

IMANI: Hello fellow law nerds! Welcome to another episode of Boom! Lawyered, a Rewire News Group podcast hosted by the legal journalism team that's doing NPR sexy voices today. I'm Rewire News Group's Editor-at-Large, Imani Gandy

JESS: 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 be done with Sam Alito's nonsense already—and the Boom! Lawyered podcast is part of that mission. A big thanks to our subscribers and welcome to our new listeners!

Folks, if you have not had the chance to visit [Rewirenewsgroup.com](https://rewirenewsgroup.com) in a hot minute, please go over there. My team and I put together this amazing content drop about this whipped up trans panic that conservatives are out there doing. We connected it to these larger issues of who gets to be a person and the artwork on it is just delicious, it is chef's kiss, amazing. Our team worked so hard on it and obviously I'm biased, but the the drop itself is comprehensive.

There's a fresh take on a lot of these issues between like how teachers can help their students to your deep dive, Imani, in what the fuck the constitution could actually do for a change for trans folks, right?

IMANI: Yeah, I mean, the constitution is failing trans folks pretty badly these days, and if you happened to watch the Republican debate, you know that they are saying the quiet parts out loud. They want to detransition trans folks. I don't understand how anyone can look at what's going on and not view it as a concerted effort at genocide, right. If you're trying to keep people from being trans, that's genocide. So yeah, that our content drop is amazing. Please check it out. It's called "They the People," go to [Rewirenewsgroup.com/theythepeople](https://rewirenewsgroup.com/theythepeople). The graphics are amazing. If you love Barbie, you're gonna love this content drop.

JESS: It's so good.

IMANI: So Jess today you are on deck because, it's, this is your show, man. This is your show, baby. Why? Because you are our Cassandra, right? Like you have keen insight into the goings-on of the Supreme Court, and that's what we're going to be talking about today. We are going to be providing a sneak peek at the cases that we are gonna be watching this term. And our own Cassandra slash white lady whisperer slash Amy Coney Barrett impressionist Jess will be giving predictions about what she thinks might happen in these cases and with the Supreme Court as a whole.

JESS: The TL;DR is that this term is shaping up to be a doozy as the youths say. While there are no abortion cases on the Supreme Court's docket just yet we have Court weighing in on the mife case eventually, and that could be the abortion case to end all abortion cases.

IMANI: I thought *Dobbs* was the abortion case to end all abortion cases. I thought we were done with these apocalyptic abortion cases. What's happening?

JESS: *Alliance for Hippocratic Medicine* is worse. If not worse, definitely equally as bad.

IMANI: Well let's start with that one then! *Alliance for Hippocratic Medicine v. FDA*.

JESS: We did multiple episodes on this case last season, because the conservatives had been targeting medication abortion as soon as they possibly could. So for in depth coverage check out those episodes. But we should give a recap on the mife case so people can remember what's at stake.

IMANI: And then can I yell about standing?

JESS: Of course. The tl;dr on the mife case is that conservatives are poised—if SCOTUS lets them—to roll back medication access to the Obama years based on an argument that the FDA rushed mifepristone to market and it's dangerous.

IMANI: It's killing everyone! It's taking over towns! It's taking over telephone poles!

JESS: Check your Halloween candy for mifepristone!

IMANI: Imagine those Smarties candies except for it's not Smarties, it's just stacks of—wait a minute, that might be a good idea for when we have to go underground.

JESS: Oh my God. Is there mife in your apples? It's a full-fledged political hit job dressed up as a legal challenge and we could know sometime this fall if SCOTUS is weighing in.

IMANI: So mife has been on the market for over 23 years, right. The FDA approved mifepristone in 2000. Since then, only 28 people have died from complications—28 out of ~5 million;- the risk of a major complication associated with medication abortion is 0.4%. The mortality rate associated with medication abortion is less than 0.001 percent—0.00064%, to be precise.

JESS: Okay, that sounds really small, but candidly, and full transparently, I went to law school to avoid math.

IMANI: Yeah, I mean, we all did.

JESS: Between that and the right and left, which I still do occasionally.

There's a lot to be concerned about with this case. I mean, this is really bad. Not only are we looking at a dramatic rollback in medication abortion access—and it will be, if that happens, there will be some way folks will try to categorize that as a win because the conservative movement is trying to remove it from the market entirely. But there's also this possibility that the Supreme Court will recognize some kind of "aesthetic injury" for conservative weirdos who fetishizes pregnant folks. Do you remember that part of James Ho's opinion from the Fifth Circuit?

