

Imani Gandy: Hello, fellow law nerds. Welcome to a special live reaction episode of "Boom! Lawyered," a Rewire News Group podcast hosted by the legal journalism team that is stunned, again. What's happening? I don't know. My name's Imani Gandy. I'm editor-at-large at Rewire News Group.

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 celebrate ICWA surviving because really we didn't see that one coming. And the "Boom! Lawyered" podcast is part of that mission. So a big thanks to our subscribers, a welcome to our new listeners and viewers and livestream participants. Hello.

Imani Gandy: Jess, we're two-for-two when it comes to the cases that we've been watching and that we said all season was gonna be weaponized by the Fed SOC six, two for two. Last week Robert surprised the hell out of us by saving the Voting Rights Act. And then today, Amy Coney Barrett, Amy Coney Barrett surprised the hell out of us by saving the Indian Child Welfare Act. So here's what she said. My Amy Coney Barrett, it's not nearly as good as yours, but I'm working on it. I'm working on it.

Jess Pieklo: It's a pretty solid Amy Coney Barrett.

Imani Gandy: Okay, thank you, thank you. I've been working on it. So here's what she said. "Ultimately, the bottom line is that we reject all of petitioner's challenges to the statute."

Jess Pieklo: I what?

Imani Gandy: Exactly.

Jess Pieklo: Really? I had to read that like three times when I saw that.

Imani Gandy: Yeah, I mean, I honestly read that. I was like, what is going on? And then you were like, did we win? Like very confused. This was the case I was most worried about, right? Because I think it would've had the most far reaching consequences. When it comes to the destruction of tribal sovereignty and the advancement of white supremacy, and the continuation of this cultural genocide that began when settlers came to this country and began scooping up all of the lands that didn't belong to them, scooping them up for themselves.

Jess Pieklo: So let's get into it. Let's hit the main points first, and then we can really sort of break apart this opinion. Okay, by a seven to two vote, also a surprise, right? The court upheld the Indian Child Welfare Act and rejected all of the petitioner's claims, either on the merits or because of standing. And we're gonna talk about that because some of that standing stuff is a little slippery. The two dissenters, would it surprise you to know, were Justices Alito and Thomas? I mean.

Imani Gandy: I mean. those two dissent from common sense and reality, like honestly, I'm done. I am done with those two.

Jess Pieklo: On social media, Susan Rincon has said, "Jezebel called them the disgusting brothers," as a nod to succession.

So here's the background. ICWA had been challenged by seven individual plaintiffs in three states claiming basically that it was unconstitutionally racist because it gave preference to tribal families and relationships in foster care and adoption proceedings, right? So that was the nut of the argument.

Petitioners made three claims. One, that Congress exceeded its authority when it passed ICWA, so beyond the scope of what Congress can do. Two, that the law commandeers state agencies and directs them to enforce federal regulatory programs. This is a 10th Amendment argument, basically that Congress is coming in and stepping into the state's business. And number three, that the law violates the Equal Protection Clause because it places Indigenous children based on their race.

Imani Gandy: And on the third point, I mean, the point that was really most egregious, like some of the most egregious arguments relate to that third point, relate to that claim that it violates the Equal Protection Clause because it places Indigenous, essentially the way they phrase it is that it puts white people last in line when it comes to the placement of Native American children. You know?

And if you just imagine like the privilege that it takes to even think that way, like that's the way the Brackeens and the Cliffords and some of these other individual plaintiffs think. They think that they were placed last in line. And that's not fair. The Equal Protection Clause says you can't put white people last in line for anything, even if it's adopting Indigenous kids and trying to maintain families and tribes. But, you know, the Court didn't hit that point. Not on the merits anyway, right? The court said the petitioners didn't have standing, so the Court punted on that issue. But I'm gonna go into detail about that a little bit later.

So let's backtrack. Let's just talk about Barrett writing this opinion. Why did Barrett write this opinion?

Jess Pieklo: I mean, right. When I saw that she had the ICWA opinion, at first I had chills because I mean, you think you see that and you think, "This can't be good," right? And then, I mean, I don't know. And we've been talking about why did Barrett write this opinion as opposed to like Gorsuch, who, I mean, tribal law is his jam, right? I don't know.

