

Boom! Lawyered: Rapid Reaction — A Good Day for Theocracy at SCOTUS

Imani Gandy: Hello, fellow law nerds! Welcome to a special reaction episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that is wearing kaftans now. 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.

Imani Gandy: So Jess, it was my birthday yesterday.

Jessica Pieklo: Happy birthday.

Imani Gandy: Thank you. And as part of my aging process, I've decided that I'm going to start wearing a lot more kaftans, just be more comfortable, serve up a lot of Mrs. Roper realness. That's just my thing.

Jessica Pieklo: Totally.

Imani Gandy: But do you know what happened, because I'm wearing this kaftan now? It means that I'm not wearing the SCOTUS dress.

Jessica Pieklo: Imani.

Imani Gandy: I know. And so, you know what that means. We've got a real garbage decision in Little Sisters of the Poor, and I feel like it's my fault. But at the same time, I don't feel like I should accept all of the blame.

Jessica Pieklo: This is a lot for me to take in. Okay. First of all, again, happy birthday! That's the most important thing, really, sincerely.

Imani Gandy: It is, I think.

Jessica Pieklo: The kaftan looks amazing. I like this as a fashion pivot for you. Totally own this, you rock it.

Imani Gandy: Thank you.

Jessica Pieklo: I don't think it's totally your fault that we got a garbage decision, in the birth control case today because you weren't wearing your lucky SCOTUS stress. I think it's mostly the fault of the Little Sisters of the Poor.

Imani Gandy: Goddamn nuns. Sorry! That seems a little bit blasphemous. I'm tired of these damn nuns. I like nuns generally. I love a Sound of Music style nun, just twirling on the Alps somewhere.

Jessica Pieklo: I had a nun who started a prison ministry in my family. She was pretty cool.

Imani Gandy: Brilliant. These nuns however, honestly, honestly, can we just not with these nuns?

Jessica Pieklo: Yeah, I can't anymore.

Imani Gandy: Can you explain what happened why I'm so verklempt?

Jessica Pieklo: What's amazing about these nuns is that they've been fighting about the Birth Control Benefit in the Affordable Care Act, basically, as long as you and I have been friends. That's a long ass time.

Imani Gandy: It's a long time, it's almost a freaking decade. Let it go, nuns.

Jessica Pieklo: Let it go, let it go.

Imani Gandy: Make like Elsa and let it go.

Jessica Pieklo: So here's what happened today. It was a really bad day at the Court, which is a total bummer. Because like the last time we got to talk to you all, we had this great day, and then we had Julie Rikelman on, and it was all love and abortion. And it was amazing. And now it's hate and birth control and being crabby about the Administrative Procedures Act.

Imani Gandy: But the Administrative Procedures Act that's got to light your fire a little bit. Am I right?

Jessica Pieklo: I just crossed my legs, not going to lie.

Imani Gandy: You're doing a little shoulder shimmy for the APA?

Jessica Pieklo: Only Justice Clarence Thomas, could take all of the fun out of the Administrative Procedures Act for me today, which is exactly what he did. And I'm a little salty about it.

Imani Gandy: You should be, tell listeners why.

Jessica Pieklo: Look, the APA is a work of art. It is a piece of legislative marvel, that tells us how to do things. We need to know how to do things. How do you like implement a law? How do you implement the Affordable Care Act? You know what, the Administrative Procedures Act tells us how, that's super cool. And Justice Thomas was basically like, "Meh, the Administrative Procedures Act ain't all that." And this... Okay. I got to have a few words. First of all, how dare you? First of all, Justice, Thomas, how dare you? Second of all, Little Sisters of the Poor, what have you done? Sorry, you knew I had to just that once.

