

Imani Gandy: Hello fellow law nerds. Welcome to another episode of Boom Lawyered, a Rewire.News podcast hosted by the legal journalism team that is ecstatic about the rights of pregnant people in Louisiana to continue to receive abortion care. Hooray!

Jessica Pieklo: Hooray!

Imani Gandy: 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. A big thanks to our subscribers, and a welcome to our new listeners.

Imani Gandy: Last night the Supreme Court shocked Jessica and me. For those of you who listened to our episode on Monday, we were rather pessimistic about the prospect of the Supreme Court issuing a stay in June Medical Services versus Gee, which is the case involving Louisiana's admitting privileges law. But, John Roberts joined forces with the liberals and issued the stay. We are going to talk to you about what that means, after the break, and we're also going to talk to T.J. Tu, who is senior counsel at the Center for Reproductive Rights, and he will tell us what this case means as well.

Stay tuned.

Jessica Pieklo: We are so excited to have with us T.J. Tu, senior counsel at the Center for Reproductive Rights and lead attorney for the folks challenging the Louisiana law. T.J. thank you so much for joining us.

T.J. Tu: Thank you for having me.

Jessica Pieklo: Can you give a quick explanation for our listeners as to just what exactly happened? What did the court do last night?

T.J. Tu: Sure. Late last night the court stepped in and said, "We are going to protect the women of Louisiana while you take this appeal to the Supreme Court." Louisiana has its admitting privileges law, that law is now blocked, and it's going to remain blocked while we continue to fight the law in the Supreme Court.

Jessica Pieklo: In terms of next steps then, what does this mean for your clients and then also, sort of broadly, in terms of the landscape of the fight around admitting privileges across the country?

T.J. Tu: I think where you started is where we should all start. Which is that for the women in Louisiana, this is a huge relief. Just dialing back a day ago we were seriously facing into the prospect that all the clinics in the state would close but one, and that we would be down to one doctor for over a million women of

reproductive age in that state. I know that in light of what happened yesterday we dodged that bullet, but for the people who are on the ground there the sense of elation is real. Doctors have a job today, and women have a place to go. That matters, that's meaningful, the court did the absolute right thing by people in Louisiana last night.

In terms of what this says for the rest of the country, I think time will tell. We have the benefit of a very successful case in the Supreme Court just three years ago, where the court said these admitting privileges laws are unconstitutional, we thought that was the law of the land, and we thought that when the Supreme Court said these laws shouldn't exist that people would get the message, but apparently not. In this case we're asking the court simply to say, "We meant it when we said it the first time," and if they don't say that clearly, or they give us a muddled message, I think it's open season on the abortion rights in this country. Opponents of abortion rights will see this as a court unwilling to step in and protect women against even their most basic protections, even the most recent precedent directly on point.

Jessica Pieklo: Specifically for this case, what's the timeline here?

T.J. Tu: We will be moving forward with our cert petition, asking the Supreme Court to review this case on the merits, that'll come due in April. Then we'll get whatever Louisiana has to say in opposition, and a briefing will continue long after this session is closed out. So the soonest the Supreme Court is actually going to take this up is when they convene for their October sitting, and there'll be that whole stack of cert petitions that has accumulated over the months. I'm hopeful they will take a look at ours and say, "Oh yeah, that case where we gave that stay, we should definitely take that case and fix this problem once and for all."

Imani Gandy: I guess I have sort of a mundane question, but Jess and I sat on Twitter for most of yesterday just sort of biting our nails and waiting to see what would happen. As attorneys for the case, how do you deal with the wait, how do you deal with this pressure?

T.J. Tu: Not well, I have to say, yesterday was a total nail biter; if I could have only been a fly on the wall in the Supreme Court to know what was going on there. We fight like mad in these cases and when the stakes are this high we tie ourselves up in knots. We sit there making lists of names of clients and providers who we'd have to call in the event of a bad decision and say, "I'm sorry the Supreme Court failed you and it's time to turn the lights off." That's how I spent my day, preparing for the worst. Then to get word late last night that the Supreme Court is gonna hit the pause button, it's so gratifying on the one hand even though obviously this is not ... we're far from victory in this case. But the ability to call providers on the ground in Louisiana and say, "The system worked the right way for a change, and you can still do the good work that you're doing, and the fight continues," that is just a huge relief.

