

*This transcript is a version of the episode.*

**Imani:** Hello fellow law nerds! Welcome to another episode of Boom! Lawyered, a Rewire News Group podcast. I'm Rewire News Group's Editor at Large Imani Gandy.

**Jess:** I'm Jess Pieklo, Rewire News Group's Executive Editor. Rewire News Group is the one and only home for expert repro journalism, and the Boom! Lawyered podcast is part of that mission. A big thanks to our subscribers and welcome to our new listeners.

**Imani:** In twin decisions this week, the Florida Supreme Court stripped the right to abortion from the Florida Constitution while also allowing voters to decide whether to amend the constitution so that it explicitly protects the right to abortion.

**Jess:** Recently we did an episode on the ongoing efforts in Pennsylvania to locate a right to abortion in that state's constitution. And in that episode we pointed out the importance of state court elections when it comes to judges. Well in Pennsylvania, supreme court judges are elected. Not so much in Florida, where Ron DeSantis has made it his mission to stack the courts with right wing ideologues so that they'll do what they did earlier this week:

Upholding a 15-week ban, and in the process allowing a six week ban to go into effect on May 1. To reach that result, conservatives on the court overturned 35 years of precedent that found the right to privacy in Florida includes the right to abortion.

**Imani:** By a 6-1 vote, the Florida Supreme Court ended the right to abortion under the state constitution. And the reasoning was dodgy at best.

The majority overturned a 1989 decision, in which the Court ruled that Florida's express right of privacy encompassed the right to an abortion.

Then through some tortured logic, they ruled that when Florida voters amended the state constitution to add a privacy clause in 1980, that didn't mean they were finding that a right to abortion, covered by that privacy clause, was a constitutional right.

**Jess:** According to the conservative majority, no Florida voters could have ever believed that when they added the privacy amendment to the constitution, that the amendment would cover a right to abortion. All that the privacy clause covered was informational privacy—limiting the public's right to access public records and what not.

**Imani:** But that's nonsense. As the lone dissenter, Judge Labarga noted, given that the amendment was voted on seven years after Roe found that the right to privacy in the federal constitution covered the right to abortion, and that local and national media was saturated with coverage of Roe, including headlines screaming about Roe and the right to privacy.

**Jess:** Yeah it's total nonsense. The dissent destroys this argument. But this opinion is full of bad faith. The conservative majority also looked at the legislative history of the privacy clause and somehow came to the conclusion that nobody was talking about the clause in terms of abortion. "As best as we can tell, no commissioner or legislator ever claimed (at least publicly between 1977 and 1980) that abortion was part of the rights guaranteed by the Privacy Clause."

**Imani:** But why would they if it was already understood by the time they were debating the privacy clause that the right of privacy includes the right to abortion. That's one of the points the lone dissenter in the case, Judge Labarga, made.

I can imagine folks saying well if legislators never talked about it when they were discussing the proposal of adding the privacy clause then maybe abortion is not included. But as the dissent points out, there would have been no reason to have such a debate in the legislature because as of 1980 the protection of abortion through the right of privacy was established law.

**Jess:** Also, if the right to privacy in Florida doesn't include abortion, why did the Florida Supreme Court behave as if it did? Florida Supreme Court cases understood that Roe expanded the right of privacy under federal law and affirmed that understanding to apply to state law.

- There was a case in 1977 where the Court rejected an argument that possession of weed in the home was protected by the right of privacy. In that case, a case called Laird v. State, the court said "Justice Blackmun's articulation in Roe v. Wade of the limited scope of the right to privacy remains the current state of the law." And even the dissent in that case said "A constitutional right to privacy has been clearly established by the United States Supreme Court in Roe."

**Imani:** There was an abortion case in 1974, one year after Roe, where the Florida Supreme Court ruled that a father had no right to veto a mother from getting an abortion. The court said "The recent decisions of the U.S. Supreme Court in Roe v. Wade and Doe v. Bolton while dealing with the constitutionality of statutes, set forth what we perceive to be the essential and underlying factor in the determination of this

appeal. That factor is the right to privacy of the mother.” There are so many other examples listed in the dissent.

