

Boom! Lawyered: How Planned Parenthood Gave Clarence Thomas a Case of the Sads

- Imani Gandy: Hello fellow law nerds. Welcome to another episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that wants to wish you a happy belated Hanukkah. L'chaim! I'm Imani Gandy.
- Jessica Pieklo: And I'm Jess Pieklo. Rewire.News is dedicated to bringing you the best reproductive rights and social justice news, commentary and analysis on the web and the team legal podcast is part of that mission. So a big thanks to our subscribers and a welcome to our new listeners.
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- Jessica Pieklo: You can support us at rewire.news/donate.
- Imani Gandy: That's rewire.news/donate.
- Jess, remember the Planned Parenthood sells “baby parts” scandal that was sweeping the nation a few years ago?
- Jessica Pieklo: Good grief! Yes, that's where a bunch of anti-choice activists like David Daleiden infiltrated private meetings among abortion providers, recorded them, spliced up all the video and released versions of those recordings to make it seem like Planned Parenthood was illegally selling fetal tissue. That's what you're talking about, right?
- Imani Gandy: Precisely. That scandal turned out to be total horseshit.
- Jessica Pieklo: Complete horseshit.
- Imani Gandy: Like seriously, but it provided the excuse for many states to launch investigations into Planned Parenthood and their supposed nefarious black market baby parts business. [Scary noise]
- Jessica Pieklo: I think we always have to go [Scary noise]
- Imani Gandy: [Scary noise]
- Jessica Pieklo: When we're talking about this.
- Imani Gandy: No investigation turned up any wrong doing on Planned Parenthood's part, but that doesn't matter because it provided the opening for several states' attorneys general to try to kick Planned Parenthood out of their state Medicaid programs. Two of those states were Kansas and Louisiana, and today we're

going to talk about the lawsuits challenging Louisiana and Kansas' efforts to defund Planned Parenthood and why Clarence Thomas has a case of the sads. Sad. That the court refused to take those cases and why those cases weren't even really about trying to defund Planned Parenthood at all.

Jessica Pieklo: Okay. So we have this whole ridiculous scandal from David Daleiden and Planned Parenthood and fetal tissue, but let's talk about the cases involved. Imani, what are they? What are the arguments behind them? Let's get into this.

Imani Gandy: Alrighty! The cases are Anderson versus Planned Parenthood of Kansas and Mid-Missouri, and Gee versus Planned Parenthood of Gulf Coast Incorporated, and while these cases are broadly speaking about state efforts to defund Planned Parenthood, the actual issues in the cases are narrower and more wonky.

Jessica Pieklo: And you know I love wonky, right?

Imani Gandy: Right. You're the wonky queen.

Jessica Pieklo: Right. I am the queen of wonk. It is true.

Imani Gandy: Queen of the wonk!

Jessica Pieklo: The actual issue in these cases is whether providers and beneficiaries can challenge changes to state Medicaid programs.

Imani Gandy: In other words, can patients and providers sue states when states make changes to its Medicaid programs like, for example, kicking Planned Parenthood out of the program, because you think that Planned Parenthood is selling baby heads and making smoothies out of toddlers as my friend Joshua Holland once said.

Jessica Pieklo: Toddler smoothies are terrible.

Imani Gandy: They're not. They're not a super food. That's the thing.

Jessica Pieklo: No, they're not.

Imani Gandy: You're not going to get a lot of nutrients.

Jessica Pieklo: You need quinoa.

Imani Gandy: You need to add some quinoa.

Jessica Pieklo: Oh! Okay. Before we get too far off the rails on that, let's talk about Kansas and Louisiana tried to do here, because they're really amazing and perfect examples of shenanigans at the state level when it comes to Medicaid and Planned Parenthood. So these videos get released, a thousand investigations get launched. They turned out absolutely nothing, and these states say it doesn't

matter, because the allegations enough are sufficient to say that Planned Parenthood isn't qualified. Therefore, we can just kick them out. No Medicaid money for you.

Imani Gandy: Right. The Medicaid statute lays our criteria for determining which providers are qualified and therefore can participate in the Medicaid program. It also says that providers can't be excluded for purely political reasons, which is what this is, right? They can't exclude Planned Parenthood simply because of this baby parts nonsense.

