

[We'll Hear Arguments podcast — Closing the Courthouse Doors: Roe v. Wade, Episode 4](#)

Imani Gandy:

So far in this series, you've heard Sarah Weddington basically kick the asses of the Texas attorneys both times Roe was argued.

Jessica Pieklo:

She kicked their asses over whether a fetus was a person, because it's not.

Imani Gandy:

Even if the court were inclined to decide that a fetus is a person, Sarah was ready. She proceeded to kick the Texas attorneys' asses on the balancing test between the rights of a fetus and the rights of a pregnant person, because the alive, breathing person is the one whose rights should come first.

Jessica Pieklo:

She even kicked their asses over whether there's enough at stake for the state to be able to regulate abortion in the first place.

Imani Gandy:

Texas just conceded, right? They took the L, apologized for wasting the court's time, and went home.

Jessica Pieklo:

Imani, you are a dreamer.

Imani Gandy:

You may say I'm a dreamer...

Jessica Pieklo:

Well, but you're not the only one.

Imani Gandy:

Exactly.

Jessica Pieklo:

Texas, unfortunately, did not take the L. As a last resort, attorneys for Texas argued that pregnant people don't even have the right to go to court in the first place. Here's Jay Floyd.

Jay Floyd:

I think she makes her choice prior to the time she becomes pregnant. That is the time of the choice.

Imani Gandy:

Literally, Texas's coup de grâce was that pregnant people cannot have standing because their choice was made before they were pregnant.

Jessica Pieklo:

They even tried to claim that because Jane Roe couldn't get her case to the Supreme Court before she gave birth, she couldn't sue on behalf of other pregnant people.

Imani Gandy:

They're basically trying to take the ball and go home. Are you kidding me? Did the justices seem to buy it? And how does Sarah Weddington respond?

Jessica Pieklo:

That's exactly what we're going to discuss in this episode. This one really matters because present-day anti-choicers are once again going after standing in abortion rights, so understanding this debate is extra important.

Imani Gandy:

I'm Imani Gandy.

Jessica Pieklo:

I'm Jessica Mason Pieklo.

Imani Gandy:

And now, We'll Hear Arguments.

[title montage]

Imani Gandy:

Jess?

Jessica Pieklo:

Yeah, Imani?

Imani Gandy:

We've spent a lot of time listening to these arguments, and one of the things that jumped out was just how much time the court spends debating whether or not there was even a case for it to decide. Jay Floyd spent almost half of his time, nearly 15 minutes, making procedural arguments designed to get the court to avoid answering the big questions at all.

Jessica Pieklo:

It's kind of like a filibuster, or stalling when you know you're unprepared or have a losing case.

Imani Gandy:

Except it's more than a filibuster. All this stalling is really a bunch of different ways of arguing that plaintiffs have no standing.

Jessica Pieklo:

Ooh, I love this idea. Let's talk about it. But we should also explain to our listeners what standing is.

Imani Gandy:

Yes, because it's a huge issue in the Supreme Court case *June Medical Services v. Gee*.

Imani Gandy:

Standing arises from the "case or controversy" requirement in Article III of the Constitution. It's intended to preserve the proper role of the federal courts when it comes to presiding over lawsuits. Standing ensures that a person before the court has a personal stake in the litigation, rather than just an interest in airing grievances.

Jessica Pieklo:

Imani, you're saying the Supreme Court is not a venue for celebrating Festivus?

Imani Gandy:

Precisely. If you want to air grievances, sign up for Twitter.

Jessica Pieklo:

Except they didn't have Twitter in 1973.

Imani Gandy:

It's probably for the best, because, frankly, I wish we didn't have Twitter now sometimes, but I digress.

Imani Gandy:

In order to meet the constitutional standing requirement, the party before the court must have an injury that the court can remedy. If the party has standing, then the party can bring their claims to court.

Jessica Pieklo:

Floyd's response is essentially "Nuh-uh, no, they can't, because look, Jane Roe isn't even pregnant anymore."

Imani Gandy:

Check out Floyd's opening argument. But before we get to that audio, some background is in order. Jane Roe wasn't the only plaintiff in this case. A married couple, John and Mary Doe, also challenged this Texas statute.

Jessica Pieklo:

In this clip, Floyd argues that the married couple doesn't have standing because they were not pregnant, nor did they ever want to be. Mary Doe had a medical condition, and her doctor had advised her not to get pregnant or to take birth control pills. They claimed that the Texas law interfered with their marital relations because if Mary became pregnant, she wouldn't be able to get an abortion, and that potentially put her life in danger.