IMANI: I mean, yeah. Where's talking about how if you're getting abortions or providing abortions, you're making it more difficult for people, for doctors, for pro-life doctors, to appreciate the aesthetics of a pregnant person. You're making it difficult for society writ large to just go up and just start rubbing on people's bellies because they love fetuses so much. It's gross. These people are basically dreaming of ultrasounds for these future babies that they really want but don't exist yet. I talk about this a lot. They love fetuses but when those fetuses become babies and when those babies become toddlers and when those toddlers become adults and if you're Black, you become an adult about 11 years old—if you look at Tamir Rice—then the same people fetishizing, these fetuses are gonna be like, well, you know, she, he was no angel because the cops yucked them up for some bullshit. The way in which life begins to become meaningless as soon as it exits the womb is truly, truly shocking. And I do want to point out the newsletter that you published recently, right. In the newsletter last month you pointed out this mife case is about more than conservatives' effort to ban medication abortion nationwide, it's part of an effort to upend constitutional principles around articles of free standing. And I just need to yell about standing for a moment. Conservatives love the Constitution as long as it suits their purposes. And right now conservatives seem to want to make white grievance and "I'm sad" a legal cause of action, and so they've invented new kinds of standing over the past couple of years.

JESS: Everyone probably knows what standing is by now, but it's basically skin in the game. Under Article 3, a plaintiff has to have suffered an injury that is concrete or imminent, the defendant has to have caused the injury, and there must be some way the court can remedy the situation. Basically, it's the Constitution's way of saying, "don't waste my fucking time."

IMANI: None of that is happening here. There's no imminent injury. The defendant, the FDA, isn't causing that injury by having approved mife 23 years ago. And in the interim, the casual chain has been broken so many times. Someone has to take the medication abortion, someone has to provide it. It's absolutely absurd. Doctors are simply complaining about having to do their job. These affidavits that they submitted are like, "Well, someone came in with a complication and I had to perform an abortion procedure or some sort of procedure to complete the abortion. And that made me sad because I love pregnant people and aesthetically I think they're super hot and it's my favorite search on Porn Hub, and now I'm not allowed to fetishize these pregnant people." I mean, these are theoretical injuries that might happen in the future. This is one of those new theories of standing. This is Any Random Motherfucker Standing or I feel some type of way standing but either way it's nonsense. ARM standing is a term coined by friend of the pod Andrea Grimes to describe Texas's bounty hunter bill SB 8. You remember that was when Texas was like, we're out of the business of enforcing abortion laws. But what we're gonna do is we're gonna let any random, any random motherfucker in the country just go ahead and file a civil suit and just collect a \$10,000 bounty because someone they don't know got an abortion. Some type of way standing is letting people bring lawsuits because somebody else did something that made them feel icky. Somebody in Texas got an abortion and you're a jamoke in Arkansas? You can sue because that abortion in Texas made you feel some type of way.

JESS: So Imani's saying so many smart things here about the ways in which conservatives are rewriting standing principles, but I just need to say I love how enthusiastically Imani has embraced the term Jamoke. It comes from deep in my family roots and it means so much to me. The FDA is saying that any potential injury allowing standing is speculative and merely raises issues of potential future injury. But with new grievance-based standing, the injury can't simply be "I don't like this," I mean, can it?

IMANI: No. I mean, first of all, that's not how the Constitution works, and I feel like if we're dealing with a group of people who are obsessed—I mean, they are obsessed with the Constitution. They're, like, dry humping the Founders. That's how obsessed they are with the Constitution. So, no, grievance-based standing can't be a thing because then anyone could sue about anything and anytime for any reason, and the reason we have standing is so the courts don't get overwhelmed by ding-dongs filing complaints about shit that went on that doesn't affect them.

JESS: The standing arguments in the mife case boil down to "I don't like abortion and it makes me sad." And the Supreme Court is poised to accept it. Because the fact of the matter is the FDA requires people who provide medication abortion to either be able to intervene surgically if there's a complication or make plans with someone who can so really there's no impending injury whatsoever.

