

[We'll Hear Arguments podcast — Making Sense of It All, Reality TV-Style: Roe v. Wade, Episode 5](#)

Imani Gandy:

Hey Jess.

Jessica Pieklo:

Hey Imani.

Imani Gandy:

You know how in reality TV shows like The Bachelor, they always end the season with a wrap up episode where they bring everyone back together to talk about how it all went?

Jessica Pieklo:

Totally. It's a way to rehash the best highlights and low lights and you know, make sense of the whole story.

Imani Gandy:

I know we opened the series talking about how the Supreme Court is the ultimate real life courtroom drama. But if you think about it, Supreme Court arguments are also basically a reality show.

Jessica Pieklo:

Oh my God, you're right.

Imani Gandy:

A bunch of people who don't agree on anything are shoved together in a room where they bicker, they talk past each other, they make fun of each other and try to make a name for themselves.

Jessica Pieklo:

There are even abortion storylines.

Imani Gandy:

Exactly. So what I think we need to finish our first season is a good old fashioned reality TV style wrap up episode, just so we can make sense of everything we covered from the Roe V Wade arguments.

Jessica Pieklo:

Well, if we do that, we're going to need a semi cheesy white dude to come in and host the interview because that's how all those shows do it.

Imani Gandy:

Jess, I know just the guy.

Marc Faletti:

Even though I suggested that, I want you to know that still hurts. [laughter]

Jessica Pieklo:

Oh, boo-hoo. Do you want to introduce yourself?

Imani Gandy:

Oh, yeah, but do it in a cheesy host voice!

Marc Faletti:

I'm Marc Faletti, the producer of We'll Hear Arguments. Coming up on our final episode, I sit down with stars, Jess and Imani for a heartwarming conversation uou won't want to miss.

Jessica Pieklo:

Now make it British for Imani!

Marc Faletti:

And now We'll Hear Arguments.

Imani Gandy:

That's the worst British voice I've ever heard. [laughter]

[title montage]

Marc Faletti:

Well, thank you both so much for having me on.

Jessica Pieklo:

Oh, absolutely.

Imani Gandy:

Thank you so much for producing our show.

Marc Faletti:

I have learned so much about the Roe versus Wade arguments because of this project and working with you, but I'm curious about the first time you listened to that audio. What jumped out at you and made you think: we have to do a series?

Jessica Pieklo:

As someone who is fortunate enough to be able to cover Supreme Court arguments now, being able to hear Sarah Weddington stand up and make her case to the justices. Hear all of the goofs and missteps that we played from the Texas attorneys, really just the arguments themselves are compelling. And like we said, we know a lot about Roe versus Wade, but what do we *really* know about it? So just the opportunity from a law nerd perspective to dive into those arguments. And that audio archive was just too much to pass up.

Imani Gandy:

For me, as someone who was frequently underestimated when I walked into a courtroom to argue a motion or when I walked into a conference room to take a deposition, I really sort of felt sort of spiritually connected to Sarah Weddington because here you have this 26 year old woman who's at the Supreme Court arguing one of the biggest cases of her life. And she's arguing against these good old Southern Texas boys, you know, who probably took one look and were like, oh, I want a cute little white lady. Aw pat her on the head.

Marc Faletti:

I mean, Jay Floyd said that in his actual opening statement.

Imani Gandy:

Right. Exactly. I mean, he told this offensive joke and it sort of set the entire tone and I can just imagine how Sarah Weddington felt like, all right, jackasses, you want to go? Let's go. Because she was so prepared and these dudes were so unprepared. So much so that they even admitted Robert Flowers actually admitted that he walked up there and didn't have any notes. And I think it's important that, I don't know that people realize that, not to sound cheesy, but women can do anything. And in fact women can kick men's ass as Sarah Weddington showed.

Marc Faletti:

So, can I take us down to "Mr. Justice" rabbit hole for a second?

Jessica Pieklo:

Oh, totally. Please do, this is great.

Marc Faletti:

All right. So the first time I listened to the audio, I remember Jay Floyd doing what most people do, call the justices, your honor.

Jay Floyd (montage):

And I say, your honor, that is correct, your honor. And that's correct, sir. Thank you, your honor.