Imani Gandy: Yeah. I mean, first of all, something about Amy Coney Barrett having adopted Black children and then writing about this transracial adoption issue when it comes to native children. I don't know how it makes me feel, but it makes me feel some kind of way. That's all I'm gonna say about that. But then also, you know, like your bearded paramore, Neil Gorsuch-

Jess Pieklo: The pandemic was a rough time for all of us. And that beard suits him. We will say no more about it, but I'm just saying we did what we had to do to get through lockdown.

Imani Gandy: We had to. We did, we did. But, you know, it's Gorsuch's concurrence that really lays out why it is ICWA was such a necessary statute, right? He goes into the history of the boarding schools and how kids were literally abducted by government agents and placed into boarding schools where they were sometimes starved to death, beaten. They have higher rates of suicide and drug addiction because they were literally taken from their homes and stripped of their culture. They had their hair cut, which is a big thing in Native American culture. They were placed with other children from different tribes. So there was no way that children could maintain their language skills, their communication skills, right? Their intra heritage communication skills. And that's what they, I mean, that's literally what white folks did with enslaved Africans, right?

They brought us here and they cut our hair and they made it so that we, you know, we couldn't speak our native languages. And that led to some really interesting things like Black people making maps in their cornrows in their hair and everything. Anyway, that's a completely different topic for another time. But I think that, I just was gonna say, I think that Gorsuch's opinion, which reads like a majority opinion, wasn't the majority opinion, because I don't think the other conservatives on the Court wanted to sign on to all of the horrible shit that Gorsuch was saying this country did and continues to do to Native American people.

So that's why I think, 'cause his opinion really, it's beautifully written. It lays out all the issues. And it should have been the majority opinion, not this boring ass shit that Amy Coney Barrett wrote.

Jess Pieklo: Right, that's what I was gonna say. Amy Coney Barrett, I'm just gonna say it. Look, she's boring. She is dull. This opinion is a snooze fest. And I, you know, I mean, I cynically think one of the reasons why they gave it to her, you said, you know, it's icky. It's something about it just makes you feel icky, given the fact that she's an adoptive mother. I think the conservatives see her as like the Court's mom. Right? And so this is a case that involves kids and adoption. So give it to the mom on the Court, right? Even though there are other mothers on the Court, right?

Like, at any rate, I think that's part of it. Because when you do contrast them, like Gorsuch's concurrence is gorgeous in its language and its writing, and it's not just because he looked good in the beard. It's actually very, very good. But you know, they do compliment each other. Hers reads like a manual.

Imani Gandy: It's just like, here's a law straight down the middle, nothing, no emotion either way. And Gorsuch is like, "We done fucked up when it comes to Native Americans, over and over and over native Americans come to our court with their bowed heads and they can't get any justice. And do you know what we've done to Native American kids? This is what we did to" And it really was just like very extensive. And I was like, alright buddy.

Jess Pieklo: I'm surprised he didn't announce the concurring opinion as coming from like Potawatomi lands or something, right?

Imani Gandy: Yeah, seriously. Like, exactly. So, but let's get into it, right? On the first point that you mentioned, right? Whether or not Congress exceeded its authority when it passed ICWA, no, they didn't. Honestly, I mean, Congress has plenary power to legislate with respect to Indian tribes, right? Now, plenary power means like a whole lot of power. It doesn't mean absolute power, it doesn't mean unbounded power, but it's a shit ton of power that they have.

Legal term of art. Legal term of art, and they're allowed to exercise it. That power stems from the Indian Commerce Clause, which specifically authorizes Congress to regulate commerce with the Indian tribes. But Imani, kids aren't commerce. That's really creepy to refer to kids as commerce. Well, no, kids are not like a unit of commerce. But when it comes to Native American tribes and when it comes to maintaining their culture, they are a resource. And Native American people talk about their children as a resource, right? And there's a reason why this country was snatching them up and separating them. It's because if you don't have the resource of children, then eventually you won't have a tribe because the tribe will all die out. And all of the children will have been sprinkled about in white Christian families across Texas or Indiana or Louisiana, right?