Imani Gandy: Hey Little Sisters, what have you done? [laughter]

Jessica Pieklo: So, 245 years ago when Trump was first elected, he had a ceremony on the Rose Garden, where he trotted out the Little Sisters of the Poor. It was one of the very first acts that he did as president. And he said, "You know what, that big, bad Obama administration, they did nothing but step all over your rights. They were like, "Hey, I'm forcing you to hand out birth control pills out of a Pez dispenser to kids on the playground kind of thing." And my job as president is to put an end to that." And so he directed the agency Health and Human Services to issue some new regulations, to basically give the nuns a pass from the Birth Control Benefit.

Except HHS didn't just give the nuns of pass. They gave every private employer who wants a pass from providing coverage for birth control for their employees the avenue to do so. And that's what this fight was about. So if the Little Sisters of the Poor wanted to raise a religious objection, the Trump administration was like, "That sounds pretty cool. How about I see your religious objection, and I raise you a moral objection as well." And that's what HHS did.

Imani Gandy: And that just essentially it's an exemption that swallows the rule. I mean, if you have a rule that you have to do thing A, and then you have another rule that says, "If you have a moral or religious exemption to doing thing A you don't have to do thing A anymore." Then who's going to do thing A?

Jessica Pieklo: Precisely, precisely.

Imani Gandy: No one's going to do thing A, except for progressive employers, and there aren't a whole lot of those out there in the workforce, you know what I mean? Like, "Oh yeah, hey, abortion for everyone, birth control for anyone. Hallelujah." Nah, it doesn't work that way. Corporations are-

Jessica Pieklo: I love how we both started shimmying, at that argument.

Imani Gandy: ... We really did. Why do we both shimmy when we talk about-

Jessica Pieklo: It's the kaftan.

Imani Gandy: ... It's the birth control kaftan shimmy. We need to get on tik tok.

Jessica Pieklo: It is the pills. [laughter]

Imani Gandy: I just need to express again one of my main beefs with this decision, with this particular -- these interveners, these interlopers.

Jessica Pieklo: What are interloper-viners?

Imani Gandy: Interloper-viners? So interloper-viners, are people who aren't parties to the litigation at first, but who feel they have some interest in the subject matter of the case, to the point where they feel like they need to be involved in the case. They need to intervene on behalf of one side or the other. And so these Little Sisters were plaintiffs in the case, weren't defendants in the case. They were interveners in the case. And they intervened essentially to, as you put it to me very aptly in Slack earlier, to be a human shield for the Trump administration. Because everybody loves nuns. Just look at these cute little nuns. And all they're saying is, "Why should we have to hand out birth control? It's not fair. Look at what these mean liberals, these radical leftists are trying to do. They're trying to force nuns to take birth control." Bitch, no, we're not. [laughter]

Jessica Pieklo: I was like, "feminists with hairy armpits."

Imani Gandy: I mean, honestly, that's not at all the case. First of all, little nuns, there is no universe in which you would have been required to provide birth control, because of a really extremely boring law that nobody even gives a shit about.

Jessica Pieklo: I give a shit about it.

Imani Gandy: This law is called ERISA. Okay, Jess gives a shit about it. Because she likes all this agency stuff, but normal people, don't give a shit about this law. That's not true. I'm sure there are plenty of normal listeners out there who love ERISA. I am not one of those people, but ERISA is important here because it essentially says that the government can't entangle itself in the operation of church plans. And the Little Sisters have a church plan. That's what they do, and so the government could not have possibly forced the Little Sisters to do anything. So their only purpose in this litigation was to provide a really nice face to this really crap policy.

So if you're looking at these cute Little Sisters and being like, "Of course we shouldn't force nuns to take birth control." You're going to feel a little bit mushier inside, and not so much like, "Give me my goddamn birth control." Which is what you should be feeling. You should be yelling, "Give me my goddamn birth control, because these nuns have nothing to do with it. We were promised birth control." Like, "I was told that I would get birth control, in my yogurt, in my bananas, in my granola. And there is no birth control in my yogurt, my granola, or my bananas. And I'm very upset." We were promised birth control. The Supreme Court essentially promised as birth control, in Hobby Lobby eight years ago, right?