Imani Gandy:

Floyd then goes on to argue that Jane Roe also doesn't have standing because she's no longer pregnant. Her case is moot. There's no case or controversy. Everybody, go home.

Jay Floyd:

Before I proceed to the original issue in this case, which was the propriety of the trial court denying injunctive relief, I would like to bring to the court's attention some grave matters concerning what has been referred to as the standing of the parties.

Jessica Pieklo:

Floyd is going to argue that pregnant people shouldn't be able to sue to enforce their rights. Once again, it sounds like he's just going to meander through his whole argument, too, here, so super.

Jay Floyd:

The couple involved, they were a married couple, a childless married couple. The only matter, evidence, or whatever in the record concerning their contentions is contained in their first amended original petition. That is that the woman would have difficulty if she became pregnant in carrying a child to childbirth. Further, that they were unprepared for parenthood.

Jay Floyd:

We submit to the court that their cause of action is strictly based upon conjecture. Will they continue the marriage? Will her health improve? Will they then be, at some time in the future, prepared or unprepared for parenthood? There is no fear of prosecution by Mary Doe. We feel that the lower court properly denied them standing.

Jay Floyd:

As to the unmarried pregnant female, a unique situation arises in, is her action now moot? Of course, if moot, there is no case or controversy.

Imani Gandy:

Floyd wants there to be all these unknowns with the parties because courts need certainty to enforce rights. While it may sound like he's just taking another walkabout, he's really not. This is the very opening of Jay Floyd's arguments, so Floyd probably thought this was his strongest argument, because that's what lawyers do. They lead with their best arguments.

Imani Gandy:

After making the smart decision not to tell another offensive joke like the sexist one we played for you in our first episode, Floyd tees up this idea. He said that the court had no business even hearing *Roe v. Wade*, let alone deciding that the Constitution protects the right to abortion.

Jessica Pieklo:

We have Floyd arguing that John and Mary Doe don't have standing because they're not pregnant and have no intention of being pregnant, but he also argues that Jane Roe doesn't have standing, in fact, never could have standing, because she "made her choice" when she got pregnant, and darn it, there's nothing the court can do about it now. If she doesn't like it, by the way, she can just move. That's what Floyd argues in this back-and-forth with Justice White, which we touched on in our second episode.

Justice White:

If you're right, what procedure would you suggest for any pregnant female in the state of Texas ever to get any judicial consideration of this constitutional claim?

Jay Floyd:

Your Honor, let me answer your question with a statement, if I may.

Justice White:

Okay.

Jay Floyd:

I do not believe it can be done. I think she makes her choice prior to the time she becomes pregnant. That is the time of the choice.

Imani Gandy:

I got to say, Floyd is not very good at this.

Jessica Pieklo:

No.

Imani Gandy:

The one thing they teach you in moot court in law school is to not state your argument as something that you just believe, but rather, is something that just is. Jess, which sounds more forceful to you, "Pregnant women can never get judicial consideration of their constitutional claim" or "I don't think pregnant women can ever get judicial consideration of their constitutional claim"? Come on, Floyd. Get it together, man.

Jessica Pieklo:

At least he answered the question with a statement and not another question, though. What an odd thing to say. "Let me answer your question with a statement, if I may." You're arguing before the Supreme Court, my dude! That's what you're supposed to do when asked a question, make a statement.

Imani Gandy:

More important than our griping about Floyd's lackluster style of oral argument is this. What started out as a question about civil procedure, about whether or not Jane Roe had standing, ended in a stunning admission by Jay Floyd, that he doesn't think that pregnant people in Texas could ever get a court to consider whether or not they had a constitutional right to abortion.

Imani Gandy:

Earlier, I mentioned that in order to have standing, a party before the court must have an injury that the court can remedy. What exactly do we mean by the word remedy? I lugged out my trusty Black's Law Dictionary, and it says that a remedy is the "means by which a right is enforced or the violation of a right is prevented, redressed, or compensated."

Jessica Pieklo:

Oh my God, I love that you have a hard copy of Black's Law Dictionary, because so do I.

Imani Gandy:

I know, a hard copy. They made us buy it in law school. It's literally the first book that I bought. Kids today probably just look up stuff on the internet. What a time to be alive.

Imani Gandy:

Remedies generally fall into four categories, damages, restitution, coercive remedies, and declaratory remedies.