So that's number one. And also the Court has recognized over and over and over Congress's power to displace the jurisdiction of state courts in adoption proceedings involving Indigenous kids. Indigenous kids are just separate. Right? Like they are separate. And that's just, that's how it is, that's how it's been for 40 years, since 1978. That's how it's gonna be.

Jess Pieklo: Done there, right? I mean, the bottom line is that the Brackeens argued that ICWA treads on state authority over family law, like that was the nugget of their argument. But conflicting state family law is preempted. That is a basic principle of constitutional law, right? Like supremacy clause 101, Brackeens.

Imani Gandy: Easy, like easy. And the Brackeens also argued that the Commerce Clause provides authority over resources, but not individuals. Right? They tried to make this claim that it was creepy to call kids units of commerce. But you know, as I said, resource, these children are resources, right? They are these tribes' natural resources. It's how they are gonna continue keeping the tribe going from generation to generation. Also, I just wanna point out, like how shady the Brackeens are, just generally, because, and this is something that I learned recently after, well, I relearned it, I should say, after I re-listened to Rebecca Nagle's podcast, "This Land" which if you haven't listened to, honestly the investigative journalism that she did in that podcast, and the way in which she described everything that happened in the Court proceedings, it is absolutely true that if you listen to that podcast, you will know more about the Brackeens and what went on with this case than the Court deciding it did.

Because A, the lower court denied discovery. So it was just like whatever Chad and Julie Brackeen said went, went. Oh, it's very frustrating. Very frustrating.

Jess Pieklo: I mean, I think, you know, this is why Gorsuch's concurrence opinion is, again, so important, right? Because we have the Brackeens making these arguments, and Amy Coney Barrett gives us this very like middling, like, "Nope, we just don't agree with that. The law doesn't say that." And Gorsuch gets into the history, which is important because hey, the government spent decades, right? Trying to eliminate tribes by abducting and adopting out their kids. Like there's no way that the Court could, I mean, there is a way that the Court could have reached this case without discussing that history. And I think that's what Alito and Thomas were driving towards. But Gorsuch made sure that didn't happen. And it feels a little uncomfortable to give the man that much credit, but hey, look.

Imani Gandy: I mean, he's always been good on anything to do with Native American, that's-that's his space. So, absolutely.

Jess Pieklo: Alright. The other argument that the Court rejected outright was this anti-commandeering claim. And this is a little weedy, but it's also like pretty straightforward at the same time. Okay, so the petitioner's claim that the law directs state agencies to provide all of these extensive services to the parents of Indian children, even though the 10th Amendment prevents Congress from commandeering states to enforce federal regulatory programs. So basically the argument is, hey, ICWA unconstitutionally tells state foster care and adoption agencies how they have to proceed, right? State child protective services proceedings, how they have to go. And we just don't do that.

But the 10th Amendment doesn't apply if the law applies to any party, not just state agencies. So the 10th Amendment is really designed to balance the power of the Federal Government and the state government and how those two governments interact with individuals. If other individuals are involved in that, it no longer becomes a 10th Amendment question.

Imani Gandy: Yeah, pretty simple.

Jess Pieklo: Like, I mean, and it's been a minute since I was considering 10th Amendment law, but here we are, right? So like a demand that either public or private actors can satisfy something is unlikely to get into sovereign power. So it's just, it's not a 10th Amendment issue here. And I mean, on that part of the opinion, I thought Amy Coney Barrett was actually pretty good. I mean, it was useful to have dry, boring prose.

Imani Gandy: Very dry, very boring, and-

Jess Pieklo: An adjective is okay, Justice Barrett.

Imani Gandy: Yes, seriously. Just some, some emotion would be useful.

Jess Pieklo: A little flourish is okay.

Imani Gandy: It is okay. It is okay. And then that third question, right? We're gonna circle back, we're gonna circle back, we put a pin in it before, now we're circling back to the equal protection question, right? And so-

Jess Pieklo: This is the big one.