Jessica Pieklo: What was your client's reaction to that call? I mean I have to imagine they're braced this whole time too, huh?

T.J. Tu: Totally. I mean, they're so happy, but not happy like, let's cork the champagne and have a party, happy. They're happy like, we just dodged a bullet, happy. These folks more than anybody in the movement, they're battle tested. They live in an environment where they are constantly under siege only because they provide necessary health care and only because they give an outlet for women to exercise their constitutional right to choose abortion. So they, more than anyone, kind of are used to this idea that this is just another day in a very long game, and as long as they're able to provide, as long as they're able to serve their communities, that's a good day.

Jessica Pieklo: That's fantastic. Anything else that you would like to share with our listeners before we let you go? We know that you folks are very busy.

T.J. Tu: I'd just like to say that what you guys do is a real public service, but man I listened to your podcast on Monday and man, I was feeling terrible.

Jessica Pieklo: Oh no!

T.J. Tu: I'm so glad your predictions were way off. I almost packed my tent and went home!

Imani Gandy: That's part of the hazard of doing this business is we're so stuck in it and I guess the pessimism starts to overtake us! Perhaps it's a defense mechanism? But yes, we are also happy to have been wrong. We also appreciate the lawyers in the trenches so much. What you do is a true public service.

T.J. Tu: Thanks so much, and please do what you can to keep attention on this case. Like I said, this is a real test for the Supreme Court and whether it is going to stand by its precedent, and it's a three part test. Just because they managed to pass the first part doesn't mean they aren't gonna flunk in the end. I think the more that the public is engaged and watching what is going on, and realizing unless the Court comes out the right way in this case it's gonna be a major, major setback. Unless we keep the pressure on, there's a real risk here that we may lose ground.

Jessica Pieklo: T.J., thank you so much for your time. I know how busy you are.

T.J. Tu: Thanks a lot.

Imani Gandy: So Jessica, let's talk about what the main takeaways from Thursday's order are besides the fact that we were wildly pessimistic and were proven wrong, if there's ever a time where I've been ecstatic to be proven wrong, it is now.

Jessica Pieklo: Seriously. I am thrilled to have been thwarted by my pessimism, I guess. I mean, there is something to be said about preparing for the worst and being pleasantly surprised when it doesn't happen. Here we are, pleasantly fucking surprised.

Imani Gandy: Pleasantly surprised. It's particularly great for the pregnant people in Louisiana who are able to keep their appointments and receive abortion care. Can you talk a little bit about what it means that Roberts sided with the liberal justices?

Jessica Pieklo: Yeah, I mean, let's spend a little bit of time with Chief Justice John here. So Roberts did the right thing, he did the conservative thing, he kept the status quo in place. We talked about that in the last episode, sort of what would that look like. He voted with his liberal colleagues to keep abortion access open as it stands in Louisiana now, and to not further undercut *Whole Women's Health v Hellerstedt*, so that's really important.

I have to stress that I don't really think this is a solidly pro-choice vote, and here's why. We talked about all of the fuckery in the Fifth Circuit decision, just like how bad it is. This case came up to the Supreme Court in sort of a procedural posture, it was an emergency request, "Hey, pause the Fifth Circuit, give us more time to file our petitions so that you, the Supreme Court, can decide to take it up." So I don't know, at the end of the day, that Roberts still isn't going to vote as he did in *Whole Women's Health* and allow the law to take effect. But right now what he definitely did is send a clear message to the lower courts that they just can't go rogue and overrule *Hellerstedt* and whatever other abortion rights precedents they want on their own. That he is going to be the one doing the overruling dammit.

Imani Gandy: Right, exactly. It's like, "If anyone's going to be sleeping with my sister, it's me." It's like you guys don't get to overrule precedent, if anyone's going to do it, it's going to be me, dagnabbit.

Jessica Pieklo: Right. So that's my read of the tea leaves in terms of the John Roberts issue and vote here. But then we gotta spend a minute and talk about Brad McBeer's dissent here. Like what view ... I'm going to give this to you for a minute, you go.

Imani Gandy: First of all, I'm going to blame our pessimism on Brad McBeer, because initially we thought that the reason that they didn't issue the stay immediately last week is because they were planning on not issuing it, and they were providing the liberal justices a chance to write dissent. I actually was expecting to get an order, read those dissents first so it would put me in a happy place before I actually mulled upon the fact that the Supreme Court had decided to just let this law be in affect while it's continuing to be litigated in the courts.