Jessica Pieklo:

Damages are monetary compensation. A court will award damages to a plaintiff to compensate them for a loss of some kind or to punish a defendant to deter them from bad behavior. Restitution is designed to restore the plaintiff to the position they were in before their rights were violated.

Imani Gandy:

Coercive remedies are court orders that tell a defendant to do something or to refrain from doing something. Injunctions, which I'm sure you're all familiar with since that's what we talk about in abortion rights cases all the time, injunctions are coercive remedies.

Jessica Pieklo:

Declaratory remedies is where a party is asking a court for a determination as to what their legal rights are, what a law means, and whether or not that law is constitutional.

Imani Gandy:

Here's a fun tidbit. In Roe, the lower court ruled that the Texas statute was unconstitutional and said that the law was vague and an infringement on a woman's Ninth Amendment right to an abortion. The court granted declaratory relief. Now, remember, that's just a statement that the law is unconstitutional. The court declined to grant injunctive relief because the court naively thought that Dallas D.A. Henry Wade wouldn't continue prosecuting an unconstitutional statute.

Jessica Pieklo:

Boy, was the court wrong. The day after the court issued its ruling, Henry Wade gave a press conference and announced that he intended to keep prosecuting violations of the Texas statute.

Imani Gandy:

So he just decided to ignore the court's ruling?

Jessica Pieklo:

Yep, basically.

Imani Gandy:

Floyd is arguing that none of the remedies we just described are available to Jane Roe and to other people like her.

Jessica Pieklo:

It is ridiculous. He's saying that a person seeking an abortion doesn't even have the right to go to court to ask for declaratory relief. That's just to ask the court to declare that the law is unconstitutional. It's a wild thing to argue, and a really, truly stunning claim to make.

Imani Gandy:

An even more stunning claim is that when it comes to the right to choose an abortion, there is no choice. A woman makes her choice before she becomes pregnant. In other words, when she has sex, she's making the choice to carry to term any pregnancy that may result. The question that is left unanswered on the table is, what happens when a woman doesn't choose to have sex, when she becomes pregnant by a rape?

Jessica Pieklo:

Justice Stewart tried to get Floyd to address this, but Floyd sidestepped it.

Jay Floyd:

There is nothing in the United States Constitution concerning birth, contraception, or abortion. Now the appellee does not disagree with the appellant's statement that a woman has a choice, but as we have previously mentioned, we feel that this choice is the woman's prior to the time that she becomes pregnant. This is the time of the choice.

Justice Stewart:

Texas doesn't grant any exemption in the case of rape, if a woman, their pregnancy has resulted from rape, either statutory or otherwise, does it?

Jay Floyd:

There is nothing in our statute about that. Now, the procedure-

Justice Stewart:

Such a woman wouldn't have had a choice, would she?

Imani Gandy:

First of all, props to Justice Stewart for recognizing how insulting Floyd's comments about choice are. Setting aside the fact that any pregnant person should be able to make a choice of whether to carry a pregnancy to term, regardless of whether they chose to have sex, the fact of the matter is some pregnant people don't choose to have sex, or some pregnant people, like victims of statutory rape, are too young to make that choice. They are stripped of that choice, and Texas sought to strip them of the choice not to carry the spawn of their rapist. But Floyd, he's just trying to vindicate Texas's interest in keeping women in chastity belts.

Jessica Pieklo:

What?

Imani Gandy:

Remember previously when we talked about how White had to steer Floyd away from his argument that Texas has a state interest in preventing promiscuity?

Jessica Pieklo:

Oh, right. Yikes.

Imani Gandy:

Yikes, indeed. Also, we have to talk about the negative pregnant, pardon my pun, but we have to talk about the negative pregnant in this conversation. If at the moment you become pregnant, you are stripped of your choice to get an abortion, and states pass laws to enforce that lack of choice, then the very claim that pregnancy terminates choice inevitably criminalizes everyone who makes that choice. Unfortunately, that's where we're headed.

Jessica Pieklo:

In 2019, the Texas House of Representatives considered a bill that would have imposed the death penalty on pregnant people who got an abortion. The bill failed, but it may not next time.

Imani Gandy:

It is perverse that people who call themselves pro-life would advocate the death penalty for people who get abortions.

Jessica Pieklo:

And especially when the majority of people who get abortions already have kids. Throwing their mothers in jail seems like a super swell idea, don't you think, Imani?

Imani Gandy:

Just fantastic, freaking fantastic.