Imani Gandy: This is the big one. This is the one where white folks were saying it's reverse racist to place Indigenous kids with Indigenous families first, right? We should be at the front of the line, or we should at least be at the same level, which, okay, whatever. But I have things to say, but I'm not gonna say them now.

But the issue here, and Amy Coney Barrett said, there's no equal protection analysis. They literally punted on that issue because the petitioners, neither the individual petitioners nor the state petitioners had standing to raise these claims, right? The individual petitioners were arguing, I'm sorry, she said that the individual petitioners did not have standing because there was no remedy that the Court could offer those individuals that would make them whole.

Jess Pieklo: There's nothing the Court could do to fix what they were complainant about.

Imani Gandy: Right, because who did these plaintiffs sue? They sued the Department of the Interior, right? They ended up suing like five different Native American tribes. But those tribes and the Federal Government don't actually implement ICWA, right?

They're not responsible for how children get placed. They're responsible for making the rules. The Federal Government made this rule, and now the states have to follow this rule, but it's the state agencies that implement ICWA, and then it's the state courts that placed the children pursuant to the implementation of ICWA by these state agencies. So essentially they sued the wrong people. And with respect, and I just wanna say the way that she words it, she's basically telling people, it seems like, "Here's how you can bring an Equal Protection Clause a little bit later if you want to."

Jess Pieklo: Yeah, absolutely. I mean, I think that that's really it, that it's good that the Court didn't touch the equal protection claim, I think. But this is, I feel like, one of those poison pills in a really good decision. This is the Court giving an opportunity to conservatives to come back a second time. And we've seen conservatives on the Court do this over and over and over and over again. This is normally Alito's trick, but I think it's sort of across the board here.

Imani Gandy: Absolutely. And then when it comes to the state petitioners, it was Texas and Indiana and Louisiana. And by the way, you know, that's another thing that I learned from Rebecca Nagle, is that those three states have less than 1% of the Native American population in this country. The 28 states that opposed those three states, they contained something like 95% of the Native American population, right? And they were opposed to any destruction of

ICWA. So I think that shows you, I mean, you've called this challenge to ICWA cooked up. That shows you how cooked up it is that these states don't even have any Native American people. So what are you complaining about, right? Go touch some grass for crying out loud.

But then with respect to those three states, Barrett said that they don't have standing because you can't raise equal protection claims on behalf of your citizens. Texas and Louisiana and Indiana were saying that the Equal Protection Clause was violated because they promised their citizens to place children in foster care using a colorblind methodology.

Jess Pieklo: Right, right. And that this is their reverse racism claim.

Imani Gandy: And that's not a claim. Like what redress do you expect for that claim? Just stop it, honestly.

Jess Pieklo: "Stop it, honestly" is the best response.

Imani Gandy: Just knock it off.

Jess Pieklo: And so we have that very weird Kavanaugh concurrence, right? Justice Miller Light. Justice Kavanaugh filed a functionally one paragraph concurrence that was like, "Yep, everything that broad says. However, I would also reach the equal protection claim because I think it's important, and I think the Court should," and that is alarming, because when you read Kavanaugh's concurrence, that signal that, hey, we think this is an important issue along with the roadmap that Justice Barrett lays out basically saying, "Oops, you guys got it wrong. Like, go back and do your homework over again." Like, you know, "And we'll give you the higher grade this time around."

It really, I don't know, seems bad, seems super shady.

Imani Gandy: I mean, just, can you get the fuck outta here with your one paragraph? "I don't know. There's this other case," first of all, the other case that he cites is a case called *Palmore v. Sidoti*. That was a case involving, I think they were trying to place, oh, it was a custody battle. And I believe the woman was married to a Black man. And so they didn't wanna place the child with the Black guy because he was Black. Like it was something really basic about like, oh, you're Black. We're not gonna place this child with you. It's not this entire statutory framework that Congress enacted in order to make up for the cultural genocide that this country was engaged in. So no, justice Kavanaugh, *Palmore v. Sidoti* does not apply. Just shut up.

Jess Pieklo: You could've just said nothing.

Imani Gandy: Literally, sit there and eat your god damn peas. I'm tired, I'm freaking tired. And it's just such a gimme, like I know that Kavanaugh's clerks have read *Palmore*, and they know that *Palmore* doesn't god damn apply, right? Like, I'm sorry.