Jessica Pieklo: Yeah but that was Tony Kennedy, and he bounced.

Imani Gandy: Yeah, that's true. Tony bounced, and now we're stuck with Brad McBeer and Neil, not so Gorsuch, Gorsuch.

Jessica Pieklo: So here's what happened. Imani is exactly right. When the Trump administration issued these regulations, they knew that it would be a bad look to be out there defending them. So, first of all, states sued. States like Pennsylvania, California said, "Hey man, this is not okay. Like Imani said, we were promised birth control, we'd like our birth control. And by the way, these employees are paying for that coverage. So what you're doing is effectively putting on a tax, for employees who want full access to coverage that Congress said, you can't do that." So the State said, "Hey man, that's not cool." And the Trump administration said, "No, we're totally fine with it." And the lower court said, "No, actually Trump administration, that's not cool." As soon as it started to look bad for the Trump administration, the Little Sisters of the Poor filed this motion to intervene. They said, "Hey, hey, hey, hey, we want to butt in, we want to do this, we want to defend the administration, we think it's important." And the court let them. And that is how they became the public face of this lawsuit, and not the Trump administration.

So we spent a lot of time talking about the nuns, including us, and that's important, because they are absolutely bad faith actors here. But we also then got away from talking about what the Trump administration was trying to do, which was craft this massive regulatory expansion for employers of all stripes. If Hobby Lobby way back in the halcyon days of the Obama administration was about whether or not religious employers had to provide this kind of coverage, then what today's decision did—that two of the liberal justices joined in on—it said that it's not just religious employers, it's for-profit employers. It is universities. So, how many students is this going to affect? The potential impact here is huge.

There's a little bit of good news.

Imani Gandy: Right, we need some, because right now it sounds like a big crap sandwich to me.

Jessica Pieklo: Yeah. There's a... There's no way to-

Imani Gandy: Thin layer of good news?

Jessica Pieklo: Yeah. It's, a shallow veneer. So, the Administrative Procedures Act, legislative marvel, tells us how to do things. The decision today was all about whether or not the Trump administration had the power to do this. So in the law we call that a threshold question. Can the bad actor here even do the thing that they tried to do? And that was what this entire fight was about. So the majority opinion written by Thomas is effectively — there's plenty about the poor nuns and the terrible Obama administration, and awful liberals. All of that gets peppered in as we would expect. But it's really about the power of the government to act in this very like preliminary fashion.

It is not a decision on the merits, or the substance of these exemptions, that the Trump administration has enacted. That is a fight that we have yet to have. So, because time is a flat circle, we will be probably talking about the birth control benefit for the next 242 years of the Trump administration.

Imani Gandy: I believe you said it was 245. [laughter]

Jessica Pieklo: Okay, well see, time is a trick, even that. See, this is all make-believe. But my point is, what the Court did not do today, was blessed the substance of these regulations. The Court did not say today, that a moral exemption to a generally applicable law, which is what the Affordable Care Act is, is honky dory. That was not the decision. What the decision was is: can the Trump administration try to pass such a regulation, and we'll wait for another day to see whether that flies or not. So yay?

Imani Gandy: So this is an issue about process right now, we're in a very process place. And that's why this decision was seven to two, right?

Jessica Pieklo: Totally.

Imani Gandy: Because Justices Kagan and Breyer have a process argument that they wanted to make. They concurred in the opinion, but wrote separately to talk about process. Can you talk a little bit about what they said? Because I know people are going to be out there like, "WTF Kagan. I thought you were my girl."

Jessica Pieklo: Yeah, no. I mean, fair WTF, Kagan and Breyer. My read of the way that the Trump administration rolled out these regs is that they violate even the process part of the APA. So I'm with Sotomayor, and Ginsburg there. But what Kagan and Breyer did was effectively I'd say split the difference? So they know that there's this fight, and you're exactly right, they honed in on the process, and they said, "Look, we don't like these regs. We love the ACA, but we don't have a lot of wiggle room here in terms of what the Administrative Procedures Act says the governments can do here. And at this first look, they can do this. Now, if this case comes back to us, and we have to decide on the merits whether or not these regulations themselves can stand their concurring opinions suggested that they would not uphold the regulation. So, yay. However...