Jessica Pieklo:

Before flat-out saying that women have no choice, Floyd tried a civil procedure argument, that the case brought by Jane Roe was moot because she was no longer pregnant. Here he is talking about Jane Roe, that dreaded unmarried pregnant female.

Jay Floyd:

As to the unmarried pregnant female, a unique situation arises in, is her action now moot? Of course, if moot, there is no case or controversy.

Justice Stewart:

It's a class action, wasn't it?

Jay Floyd:

It was a class action.

Justice Stewart:

I suppose we could almost take judicial notice of the fact that there are, at any given time, unmarried pregnant females in the state of Texas.

Jay Floyd:

Yes, Your Honor.

Jessica Pieklo:

What in the world is the point of this argument? Is he just trying to figure out a way to get the case thrown out without having to make the argument that he ultimately makes, which is "Hey, tough break, kiddo. You've got no legal recourse to challenge Texas's law"?

Imani Gandy:

This case was brought as a class action. Without delving too far into civil procedure, it means that Jane Roe, an unmarried woman who wanted an abortion, was representing a class of people similar to her, in this case, a class of unmarried women who wanted abortions.

Jessica Pieklo:

Floyd is trying to claim that because Jane Roe is no longer pregnant, that the case should be thrown out, which makes zero sense at all.

Imani Gandy:

Stewart basically says, "Duh, bro. Even if Jane isn't pregnant right now, there are other Janes out there who are, other unmarried females in Texas," but Floyd keeps going. He's like a dog with a bone, or at least a dog with what he thinks is a bone, but that bone is actually a piece of celery. I mean, listen to him ramble through the class action argument here.

Jay Floyd:

I would say that the only thing that would uphold her standing would be, or eliminate the mootness issue, would be whether or not this is a class action on her part. The record that came up to this court contains the amended petition of Jane Roe, an unsigned alias affidavit, and that is all. She alleges that she was pregnant on April the 20th, 1970, which is some 21 months ago. Now, I think that it has been recognized by the appellant's counsel that she is no longer pregnant.

Jessica Pieklo:

Recognized by the appellant's counsel that she's no longer pregnant? What on earth is Floyd rambling about?

Imani Gandy:

It's this idea that a pregnant person's rights only last as long as their pregnancy. It's ludicrous, and he doesn't quit with it.

Jay Floyd:

This court has consistently held that the time of determination of mootness is when the hearing is before the court. That is, the case can become moot from the hearing in the trial court until the time it reaches this court. We do not feel appellant's authority contained in her brief will substantiate her contention that the case is not moot. I might add this, that I believe the law to be that if there is a reasonable possibility of reoccurrence of the situation, then the case would not be moot.

Jessica Pieklo:

No kidding, you might add that, because that's exactly what most courts would do. Courts would likely not declare the case moot and dismiss it because there is a reasonable possibility of reoccurrence of the situation.

Imani Gandy:

Floyd just torpedoed his own argument. When there's a reasonable possibility of recurrence, that's when courts look to a judicial principle that will disregard mootness if the claim is capable of repetition, but evading review. No person can remain pregnant for the duration of litigation, obviously. So why did Floyd make that argument in the first place? He's trying to bust up the idea of a class action any way that he can.

Jay Floyd:

In connection with the class action aspect of this, and I say I have no authority to support this proposition, but it would appear that in order for a class action to continue, if there be one to begin with, is that one plaintiff must remain, or else an intervenor, or someone, to be a representative of the class, because this is the whole purpose of the class action, to have a representative in court.

Jessica Pieklo:

Floyd is really sticking to his guns here. Even if the court isn't going to dismiss the case because it's moot, Floyd seems to be asking the court to consider at least having a class representative that actually represents the class. How can you have a non-pregnant person representing a class of pregnant people? So what if that person was pregnant at the start of the litigation? They're not pregnant now, Imani.

Imani Gandy:

It's an absurd argument. What's even more absurd is that, again, Floyd seems to have just taken a leisurely stroll up to the Supreme Court, intending to argue the biggest case of his life, but not really having a clue as to how to do so. He tells the court he has no authority to back up his argument, and then proceeds ahead with it anyway.

Jessica Pieklo:

First of all, you can't just roll up on the Supreme Court and make claims without having the authority to back them up. It's the most ridiculous thing I've ever heard of. He has no authority to support this position. Then why are you here, man? I'm surprised the justices didn't look at him and say, "Mr. Floyd, do you know anything at all?"