IMANI: Here's what they want you to believe. These "pro-life" doctors want you to believe that there's just scores of "post-abortive" women who have these complications flooding hospitals demanding emergency care, but that's not what's going on. The FDA protocol requires abortion providers to have basically admitting privileges, right? Those plans where something fucked up happens, you have a plan. So there's really no universe in which some of these pro-life doctors are gonna see a flood of patients such that it's gonna make them feel so sad that there's a cause of action because the FDA is already requiring abortion providers, make sort of connections with people who they trust to see their patients. Should something go wrong, which it hardly ever does.

JESS: The math ain't mathin', as they say. But the Alliance for Hippocratic Medicine is not gonna let a little thing like facts get in the way with their grievance, right? Like the doctors affiliated with them are complaining that when one of these very rare complications occur, they may have been forced to have provide abortion care to patients.

IMANI: Abortion care to patients? Doctors?

JESS: One of the plaintiffs in this case is a pro-life dentist. Do you need a root canal? Better not have a fetus in there.

IMANI: Absolutely not are we letting a pro-life dentist have a say in medication abortion protocol.

JESS: The doctors affiliated with Alliance for Hippocratic Medicine are complaining that when one of these very rare complications occur, they may or they have been forced to provide abortion care to patients. But that's their job. Moreover, the handful of complications that these doctors have attested that they have treated have to be outliers. Like, statistically it is impossible that they are not. They're an emergency on top of an emergency. If the FDA requires providers to have plans in case of emergency why would someone in distress go to one of these pro-life activist doctors for emergency care?

There was a time, lo many years ago, where Supreme Court precedent mattered, where if the Court said something, had weight. And at one point, the Supreme Court stated that a statistical probability of injury is not enough for Article 3 standing. So if the Supreme Court was not in the business of making political decisions, this case would be laughed out.

IMANI: So is the Court going to take this case up? And when? This term?

JESS: Well we're in the middle of briefing right now. We should know this fall if they're taking it. Which I think they will. So if the Court takes it, then we'll hear arguments as soon as this term. If the court doesn't take it, then the Banana Pants orders from the Fifth Circuit that rolls back mife access to 2016 stands in place. And that's not great either.

IMANI: No, it's really not. Let's talk about the case the Court is hearing on the first day of the term. It's an ADA case and wouldn't you know it also relates to standing.

JESS: I hate civil procedure so much, and the fact that we're going to be boots-deep in civil procedure all semester with standing—in *Acheson*, the Court is being asked to decide whether a accessibility tester, Deborah Laufer, has standing to bring a lawsuit against Acheson Hotels for not having legally required accessibility information regarding parking, hallway size for wheelchair users, and accessible bathrooms. Acheson operates a small hotel in Maine. Deborah Laufer admittedly has no intention to travel to Acheson Hotels. She is a civil rights tester. She reviews hotel websites looking for violations of the ADA. Hotels are required to provide information regarding accessibility for people in wheelchairs, for example.

IMANI: Lack of accessibility in hotels is a real problem. The ACLU has testimonials from various people explaining how they've found themselves in hotels that are too crowded with furniture so that a wheelchair can't get around the room, for example. Hotels are required to make clear whether their hotels are accessible and it shouldn't take a person with disabilities being shut out of a hotel experience first before they can file a lawsuit. If a hotel is inaccessible, then it may be a while before someone actually visits the hotel, suffers the indignity of having the space be inaccessible, and then deciding to sue. And all this time, hotels like Acheson are in violation of the ADA.

JESS: Testers make the process easier and force businesses to comply with the ADA. I can't stress enough that this case has the potential to strike a mortal blow to civil rights statute enforcements in general. Testers make the process easier to force businesses to comply with

civil rights laws like the ADA and it's not just the ADA, it's all of the civil rights statutes. Back several lifetimes ago I was working in housing discrimination law. We would send testers out to see if landlords were turning away families under section eight housing in Minnesota at the time, you could not refuse to rent to families. That was a protected status under state law. That was one of the ways that we could tell if it was going on. Civil rights testers from back in the day. Black patrons would try to enter whites-only spaces. Black folks would test the bounds of the law. They'd go apply for jobs knowing they were whites only. You test the law so that you can file a lawsuit forcing compliance with the law. So while this is a case about disabled people's right to have access to public accommodations in the same way able-bodied people do. It is also poised to really undermine the way we force the business community to make their spaces available and accessible for everyone.