Imani Gandy: Do we have to go through this again? Could you not have just gone over with Sotomayor and Ginsburg, maybe try to drag Roberts over with you to be like, "This is nonsense, and here's why it's nonsense." Because they essentially promised as birth control in Hobby Lobby. And Ginsburg's opinion, or her dissent rather, gets to the heart of that issue. She doesn't really seem to give too much of a shit about process, she gives a shit about what was promised, and what was supposed to be done. And she says in Hobby Lobby, "we talked about this accommodation, we talked about how much the Obama administration, tried to work with these religious people and said, okay, you know what, you

can exempt yourself. Here's how you can exempt yourself. Just tell your insurer." Just call up the insurer and say, "We don't like birth control."

And then your insurer will just step right into your shoes, and we'll provide that birth control for you. You don't even have to do anything. All you have to do is literally pick, not even pick up a phone, fill out a form. Remember? We talked about this form-

Jessica Pieklo: One form.

Imani Gandy: ... For years. One form, fill out a form. Do you want birth control? Check the box. Yes or no. Do you want to go to the prom with me? One of those... Foolproof forms.

Jessica Pieklo: Do you want birth control, do you want to go to the prom? Yes, no. [laughter]

Imani Gandy: They're related. Like wanting to go to the prom, you want some birth control. But the point is, is that... The point of this requirement, the birth control benefit, is so that women can get birth control. People who need birth control can get birth control without copay, without having to jump through a whole bunch of other hoops, without having to wait for Congress to develop some nebulous fantasy birth control program, whereby the government is going to start handing out birth control to people because they've now told corporations that corporations don't have to. Which I don't know what country you're living in, but I'm living in a country where Congress is completely ineffective and incompetent and can't do anything.

So I'm not exactly waiting for Congress to get on board, and decide to do what is supposed to be done, which is, provide birth control coverage and health insurance plans. So, that's one thing she seems irritated about.

Jessica Pieklo: Look at the Voting Rights Act.

Imani Gandy: Right. Right.

Jessica Pieklo: Have we done anything in the last decade about that?

Imani Gandy: No, not at all. Moreover, the point of this health amendment, the Women's Health Amendment, was to break down some of the inequities and the barriers to equitable coverage. Women pay so much more for health insurance because we do shit like give birth to babies. Not only women do, because there are trans people who do as well. But generally, women's healthcare coverage is far more expensive, for reasons to do with reproductive health. And so, when we are offered health insurance that covers those other things, that's stuff we're paying for already.

We're paying for that with our labor. And so what the Supreme Court has just said, for now is that it's okay for essentially corporations to take money out of your pocket, because they don't like what you're spending that money on.

Jessica Pieklo: Dexter doesn't like it either.

Imani Gandy: Even Dexter is just like, "This is bullshit. I'm out of here." So that's what's really frustrating. The point of these provisions was to make sure that these health inequities and barriers were stripped down. We were promised that they would be stripped down, they haven't been stripped down. Now to your point, they may still be stripped down because we're not talking about an actual substantive discussion of religious exemptions and moral exemptions, we're talking about process and the APA. So there may be a point where we can have... Well there will be a point in the future where we have to have this discussion again.

But I really want to get to the heart of what Ginsburg is saying, is that this is bullshit. I don't understand how we're now living in a world where it's okay for a for-profit private employer to look at what you're putting in your mouth but then say you can't put that in your mouth. "Is that a birth control pill? You can't put that in your mouth. Am I paying for that? I don't have to pay for you to put that in your mouth. You have to go pay for it on your own." And that's just bonkers to me.