**Jess:** So many examples. So basically, the conservatives were full of crap when they said nobody contemplated that the right of privacy in Florida would encompass abortion. That argument is nonsense.

**Imani:** It is. As is the argument that the right to abortion can't be a matter of privacy because other people are involved in the decision.

**Jess:** I'm sorry what. Are you telling me that these conservative jamokes on the Florida Supreme Court claimed that abortion can't be an issue of privacy because the actual procedure includes other people?

**Imani:** Yep.

**Jess:** Like doctors?

**Imani:** Yep.

**Jess:** But that's really dumb.

**Imani:** Yep. The dissent decimates this argument, including by pointing out that in *Griswold v. CT*, the involvement of a physician in dispensing contraception wasn't fatal to the privacy issue. The Supreme Court specifically noted that the law prohibiting birth control use “operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.”

**Jess:** I mean... give me a break. Medical professionals are often involved in private medical decisions. We don't allow those private decisions to be made public just because a third party is involved that doesn't even make any sense.

**Imani:** That's what the dissent said. We gotta talk about practical effects. Florida was the last bastion of abortion access in the South, right? That's where Kate Cox—the Texas woman who sued to get an abortion in Texas and was denied and subsequently threatened by Ken Paxton— What are people supposed to do now that abortion is criminalized practically in all instances? Since it's nearly impossible to get an abortion before that six weeks is up.

They can also vote. Like we mentioned in the upfront, there were two decisions that the Florida Supreme Court issued. The second puts the abortion decision to voters. In November they can vote to explicitly protect abortion access in the Constitution. There's a proposed citizen initiative amendment to the Constitution titled "Amendment to Limit Government Interference with Abortion."

The amendment would forbid any law that "prohibits, penalizes, delays, or restricts abortion before viability or when necessary to protect the patient's health, as determined by the patient's healthcare provider."

**Jess:** Anti-choicers complained that the ballot process failed to fairly inform voters of the chief purpose of the amendment. They claim that the purpose isn't to limit government interference with abortion as the title states, but to provide "abortion on demand up to the moment of birth by requiring broad exceptions for maternal health." A majority of the court disagreed and said that the ballot initiative can go forward. So why are they even fighting about this?

**Imani:** Would it surprise you if I told you it was related to the fight for personhood in Florida?

**Jess:** No not really. But how is it related?

**Imani:** The TL;DR is that conservatives on the court complained that the summary of the ballot was insufficient because it didn't explain what the consequences would be if the amendment language were added to the Constitution. And what are those consequences? Naturally, whether or not protection for abortion would call into question other constitutional rights that unborn Floridians might have.

They also complain that the summary doesn't inform voters that, for example, the amendment will authorize later abortions for the sake of maternal health which could encompass mental health as well as physical health. You can see how differentiating between health of the pregnant person vs. life of the pregnant person becomes so important.

- In the EMTALA case, that's a huge issue. Whether the federal standard for emergency care which permits abortion to protect health vs. state law, which permits it only to save a life.

It's so ridiculous. I wish I had more eyes so I could roll them.

**Jess:** Here's something eye-rolling: One of the conservatives who dissented from allowing this ballot initiative to go forward made the claim that it failed to inform voters that the abortion language might conflict with the Declaration of Rights in the Florida constitution which says that "All natural persons are equal before the law and have inalienable rights including the right to enjoy and defend life."

**Imani:** Well does it conflict or not? Has the Florida Supreme Court interpreted "natural persons" to include the quote-unquote unborn?

**Jess:** No.

**Imani:** No? Seriously?

**Jess:** Nope. And they even said basically, we haven't ruled on the issue, but that doesn't mean the summary of this ballot initiative shouldn't raise the issue.

**Imani:** How does that make sense?

**Jess:** It's not supposed to make sense it's supposed to shift the window on personhood.

FLSC has already shown it doesn't give two hoots about precedent. It just went out of its way to reverse it! So we shouldn't assume any good faith or like playing by the norms by the justices here even in their dissents.

Also I have a question for you: Is this showing their hand a little? Are the conservative justices looking for a way to read the Florida Declaration of Rights to establish as a matter of law, fetal personhood? Kind of smells like it to me!