Come on, man. It's just the only reason he wrote that paragraph is because, oh God, the Court did something they weren't supposed to do. You know, they upheld ICWA. So let me just make sure that you understand that when it comes to the part that you care about, the business about being reverse racist, and white people being in the back of the line, and how that's not fair, that's still a live controversy. We'll see that coming back around.

Jess Pieklo: And I mean, I mentioned this to you in one of our Slack chats today, but, you know, first of all, I am not one to be known for having a lot of hope when it comes to the federal courts, particularly around a reproductive rights access and justice issues. But I do wonder if there is a silver lining in the way that the Court smacked the standing equal protection claims down. And what we're seeing the plaintiffs in the mifepristone lawsuit, the challenge to the FDA approval of mifepristone, what they're trying to pull, if maybe, maybe, I don't know, we can pull a glimmer of hope that when that case gets to the Supreme Court, Amy Coney Barrett will be as equally intolerant to the terrible bullshit standing arguments.

Imani Gandy: I mean, it also gives me hope about 303 Creative, right? Which is that case where the random lady who doesn't even make websites has asked the Supreme Court to tell her that she doesn't have to make websites for gay couples, even though not a single gay couple has asked her to make a website. And she doesn't even make it a god damn website. She's asking for an advisory opinion. If the rhetoric and the jurisprudence that Amy Coney Barrett wrote about today applies generally, then that lady should get kicked outta court.

Jess Pieklo: Yeah, we'll see.

Imani Gandy: Peace out, buddy.

Jess Pieklo: We'll see. Stay tuned for that. And we will be doing a livestream when 303 Creative comes down. You better believe it. We should probably talk about the dissenters, huh?

Imani Gandy: Do we have to, my God, like the dissenters are basically like, "Fuck them kids, we don't care." I mean, whenever you see Thomas and Alito, like, you see it's seven to two, you know who those two are gonna be. And that's part of my problem with this court generally.

It's like that's such hyper-partisanship that it doesn't even, like Thomas is trying to attack this from an originalist point of view or from a textualist point of view. "Well, the Framers didn't say that ICWA was a proper law. So therefore it's not." Like, unless the Framers thought of every law that was ever gonna be passed from then 'til the end of time, then according to Thomas, it doesn't count. Unless it came out of one of the Framers' mouths, it apparently does not count to Clarence Thomas.

Jess Pieklo: Well, according to Clarence Thomas, the tribes aren't even sufficiently native enough to count anymore.

Imani Gandy: Oh my god, what was it that he said? That not a lot of them live on reservations? Like, where the fuck do you think they live, my guy? Like, what are you talking about? I just, I can't.

Jess Pieklo: What did Harlan Crow do to that man? It's like, it's worse every- It gets worse and worse and worse. And then, I mean, look. Alito's the grumpiest man maybe on the planet. He keeps winning in these cases. And like you can just, he's one of those writers where the sneer comes through the pages. Like I read anything that Alito writes and it's just a sneer. He's like snarling through it. And he's snarling through the fact that this should just be a family law dispute, like...

Imani Gandy: I mean, first of all, I'm gonna go back and talk about how shady the Brackeens are. If this is just a family law dispute, then there's really no reason for the Brackeens to be in court because they were able to circumvent ICWA. They were able to adopt the baby that they wanted to adopt. They were able, the adoption went through two days, this is something else I learned from Rebecca Nagle, I'm telling you, listen to this podcast, "This Land."

The adoption went through two days before Gibson Dunn and Crutcher swooped in and decided to file an appeal. And with that appeal, along with Texas and Indiana and Louisiana, essentially said, "Hey, can you just kill ICWA?" Like they were in family court asking that court to overturn a statute based on constitutional grounds. Why? Because Gibson, Dunn and Crutcher has clients that are related that are trying to get oil money, right? The Dakota Access Pipeline, that's Gibson, Dunn and Crutcher. So if you wanna know why it is Gibson Dunn decided pro bono to swoop in and help the Brackeens even though the Brackeens had already won what they wanted, it was because it wasn't about the family law dispute, right? So no Alito, it's not just a family law dispute.