Jessica Pieklo: Right. It's not like the reproductive healthcare facilities that issue here were running around committing a bunch of medical malpractice. That would make them not qualified. What we had was conservative law makers going, "Baby parts! Oh! Oh!"

Imani Gandy: "Oh! Baby parts!"

Jessica Pieklo: So that's a political reason and the Medicaid statute makes it pretty clear that you can't do that. You need something substantial, something with evidence. Something that's not like, "Ooh! Ick! I don't like abortion."

Imani Gandy: Right. So if the Medicaid statute says that providers can't be excluded for political reasons, then these are pretty open and shut cases. Planned Parenthood ought to win these lawsuits handily.

Jessica Pieklo: I mean, they should, but also not exactly. I'm pretty sure you know that because, I mean, on the merits of the cases on just the straight law, absolutely. But we know there's also other motivations and causes going on here, aren't there?

Imani Gandy: Right. Of course. I mean, the bottom line is anytime anyone mentions the words Planned Parenthood, people lose their goddamn minds.

Jessica Pieklo: They really do.

Imani Gandy: It's bananas, and especially here given that the impetus for these lawsuits was this nonsense baby parts scandal, people seem to think this case is about defunding Planned Parenthood when it really isn't.

Jessica Pieklo: That's right. Like you said earlier Imani, the states are arguing that the Medicaid statutes which lays out all of the rules for participation in the program, like we've said, the states are saying that folks like Planned Parenthood can't do anything about it when conservatives try to defund them. So the question is not whether or not Planned Parenthood could be specifically defunded in these cases. I mean, it is, but it's really more broadly whether or not a Medicaid beneficiary has the right at all to sue for Medicaid benefits.

Imani Gandy: Why wouldn't they? If the states aren't following the law and it's damaging Medicaid beneficiaries, why wouldn't those Medicaid beneficiaries be able to sue?

Jessica Pieklo: That's a really good question and it depends on whether or not the Medicaid statute provides for what we call a private right of action.

Imani Gandy: Okay. So I know what that means, because I went to law school. We've been working together for several years, like same brained.

Jessica Pieklo: We are totally same brained.

Imani Gandy: But I'm sure some of our listeners are thinking to themselves a private right of whaaat? So can you explain what a private right of action is?

Jessica Pieklo: Oh, absolutely. How about we do that after the break?

Imani Gandy: After the break!

Imani Gandy: Again, the question of whether a Medicaid beneficiary has the right to sue for Medicaid benefits depends on whether the Medicaid statute provides for what we call a private right of action.

Jessica Pieklo: Yeah. So I'll walk through this, because like we said at the top of the show, this is real wonky and-

Imani Gandy: Wonky Jess.

Jessica Pieklo: Wonky-wonky, but I love this. I thrive in explaining the wonk.

Imani Gandy: Nerd.

Jessica Pieklo: Okay. Buckle up.

Imani Gandy: Put on your glasses and push them up above your nose.

Jessica Pieklo: I so sincerely wish I had a whiteboard right now. Okay. Broadly speaking, a private right of action is when someone other than the state is able to enforce rights under a statute. That's the private part of it. Public is the government. Private is an individual or a third-party. They enforce those rights through a civil lawsuit or an action. Okay?

So private rights of action can be either expressed or implied. Expressed private rights of action exists when the statute itself specifically says that, "Hey, private people, private corporations, you can sue to enforce the law. We don't need you to rely on the state." How about I give a very specific example? Because like I said, this is wonky and in the weeds.

Title 7 of the Civil Rights Act. That law prohibits employment discrimination on the basis of race, sex, religion, color, national origin and other factors, and it's a really good example, because in the statute it says that individuals who've been subjected to employment discrimination can either bring their own lawsuits to enforce their title 7 rights. That's the private right of action, or they can rely on the Equal Employment Opportunity Commission to bring a lawsuit on that individual's behalf. That's a public right, but that is express.

Imani Gandy: Okay. That was a lot of words. So let me just try to break that down a little bit. What you're saying essentially is that even if the statute doesn't explicitly say, "Hey, you, Medicaid beneficiary, you can sue to vindicate your rights under this statute." Even if the statute doesn't say that outright, that Medicaid beneficiary still may be able to sue to vindicate their rights.