IMANI: I don't have confidence in the Supreme Court. I really don't have confidence in them doing the right thing here.

JESS: It's teed up for them to really strike all the things the conservative wing loves to strike at. And this is one of those cases that's so huge and I've seen basically no coverage of it

IMANI: We've got two cases this term that could continue the trend of pushing Black people out of civic society and making it difficult for us to access levers of power. In the wake of *SFFA v. Harvard*, we're moving into a world where racial classifications are going to be seen as inherently bad or wrong. We're sort of in this modern era of telling Black people to take a hike, and I think SFFA is going to prove to be the first domino to fall. In the first case—another voting rights case—the Court has an opportunity to keep pretending that racism and anti-Blackness don't exist. That case is called *Alexander v. South Carolina State Conference NAACP* and it's about racial gerrymandering. The Court will hear this case on October 11.

JESS: The South Carolina legislature drew a racist map and the district court ruled that race predominated the legislature's sorting of voters. South Carolina Republicans say nuh-uh, it was partisanship. You have no proof that it wasn't partisanship.

IMANI: Except some of those very legislators expressly disavowed that it was partisan so if it wasn't partisan then what was it: RACIAL. if they weren't, they weren't cracking open districts and sprinkling Black voters across various districts like black pepper in a sea of salt, then, like, what the hell was it? Can you just explain to people why there's like a huge difference between racial gerrymandering and partisan gerrymandering and why it matters so much that people understand that there is a difference.

JESS: It may seem like a wink wink nod nod with what South Carolina Republicans are arguing but they want you to think it's about partisan gerrymandering because the Supreme Court in 2019 in *Rucho v. Common Cause* said that partisan gerrymandering was a question best left for state legislatures and so even though states are shoving Black people into a minimum number of districts and then sprinkling them across other majority white districts in order to dilute their

vote, if the states claim that it's partisan gerrymandering not racial gerrymandering, well then that's just hunky dory.

IMANI: So we're just supposed to take Republicans' word for it, right?

JESS: Why would they lie?

IMANI: Why would they, they'd love Black people and they particularly love when Black people vote.

JESS: I mean, look at Alabama.

IMANI: Do I have to? This week the Court for the second time had to tell Alabama to stop drawing racist maps.

The district court said in the South Carolina case that Republicans effectively bleached Black voters out of an increasingly diverse—and increasingly politically competitive—congressional district in order to gain an electoral advantage. But South Carolina Republicans are basically saying "nuh uh. We just did it because they're Democrats."

JESS: Like, stop touching me. Why are you hitting yourself? {JESS QUIP ABOUT STOP TOUCHING ME}

IMANI: The very idea that we, that, that the Supreme Court said partisan gerrymandering is not a federal question and we can't touch it. The idea that SCOTUS can only talk, we can only talk about racial gerrymandering and whether that's a violation of the Voting Rights Act is absurd because then it sets up a situation where we're just taking Republican legislators' word for it that when they cracked open these districts—when they bleached black voters out of these Black districts—they did it because they were Democrats and not because they're Black. Basically South Carolina wants a disavowal of racism to be enough to designate the gerrymander partisan rather than racial and to shut down any claims that the gerrymander was racial. It's the "because we said" so defense.

JESS: Oral arguments in that case are October 11. And I just want to lift up that point. Even partisan gerrymandering should not be left without review here because what you are saying essentially is that you can rig the system against your opponents whenever you have enough power. If you have enough power, you can actually ban your opponents from running for office again. It really starts to become a zero sum game and it's functionally anti democratic.

IMANI: And then there's *Muldrow v. City of St. Louis*, a case about whether or not a person alleging discrimination under Title VII must prove that the alleged discriminatory act imposed a "material employment disadvantage" as opposed to dignitary harm. This case is a mixed bag because on the one hand, we want people to be able to sue for dignitary harm, but on the other hand, this case will likely be used by the white grievance lobby to complain about DEI initiatives.

White folks could bring more reverse discrimination lawsuits claiming that DEI initiatives harmed them without alleging they suffered a materially significant disadvantage. It's just white grievance on steroids.