It's a dispute about tribal sovereignty and the ways in which there are conservatives who are trying to destroy it and Gorsuch laid it out why that can't happen. Right? And I think, again, I think it's interesting that.

Jess Pieklo: And you know that made him so mad. And I'm just imagining a family law dispute that has, you know, one side stacked to the tune of billing, probably, oh, I don't know, two, \$3,000 an hour by the time you've got a couple of those attorneys stacked up, right? For one baby.

Imani Gandy: Yeah. For a baby that was already adopted.

Jess Pieklo: Okay. File it before Reed O'Connor, right? The original Matty K.

Imani Gandy: So what does the case mean, Jess? What are the big takeaways?

Jess Pieklo: I mean, look. I'm having a hard kombucha 'cause I was really thinking we were gonna be talking about the separation of families here and having a very bad day. But we're not.

What it means is that, look. Equal remains the law of the land, along with its preferences for keeping children within tribal relationships during foster care and adoption proceedings. That's good. And Gorsuch's, full-throated embrace defense of tribal sovereignty, I hope, you know, has has some staying power.

Imani Gandy: Yeah, yeah, yeah. Gorsuch is one complicated man. I mean, great 'cause he gave us Bostock also. Like he comes out with these opinions and you kind of wanna remember when we hated him? Remember when he was the worst member of the Court?

Jess Pieklo: We called him him Gor-sick.

Imani Gandy: For like a full year we did.

Jess Pieklo: We were very mean to that man. I mean, granted, he still had it coming to him. But we really gave him a hard time.

Imani Gandy: And now we've got these, we've got like Justice Kegstand and Justice Nazi memorabilia, and it's like it's too much, it's too much. So opinions are also happening tomorrow. Tomorrow's Friday, June the 16th. We are waiting on 303 Creative. We are waiting on Students for Fair Admissions versus Harvard. And we're also waiting on Moore versus Harper, that's that wacko independent state legislature theory case.

Jess Pieklo: That case I just need to go away. Everybody just, we need that-

Imani Gandy: Jess doesn't even wanna talk about it.

Jess Pieklo: I don't, I keep- I keep memory holing it like, you know, exercising some kind of editorial privilege and just refusing to talk about it. But it's, we gotta talk about it, folks. We will.

Imani Gandy: So, I mean, I'm hoping that they don't get, they're gonna gut affirmative action. Like I know we said they were gonna get ICWA and I know we said they're gonna gut the Voting Rights Act and we were proven wrong in those two cases. They're gonna get affirmative action. They are going to, and I just hope they don't do it tomorrow, literally three days before Juneteenth.

Like let Black folks have Juneteenth before you-

Jess Pieklo: If they do three days before Juneteenth, that is absolutely calculated because these opinions don't just take like a day or two to write, right? They're not like banging at a draft over a night like you and I would. They're going back and forth sharing opinions like, you know, arguing. So these cases, while they are coming out in a trickle towards the end, you know, they've been working on them for a while. So if that happens, then man.

That's purposeful and we need to call that out. Oof.

Imani Gandy: And if it happens tomorrow, we will call that out on another live stream.

Jess Pieklo: Thank you for joining us.

Imani Gandy: Thank you for joining us, you know, follow us on Twitter, @AngryBlackLady, @Hegemommy, follow Rewire News Group, Twitter, Instagram, sign up for our YouTube channel.

And, what else, Jess?

Jess Pieklo: I mean, it's amazing we got one of these big cases that we've been covering the same week that we published our special issue on the Dobbs anniversary one year later. We're creeping up on like one of the worst Supreme Court anniversaries that we will be marking from here on out at Rewire News Group. If you have not had a chance to check out that editorial package, please do. There is some really amazing work. Oh my gosh, like. Talk about a good way to mark a shitty day. That's what I'll say about that.

Imani Gandy: All right, well that's gonna wrap it up for us. What are we gonna do, Jess?

Jess Pieklo: We are gonna see you on the tubes, folks.

Imani Gandy: We're gonna shimmy and see you on the tubes.