Jessica Pieklo: Right. Exactly. That's what we call an implied right of action. Sometimes courts have read implied rights of action into statutes where Medicaid, again, excellent example here. The purpose of Medicaid is to work with the federal and state government to provide benefits, insurance coverage benefits in this case. Who would sue to enforce that? If you are a beneficiary and your insurance changes and you can no longer see, for example, the provider that you want to see, are you just shit out of luck? The courts have said that's not really in the spirit of the Medicaid statute, and so there should be some way for people to be able to sue to enforce their rights. That is implied private right or action.

Imani Gandy: Just to rephrase, because, again, wonky nerd, a lot of words. The Medicaid statute doesn't have an expressed private right of action, because it doesn't say that consumers, Medicaid beneficiaries, can sue for benefits. But despite that fact, courts have said that they can sue for benefits.

Jessica Pieklo: Exactly. The courts find private rights of action when the statute confers sufficient benefits. This is the legal phrasing -- to justify allowing an individual to sue to enforce it on their own behalf. They don't need to rely on the state in this case. They can sue on their own behalf.

Imani Gandy: And that's what's happened here. As we said earlier, these two cases stemmed from Kansas and Louisiana's efforts to defund Planned Parenthood after the baby parts nonsense. The 10th circuit court of appeals, which is where Kansas sits, and the 5th circuit court of appeals, which is where Louisiana sits, ruled that Planned Parenthood and individual Medicaid recipients could sue to block efforts to remove Planned Parenthood from the Medicaid programs. They found an implied right of action. Both states, Louisiana and Kansas, petitioned the Supreme Court for review, and on Monday the Supreme Court basically looked at them and said, "Nooope."

Jessica Pieklo: Right. By saying nope, that leaves in place those decisions that say Planned Parenthood in Kansas and Louisiana, you can sue. The states can't kick you out of these programs, at least at first blush. By the way, Medicaid still has a private

right of action. Why does this matter beyond just Planned Parenthood? Let's use Kentucky in the Trump administration as an example.

Both Governor Matt Bevin and the Trump administration want to make Medicaid as difficult to participate in and as politically toxic as possible. One way they've done that is to impose work requirements on Medicaid recipients. You've probably heard about this. This is terrible. It's horrible, right? But the only way those recipients can object to those changes or to defend their benefits is to sue. You can see why conservatives really have these in their sights.

Imani Gandy: Right, and they only win that case if they can show that the changes go against the Medicaid statute, which so far, by the way, they've actually been able to do.

Jessica Pieklo: Right. In these states that have what I like to call conservative capture, where the Republicans basically run the show completely and they want to kill off Medicaid, private rights of action are what prevents that from happening full stop. After the break, we'll talk about what it means that the Supreme Court decided not to take up these Medicaid cases. Contrary to what Susan Collins may think, it's not because Brett Kavanaugh saved the day.

Imani Gandy: Earlier this week, the Supreme Court declined to review these cases leaving the lower court rulings in place. So far, every court but one, the extremely, wildly hella as we say in Oakland, conservative 8th Circuit, has rebuffed efforts to kick Planned Parenthood out of Medicaid programs. The 8th Circuit green lit Arkansas' Planned Parenthood defunding effort.

But here's a question that our discerning listeners might be asking. If the 8th circuit is letting Arkansas go ahead with its plans to defund Planned Parenthood, doesn't that create a circuit split that SCOTUS should resolve? I mean, that certainly what Kansas and Louisiana are arguing. Right, Jess?

Jessica Pieklo: Oh, absolutely.

Imani Gandy: Basically, these cases can percolate a little bit longer in the lower court before the United States Supreme Court steps in. That's sort of what Planned Parenthood is arguing.

Jessica Pieklo: Right. I mean, yes, we have a circuit split with the 8th circuit, but they're an outlier. Right now they're hanging out there in the wind on their own, which could be one reason to explain why the court didn't take up the case. That's also because there's another case from Ohio that the entire 6th circuit, which has also become hella conservative under the Trump administration, they're considering that right now. They haven't issued a ruling yet, but if they rule on behalf of Ohio, we could end up with a deeper circuit split, which then could inspire the court to take up this issue.

