right? Florida has a conservative captured super majority in the state. And the first thing that their elected officials are champing at the bit for is to roll back abortion rights and access. Devastating because Florida in that part of the country is a key regional point of access. But this is where the battle is. So, Gen Z.

Imani Gandy: Give it up for Gen Z.

Jess Pieklo: You destroyed conservatives, full stop, in this last election. And I hate to put this on you, but—

Imani Gandy: Please keep it up.

Jess Pieklo: I'm gonna Please keep it up.

Imani Gandy: Please help us.

Jess Pieklo: Like, mama's tired.

Imani Gandy: 'Cause apparently Gen Xers are screwing up. Like, Jess and I are both Gen X, and like, Gen Xers are just MAGA as fuck. Not me, not a lot of Black and brown women for starters. And obviously there are tons of progressive Gen Xers. But Gen Z, you gotta cancel us out. Please cancel us.

Jess Pieklo: White women, Gen Z. White women.

Imani Gandy: Cancel white women. Oh God, that's gonna be the clip that airs on Fox News. "Woke journalist Imani Gandy said cancel white women."

Jess Pieklo: Oh no, I'll be in the Daily Mail again. But truly, like, Gen Z. And this is the moment, we are gonna have a bunch of terrible bills getting passed in states looking to enshrine "fetal personhood." You know, like, any sort of cockamamie abortion restriction that you can imagine right now will get cooked up in some of these places to see if it can stick. The Supreme Court, the federal judiciary, versus the voters, versus the people. Imani, this where we're at, this is the fight.

Imani Gandy: I like it.

Jess Pieklo: The lines have been drawn.

Imani Gandy: Lines have been drawn and you know, Gen Z, they're not to be trifled with. This is a generation that grew up on the internet, grew up on social media, I mean, watching some of these old fogies and I mean, I don't consider myself an old fogie 'cause I'm fairly well-versed in

social media, but you know, you recall Matt Gaetz going after Olivia Julianna, and then she raised like \$3 million. Like, these people are not fucking around, so.

Jess Pieklo: They're not, in the least bit.

Imani Gandy: I feel like Gen Z could save us all. And I like it, I'm here for it. I'm here for our Gen Z overlords.

Jess Pieklo: Me too, me too.

Imani Gandy: At any rate, that's gonna shut us down for today. You know, votes are still being counted.

Jess Pieklo: Totally normal.

Imani Gandy: Right, but I think it's time for some, I think it's time for some celebration of it. A little bit. So let's celebrate. If you wanna celebrate with me and Jess on Twitter, what's left of Twitter, anyway, you can find me there @AngryBlackLady. You can find Jess there @Hegemommy, H E G E M O M M Y.

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Jess Pieklo: Nope.

Imani Gandy: And on that note, what are we gonna do?

Jess Pieklo: We're gonna see you on the Tubes folks.

Imani Gandy: See you on the Tubes, folks.