JESS: So your point about attacks on DEI initiatives in the workplace is a real one. We're also seeing evangelicals make these kinds of claims that they have been hurt without being able to show any actual injury with public pride displays, for example, right. But like you said, this is one of those openings for the Court to really screw up. And again, I think another really excellent example of the conservative legal movement finding ways to flip the script on civil rights history, laws and enforcement in this country because that's really part and parcel of what's going on.

There are a couple other cases that we should keep an eye on, particularly given conservatives' obsession with "woke gender ideology." Two cases in the Fourth Circuit, *Kadel v. Folwell* and *Fain v. Crouch*, relate to whether or not state insurers are required to cover gender-affirming care. This case is basically *Hyde* but for gender-affirming care. In other words, will conservatives be successful in stigmatizing and carving out hormonal treatments from insurance. So yes this is about gender affirming care but I want to say this NOW while we're talking about trans care. When conservatives successfully ban one kind of hormonal treatment they can ban ANOTHER. From bans on gender affirming care we will slide into bans on birth control.

IMANI: And then there's the case out of Tennessee, *LW v. Skrmetti*, which has created a huge controversy by reinstating a Tennessee law that prohibits gender-affirming medical care for trans youth. The ruling overturned the trial court decision. It's tempting to view this case as an outlier, but the judge who wrote the opinion, Chief Judge Jeffrey Sutton, is a respected figure among the Fed Soc 6 and his arguments are likely to sway them. Like the two cases in the 4th Circuit, this case is up in the air. The full 6th Circuit is slated to reevaluate this decision. As of this recording ON 9/28, that's supposed to happen by September 30, 2023. If the full Sixth Circuit agrees with Sutton's position, then SCOTUS will have to step in to resolve the circuit split re GACB between the 6th and 8th Circuits. 8th Circuit struck down Arkansas GACB in *Brandt v. Rutledge*. Here's where it gets interesting: Sutton draws on the precedent set by the Supreme Court's anti-abortion decision in *Dobbs*, arguing that bans on medical procedures specific to one sex don't trigger heightened constitutional scrutiny unless they're a pretext for discrimination. But both sexes can receive puberty blockers, estrogen, or testosterone and the 8th Circuit in *Brandt* said that a state can't tell members of one sex they can receive hormones but then deny members of the other sex those hormones. So that's a big problem with Sutton's argument, but it's a colorable argument, meaning it passes the smell test and that will likely be enough for the Fed Soc. 6. So even though multiple lower federal courts have struck down these bans as unconstitutional, the Sixth Circuit said hold my beer. And now this case is careening wildly towards the Supreme Court.

JESS: Wait! One more quick case and then a point that ties this all together. In November the Court is hearing a HUGE guns case, *United States v. Rahimi*. This case could effectively end bans on domestic abusers from possessing firearms. And guess what? Conservatives cite

Dobbs for the proposition that those kinds of regulations are not proper. So I know we threw a lot of cases out there at y'all. But there is a theme here. All of these cases in some way push forward the conservative legal project to redefine who gets to be a person in our society and who does not. Even the standing cases—because standing is a way for the federal courts to recognize and respect our civic personhood. If you don't have standing then from the courts perspective you are basically not a person with a cause to remedy in its eyes.

IMANI: I'm doing those slam poetry snaps because that's absolutely dead on, particularly when you think about the increasing "personhood" of corporations and fetuses, and the decreasing personhood of actually born motherfucking people, we're in an actual crisis out here, especially when it comes to trans rights. I cannot stress this enough: trans people are under siege right now, and if you want to read about the myriad ways that is true, Rewire News Group has a special content drop. We talked about it at the front of the show, it's called "They the People," please go check it out. rewirenewsgroup.com/theythepeople. Also, we've got our first Boom! Lawyered livestream coming up on October 5, I believe. It's gonna be really exciting. We're going to have some special guests. It's going to be fun. Jess, this term is going to be a doozy, but as always, listeners, we are here for you. We have got you. If you want to talk to us about any of this stuff, you can find me on x.com—formerly known as Twitter—@angryblacklady. You can find @hegemommy at the same place. Both on Bluesky. Follow Rewire News Group on Twitter, on Bluesky, on Threads, on Instagram. We're launching on TikTok soon. And you should sign up for our YouTube channel. And besides that, Jess, what are we gonna do?

JESS: We're gonna see you on the tubes, folks.

IMANI: See you on the tubes folks.