But, but, but, I just want to say that it's important that even if the Supreme Court had taken the cases, it wouldn't be ruling on the merits again of these efforts to defund Planned Parenthood, and that's not vindication for Susan Collins' vote to confirm Kavanaugh.

Imani Gandy: Why would it be? What is Susan Collins' deal?

Jessica Pieklo: I think we should have an entire column called what is Susan Collins' deal?

Imani Gandy: What is the deal with Susan Collins?

Jessica Pieklo: I mean, seriously, it beats me. You would have to ask her. I guess she said she felt vindicated, because Kavanaugh voted with Roberts and the liberal wing to not take up these cases to deny cert. I guess she somehow seems to think that that means Brad McBeer won't ultimately be the deciding vote to upend abortion access in the United States.

Imani Gandy: I mean, is she for real? I can't tell if Susan Collins is really that naïve, or if she's just full of crap.

Jessica Pieklo: Yeah, I think the answer is yes. I mean, right? Why not both?

Imani Gandy: The answer is yes. Indeed, the answer is.

Jessica Pieklo: This was Clarence Thomas' point. Clarence Thomas dissented from the Supreme Court's decision not to take up these cases. He said, "You know what, court? You really should. This is a split. This is an area that we need to resolve." So it's weird, because here we are agreeing with him. I mean, he said the reason the court didn't take up the case is because it involved Planned Parenthood and the court was too scared to step into the political muck and I think he's got a point.

Imani Gandy: Yeah, and Gorsuch and Alito agreed with him. So Thomas does have a point. We said that this issue was about more than Planned Parenthood, which is something Thomas also says in his dissent.

Jessica Pieklo: This is so weird, all of this agreeing with Thomas, but it really is.

Imani Gandy: I know. I don't like it. It makes me feel icky.

Jessica Pieklo: It does.

Imani Gandy: Or would you like to say it makes me feel sweaty.

Jessica Pieklo: I'm sweaty and itchy already because of shingles, but this is worse. But these cases are, right? Here we are agreeing with Thomas that these cases are about Planned Parenthood, but they're also not. They're about more than that. It's about this idea of a private right of action under Medicaid. Like we said in the

show, this matters for a lot of things beyond Planned Parenthood, not just the Medicaid work requirements and lawsuits which we talked about quickly.

Let me give you another example. Clinics that accept Medicaid and reimbursement rates. Clinics who accept Medicaid patients get reimbursed for seeing those patients. So one way that conservatives like to muck up Medicaid is to mess with those reimbursement rates, and that is designed to de-incentivize doctors from accepting Medicaid patients. If you're a Medicaid patients and no one accept Medicaid, where the hell are you supposed to go? This is one way that conservatives that who hate Medicaid and really want to kill it off are trying to.

I mean, but when Medicaid is allowed to work, it's a really good public health and welfare program and everyone wins with a health Medicaid program. Imani, this drives me bonkers.

Imani Gandy: Well, everyone wins but the Heritage Foundation folks who want poverty to be for profit. So they're really, really hoping that the court would jump on the outrage over Planned Parenthood, "Oh! Planned Parenthood sells baby parts videos," and the efforts to kill off the private right of action in part, because those private rights of action are the final check on state and federal schemes to gut and expand their attacks on the poor.

That's essentially the story of why Clarence Thomas has a case of the sads over the Court not taking the Planned Parenthood funding cases.

Jessica Pieklo: So Monday's decision was a really big deal for folks in Kansas and Louisiana who rely on Medicaid and want to have Planned Parenthood as a provider. If you hear folks running around and crowing that Brett Kavanaugh saved the day for abortion rights and that these cases are an enormous win for the reproductive rights community, hopefully this put that all in some context for you.

Imani Gandy: Hopefully it did, and hopefully you will join us next week for our next episode of Boom! Lawyered, but we are going to wrap this one up right now. Please, please continue this conversation with us on Twitter. You can follow me @angryblacklady. You can follow Jess @hegemommy and you can follow Rewire.News @rewire_news. Thank you for listening and we will see you on the tubes.

Jessica Pieklo: See you on the tubes.

Jessica Pieklo: Boom! Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. Our producer is Nora Hurley. This episode was produced by Marc Faletti, who is also our executive producer, and the Rewire.news editor-in-chief is Jodi Jacobson.