It turns out, apparently, that they needed that extra time to give Justice Brett Kavanaugh a chance to write an utterly pointless dissent that says literally nothing and was one of those situations where I could look at him and say, "Hey Brad, shutting up is free." There was no reason for him to write this dissent.

Essentially what he said was because of that last minute Hail Mary notice from the Louisiana State Department of Health where they say, well, we're not actually trying to close clinics, we're going to have this 45-day transition period where we can work with these doctors and make sure they try their super-hard, extra best to make sure they get admitting privileges.

So what Brad Kavanaugh, Brad Kavanaugh, I can't even get his name right anymore! What Chadley Kavanaugh did is he said, "Well, you know, I think we really ought to give Louisiana a chance to go through this belated regulatory process that they just offered up at the last minute in order to avoid the consequences of having the stay be lifted. We ought to let the state actually go through this process. Because, you know what, sure, the District Court found that these doctors had tried really, really hard to get admitting privileges and were unable to for reasons having nothing to do with their competence."

We talked about this earlier, how a lot of these hospitals are Catholic and just outright refused to provide admitting privileges to doctors. In other situation it takes this extremely long process, we're talking months, and months, and months of back and forth with hospitals where they say, "Okay, maybe we'll grant you privileges," but then they say they can't grant privileges because ultimately in order to have privileges for for-profit hospital business', doctors have to agree to admit a certain number of patients. When it comes to abortion they can't guarantee that they're going to have enough complications that would warrant admission.

The District Court went through all of this and then the Fifth Circuit meandered in and decided, "Eh, fuck it, we're just going to substitute our own judgment. You know what, we don't think those doctors tried hard enough. In fact, all of this harm that's going to be cause to pregnant people is really the fault of these no good, lazy doctors who really don't want to get admitting privileges and didn't try." So Kavanaugh essentially bought that line from the Fifth Circuit and he essentially committed the same egregious error that the Fifth Circuit did, which is substituting his own judgment for the judgment of the District Court, which is better equipped to analyze the credibility of the witness', the credibility of the doctors, the credibility of their efforts to get admitting privileges. He just threw that all out the window and said, "Let's give them another 45 days." You know what Brad, it took them more than 45 days to come to the conclusion that they couldn't get privileges anywhere.

So you'd just be kicking the can down the road. There was no reason to write that dissent.

Jessica Pieklo:

Except a political reason, I would say. Because here's the man who said, "No, really, I'm good, I am going to uphold Rowe," and he could have done nothing. Like you said, shutting up is free. One of the things that really jumped out at me about that dissent is had his reasoning taken hold this time around, and by the way, we don't know that it won't in the future, I hope not, I hope he remains in the minority. His dissent is a big old green light to appellate courts to go ahead

and ignore precedent if they want to. We spent four or five days, an entire week with him during his confirmation hearing, and all we heard was about his fidelity to precedent and the rule of law, and stare decisis, and why it matters. Because people need to have the regularity and consistency of the law staying the same and not just changing willy-nilly at the whim of a particular federal judge. Yet, here we have the first chance that he has to chime in and what does he do, says a bunch of dumb stuff.

Imani Gandy:

Precisely. One thing that I do want to point out and I think it's crucial to point out, is that he essentially said that if after this 45 day transition period it turned out that these doctors were not able to get admitting privileges, then winnowing down the number of clinics to one would be an undue burden. He essentially concedes that point. In my view, that is a self-own because there are something like, I believe seven states right now, that have only one clinic. He's basically put in a Supreme Court record that that in and of itself is probably an undue burden. That gives abortion rights advocates and lawyers a chance to go back to those states, and to figure out what laws are being put into effect are causing these clinic closures, and then attack those laws.

Brad McBeer's already said, "I mean if it turns out that there's only one doctor in Louisiana to perform 10,000 abortions, then yeah, that's an undue burden. But you know what, we ought to give these doctors, these feckless, no good, lazy doctors a chance to really get out there and try to get those admitting privileges." They're not going to be able to get them, Brad. That's why we're here in the first place.