Jessica Pieklo: It's a mess. And it's not like this is a hypothetical risk to folks, either. The National Women's Law Center estimates that 61.4 million women, 60 million women currently have insurance coverage of birth control without the out of pocket costs due to the Affordable Care Act. And so today's decision threatens that coverage. And it also opens the door to the administration trying more regulatory funny business with moral objections. Because if they think that there are five votes on the Supreme Court to bless that kind of moral objection to the birth control benefit, maybe there are five votes to bless that kind of moral objection to, oh, I don't know, a minimum wage. Who's to say?

Imani Gandy: I just, I don't know. I'm also a little mad that Ginsburg didn't mention ERISA, because I feel like, if there's a law that says you don't ever have to do this, why are you filing a lawsuit complaining that someone's going to make you do the thing that the law already says you don't have to do?

Jessica Pieklo: Yeah. Or they're not filing a lawsuit, intervening in a lawsuit rather.

Imani Gandy: I need someone to explain that to me, like I'm five years old because you're going to see me yelling about it on Twitter a lot. I've been yelling about it for several months. I don't understand why the Little Sisters were permitted to turn this piece of litigation into a public spectacle.

Jessica Pieklo: I got nothing for you Imani.

Imani Gandy: Christ.

Jessica Pieklo: Another thing that's really interesting about this decision, and it ties into another one that the court released today. This case, Our Lady of Guadalupe School versus Morrissey-Berru, and Justice Alito had that decision. We haven't talked about that case a lot, or at all on this podcast actually.

Imani Gandy: What's that case about?

Jessica Pieklo: This is a huge deal case that has gone under the radar for a lot of folks, and we're going to see the ripple effects for it. The heart of the question in Our Lady of Guadalupe School is whether or not religious employers can avoid discrimination lawsuits by exercising their rights as employers. So in this case, a teacher was fired for having breast cancer, and sued the school district, and said, "Hey, you can't do that." And the Ninth Circuit said, "Yeah, no that's employment discrimination." And today justice Alito with the rest of the conservatives, and a couple of liberals, said, "You know what, in some instances, religious employers actually can do that."

So we had two really big employment law decisions today that were grounded and wrapped up in the packaging of religiosity of religious employers. But the impact is not limited to folks who share that faith. The reach of those decisions will get to employees who may not share those faith, who just happened to be going to that university, or employed by that particular school. And so this is big, and the idea that the Court would drop these two decisions today, to me is just another reminder that, yeah this is bad. It's about evangelicalism, but really it's also about a huge expansion of corporate power at the Roberts Court. Whenever bosses come before the Roberts Court, they do really well. And today they did really well.

Imani Gandy: And really what this discussion about the increasing religiosity, of the courts, and constitutional law, and jurisprudence, is that, people who are religious, are now being told that they can infringe on the rights of people who are not religious. They can force people who do not adhere to the same religious tenets that they do, to nevertheless adhere to those religious tenets. And so Ginsburg points this out in her dissent. And I think she's spot on, which is, that old thing about how, your right to punch ends where the other person's face begins. You can punch all you want religious people, you can scream about religion, but if you want to complain that a certain policy infringes upon your sincerely held religious beliefs, which is how the Religious Freedom Restoration Act frames that question, then you can't force me to be stuck with your religious bullshit.

It's like, I'm Jewish. If you're Catholic, that's great for you, but I'm not. So why do I, Jewish person, I have to adhere to all of your religious sincerely held beliefs? That doesn't make any sense. We live in a society. But, we're supposed to live in a free society where you can practice whatever religion you want, free from governmental interference. And here, in the name of freeing up the birth

control fight from governmental interference, the government has actually interfered on the side of these religious people against everyone else.

Jessica Pieklo: It's put its thumb on the scale.

Imani Gandy: Yeah. And I find that really worrisome, where this country is going in terms of religious imposition, because I'm not going to call it religious freedom. It's religious imposition. You're imposing your religion on me. It is frightening. The strides that evangelicals have been able to make in this area, constitutionally speaking, and statutorily, under the Religious Freedom Restoration Act. It's a real bummer, man.