Imani Gandy:

Second of all, is he suggesting that attorneys have to keep finding new people to serve as class representative? Every time the class rep gives birth, the attorneys have to find another pregnant class member willing to step up and be the class representative?

Imani Gandy:

Now, in the opening of the second round of arguments, Weddington comes out swinging on these procedural questions. Here she is making a very strong case as to why Texas's standing argument is a bunch of procedural freaking nonsense.

Sarah Weddington:

In fact, we pointed out in our supplemental brief filed here that there have been something like 1,600 Texas women who have gone to New York City alone for abortions in the first nine months of 1971. In addition, I think the court would recognize there are many other women going to other parts of the country.

Sarah Weddington:

One of the objections that our opponents have raised is saying that this court is moot because, of course, the woman is no longer pregnant. It's been almost three years since we instituted the original action. Yet we can certainly show that it is a continuing problem to Texas women. There still are unwanted pregnancies. There are still women who, for various reasons, do not wish to continue the pregnancy, whether because of personal health considerations, whether because of their family situation, whether because of financial situations, education, working situations, some of the many things we discussed at the last hearing.

Jessica Pieklo:

This is such strong advocacy by Weddington here. You can tell that after the first round of oral arguments, she probably went back and studied the places where she needed to shore up her argument. And the mootness argument, this idea that pregnant people in Texas don't have any way to petition the court to enforce their rights, this could have done her case in.

Imani Gandy:

These are questions that will become important should the court eviscerate third-party standing in *June Medical Services v. Gee*. If that happens, attorneys will be forced to find people seeking abortions to serve as plaintiffs in certain types of abortion rights challenges. Rather than file individual lawsuits, we may start seeing massive class actions.

Jessica Pieklo:

A whole slew of class action repro cases could be in our future, Imani.

Imani Gandy:

We've done it again, Jess.

Jessica Pieklo:

Uh-oh, what?

Imani Gandy:

We've dropped a lot of legal knowledge on our listeners' heads, so we should recap.

Jessica Pieklo:

In this episode, we talk about remedies. What can pregnant people do if they find themselves in Texas, pregnant, and in need of an abortion?

Imani Gandy:

Basically, pregnant people can eat Texas's shorts.

Jessica Pieklo:

Crudely put, but accurate. Texas doesn't think that pregnant people can ever ask a court to take a look at an abortion restriction, not to obtain compensatory damages, not to obtain an injunction, not even to obtain declaratory relief, which here is just basically a lawsuit asking a court to declare whether a law is constitutional.

Imani Gandy:

We also talked about how Jay Floyd yet again demonstrated he doesn't really know what's going on. He claimed that Jane Roe's case was moot because she was no longer pregnant, and then he pointed out that the court could maybe, probably still take the case because the principle capable of repetition, but evading review is applicable.

Jessica Pieklo:

That's when a claim might never be resolved because the party's standing keeps evaporating, but the court decides to issue a ruling anyway. That's so the claim doesn't keep making its way back to the court only to be dismissed as soon as the party bringing the claim loses standing because they are no longer pregnant.

Imani Gandy:

Look, pregnancies don't last four years, or however long it takes for cases to make it from the lower courts to the Supreme Court, whether it's two years or four years. It's never only nine months.

Jessica Pieklo:

You don't have to tell me twice, Imani. I've got two kids, and Lord help me if I had to be pregnant with them for four years each.

Imani Gandy:

That seems like it would be the absolute worst.

Jessica Pieklo:

It really, really, really would.

Imani Gandy:

That's going to wrap up this episode. Stay tuned for our final episode, in which we reflect on what we've learned reality TV style, and maybe scream into our coffee.

Jessica Pieklo:

The Primal Scream Show with Jess and Imani.

Imani Gandy:

Featuring Pitbull.

Jessica Pieklo:

What? Why Pitbull?

Imani Gandy:

I don't know. Why not Pitbull? What has Pitbull ever done to you, Jessica?

Jessica Pieklo:

Nothing. I'm a middle-aged white lady. I love Pitbull, but I'm confused. Imani, it's time to go.

Imani Gandy:

Hey, man, I'm not the one slandering Pitbull.

Jessica Pieklo:

I didn't slander. You know what, never mind.

Jessica Pieklo:

We'll Hear Arguments is created by Jessica Mason Pieklo, Imani Gandy, and Marc Faletti.

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Jessica Pieklo:

Finally, a big thank you to everyone at Rewire.News for supporting and promoting We'll Hear Arguments.