Jessica Pieklo:

He really did give it up on that little point because also for those states that only have one clinic left, we know damn well that lawmakers are trying to close those clinics. Here they can say, "Nah, can't do that." You know one of the other things that's really interesting to me now that we've got this time to wait, we've got the briefing, we won't know for a while, like T.J. explained, if the Court takes the case we'll be talking about this in the fall. I'm curious and thinking about how hard Justice Kagan is going to be working Chief Justice Roberts right now while this case percolates. Because he is the deciding vote, he was on Thursday, and he will likely be again if and when the court takes this case up.

He and Justice Kagan have a very interesting, collegial competitive, but not in an undercutting way I would say, they're just sort of critical peers of each other. They seem to genuinely like and respect each other. Kagan is seen as a level head, I think, in many ways with Roberts. I expect her to be doing what she needs to do behind the scenes. I would love to be a fly on the wall for those conversations, like in the Supreme Court cafeteria. "Hey, John, let's talk about abortion over a cup of soup. NCAA basketball's happening, but Louisiana ..."

Imani Gandy:

Exactly. I think you're absolutely right. I've seen a lot of people talking about perhaps it's Ruth Bader Ginsburg who's the one who is sort of needling Roberts and coaxing him along the path of righteousness if I may be melodramatic. But I think that a lot of people are sleeping on Kagan, a lot of people they haven't

really examined her record, they haven't really examined her opinions, her relationships with people. She was a solicitor general, Roberts worked in the solicitor general's office, they run in the same circles. So if there's anyone who might be able to make him understand that overruling a case that they just decided three years ago is bad for the legitimacy of the court and is bad for the extremely partisan nature that the court has adopted over the last several years, decades, however long. I think Kagan could be the one that could be the deciding vote, so I think people should really pay attention to what she does, and the things that she says, and the dissents that she writes. Maybe she'll be the one to come through. Come through for us white lady.

Jessica Pieklo: I'm so glad you brought up her role as solicitor general because I'm old enough to remember her confirmation hearings and when progressives were really upset at her choice because of her time at solicitor general. In the Clinton administration she had taken some positions that progressives felt were back pedaling and rolling back on abortion rights. What they were were policy decisions in regards to proposed 20 week bans that were going through. She had written memos that said basically, "If we take a position that grants the folks that are proposing this measure a step in terms of being heard," it's effectively a reproductive justice model, I'm not doing it a lot of justice in its description. What she did was take a policy position that showed she knows how to talk to folks who are anti-choice. I think that that is something that will come in very handy over the next couple months.

Imani Gandy: It's a critical skill.

Jessica Pieklo: Yeah, for real.

Imani Gandy: It's absolutely a critical skill. I guess the next question that our listeners probably have on their mind is what's next. What's going to happen next, Jess?

Jessica Pieklo: T.J. gave us the timeline for the Louisiana case, so we have a sense of sort of what is hanging out there. I think, for me, what's next is the fact that we've got 16 other cases right now that are in the appellate pipeline. SCOTUS is in the middle of briefing on the lawsuit challenging Alabama's D&E ban. We're still waiting to hear whether or not they're going to take or reject the lawsuit challenging the Indiana Fetal Remains measure. A new one from Indiana just got filed. Basically abortion rights in the Federal Courts is going to be a thing we talk about for a lot of time, it is not slowing down.

Imani Gandy: The visual representation is that Elmo GIF, you know where his hands are upraised and everything's on fire. That's basically the visual representation of abortion rights and the fight in the next couple of years, and essentially what our lives are going to be like for the next couple of years, just everything on fire.

Jessica Pieklo: It is.

Imani Gandy: We're happy to do it, we're happy to be here to share what we know with our listeners, and to bring a different perspective to these abortion rights cases. We are going to wrap it up for us today, but if you would like to continue talking to us you can follow me on Twitter, @angryblacklady, you can follow Jessica @hegemommy H-E-G-E-M-O-M-M-Y, you can follow Rewire.News @rewire_news. We do have a Facebook group Boom Lawyered, there were several people who had not answered the question, so they were pending, I basically declined them all. So any of you who have been trying to get into the group but have been unable to, please try again, request again, just answer the question and we'll let you right in.

Jessica Pieklo: Please. Thank you.

Imani Gandy: Thanks for joining us. We'll see you on the tubes.

Jessica Pieklo: See you on the tubes.

Speaker 4: Boom Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. This episode was produced by Marc Faletti, who is also our executive producer. The Rewire.News editor-in-chief is Jodi Jacobson.