Jessica Pieklo: Okay. But I got some actual good news for you.

Imani Gandy: Okay. Hit me.

Jessica Pieklo: The Supreme Court is actually going to end of term. Imani, it's going to end, tomorrow.

Imani Gandy: What do you mean it's going to end. What do you mean, it's going to end tomorrow?

Jessica Pieklo: In theory, that's what the court announced today.

Imani Gandy: They're ending forever? Just no more Court forever, or just for a term?

Jessica Pieklo: No, no, no, no, no, not forever.

Imani Gandy: We're going to have to come back and do this in the fall. [laughter]

Jessica Pieklo: Yeah. No. The Court announced today that tomorrow is going to be the last day of decisions. And so that's good. Hopefully we get all of them, and we're still waiting to figure out if we can see Trump's tax returns, who knows stay tuned. We may, we may not. Who's to say really Chief Justice John Roberts. That's my guess. So the good news is though that the court is wrapping up business. It also means Imani that, you and I are going to take a little break, we're going to catch our breath. We are going to process. We're going to sit with the conclusions from the term. We're going to emote online about them for a little bit.

Imani Gandy: We are.

Jessica Pieklo: But really, we're going to catch your breath, and we'll be back if anything important happens, obviously. But other than that, we'll be on a lighter schedule through August, so we invite you all to hydrate, get some snacks, catch your breath. Because once we roll back up in September it's going to get serious and busy, and quick.

Imani Gandy: We have four abortion cases next term, right?

Jessica Pieklo: Well, they're thinking about them yet, they haven't taken them yet.

Imani Gandy: Their thinking about it, right, right. They're conferencing on four. Okay. Jesus Christ.

Jessica Pieklo: No, they haven't taken any abortion cases yet, but they've got a lot to think about over the summer apparently.

Imani Gandy: Well, before we go, we wanted to say: thank you, listeners, so much for supporting us. It means, so much to us. This entire spring, we've really been shocked and humbled by how generous some of you have been.

Jessica Pieklo: Seriously.

Imani Gandy: We've had dozens and dozens of donations. Someone donated to Rewire.News for my birthday yesterday, which was amazing.

Jessica Pieklo: Oh, thank you.

Imani Gandy: We've got over 20 monthly donors. So this is just a really exciting moment for us. And we are just very grateful to you.

Jessica Pieklo: If you'd like to join the law nerd donor community and have a couple extra bucks to spare, you can sign up at rewire.news/boomgive, that's rewire.news/boomgive.

Imani Gandy: Or because we are living in the 21st century. You can text boomgive to 44321. That's boomgive, one word, to 44321. Amazing.

Jessica Pieklo: It is. The future is now.

Imani Gandy: It is right, the future is now. Also the future was 245 years ago. So that's going to wrap it up for us, if you want to follow me on Twitter, you can find me @AngryBlackLady. If you want to follow Jess on Twitter, you can her @Hegemommy, H-E-G-E-M-O-M-M-Y. You should follow Rewire News @Rewire_News, because there's a lot of good stuff happening there. We've got a new social media manager, who is crushing it.

Jessica Pieklo: Totally crushing it.

Imani Gandy: On Instagram as well, she's crushing it @rewire.news. I've transferred the Facebook group over to her, she's crushing it there. We've got 1500 members, just get in on the Boom! Lawyered Loved People. It's the summer of Boom! Lawyered Love, I'm calling it now.

Jessica Pieklo: With kaftans.

Imani Gandy: With kaftans, exactly. And on that note, what are we going to do, Jess?

Jessica Pieklo: We'll see on the tubes, folks.

Imani Gandy: We will see you on the tubes folks.

Speaker 4: Boom! Lawyered is created and hosted by Jessica Mason Pieklo, and Imani Gandy. Marc Faletti produces the show.