Marc Faletti:

But then the first time Thurgood Marshall asked him a question, Floyd called Marshall. Mr. Justice.

Imani Gandy:

Yep.

Thurgood Marshall:

What is Texas' interests in this discussion?

Jay Floyd:

Oh, Mr. Justice.

Marc Faletti:

And he kept doing it.

Jay Floyd (montage):

Mr. Justice best case is just a recent case, Mr. Justice. Yes it does Mr. Justice. Mr. Justice. Yes.

Marc Faletti:

I started to get paranoid that this was like some weird racist hangup from Floyd. Like, he was refusing to call the first black Supreme Court justice, "your honor." I'm from Texas, right? So I didn't exactly feel like it was a stretch that a Texas dude born in 1923 who was on the wrong side of the abortion debate...he could be kind of racist. Fortunately though, Jess, you found out I was off base. That is not the case.

Jessica Pieklo:

I love these little research rabbit holes though. So Marc found this clip and was like, oh my God, what's going on here? And dropped it in our Slack and it gave us the opportunity to start figuring out and answering this question. And so I dug around a little bit and I reached out to a colleague of mine who runs a fabulous website called Empirical SCOTUS and definitely go check it out if you are a big law nerd and want to know all the sort of metrics and it's like fantasy baseball for Supreme Court nerds. And he helped put together the answer, which was this was actually a norm, but we didn't hear about it. We didn't know about it. And it's come out of favor in oral advocacy.

Jessica Pieklo:

But again, I think it's one of those little details in terms of this project where, what stands out at you? I would have never known. Like I am a huge Supreme Court nerd and I had never heard or seen in transcripts, Mr. Justice, you know? And now I'm like, well what did they do when they put women on the bench? Is that when the norm changed? I have so many more questions that are still unanswered, but that's been part of the really fun part of this project is getting into those little details.

Marc Faletti:

Yeah, definitely. Kind of sounded like a DC superhero gone wrong to me or something. Mr. Justice. Not a shield, but maybe some sort of device that's like a rip off of Captain America.

Jessica Pieklo:

Yeah.

Marc Faletti:

You point out on the show that the Roe V Wade arguments are obviously almost 50 years old now. What would you say to someone who is skeptical that they still matter today?

Imani Gandy:

Well, I would say that they still matter today because that case provided a roadmap for what states needed to do in order to make this case that they have an interest in fetal life and that fetuses are people. The problem that Texas had is that at the time it didn't have any laws on the books that suggested they had this compelling interest in protecting fetal life. And in fact, no states had any laws on the books that equated abortion with murder. And so as you listen to the justices asked, they're like, well, hey guys, how are you going to say you have this compelling interest in fetal life but you have no

laws on the books that suggests you have this interest? And if you do have a compelling interest in fetal life, then why is it that you're only punishing doctors and not actual people who are getting abortions?

Imani Gandy:

Unfortunately this became something that states are like word. Okay, we're going to spend the next 50 years making this case so that when we get back to the Supreme Court on this issue, then we can say, look at all these laws that we have that demonstrate that we believe that fetuses should be able to have the states, that fetuses should count for census purposes, that fetuses should count as independence for your taxes.

Imani Gandy:

All of these things that states have done and this case provided that roadmap. And you can see in the oral arguments that that was what Texas was wrestling with and that's what Texas had to go back and fix and it has done that. And now here we are basically almost screwed.

Jessica Pieklo:

And I would just add that to what Imani said that it is very likely that within the next year or two we're going to see a direct challenge to all of the precedent in Roe versus Wade. So I mean we're going to have the justices more likely than not taking up a challenge to this very case. So we've got to know what they're doing. Like what does it mean to have a direct challenge to Roe versus Wade?

Marc Faletti:

You walked us through a lot of the arguments from Sarah Weddington and the Texas droopy dogs. Out of all of those, which argument impressed you the most?

Jessica Pieklo:

I loved listening to Sarah Weddington stand up there and make the case to the men on the court about what a pregnancy does to a person's body and how it is this major life event. And they should not be up there just sort of pontificating about moving if one finds themselves pregnant and in need of an abortion in the state of Texas, for example. And thinking about what it means to be a 26 year old woman in the early 70s during that cultural moment, making that argument at the Supreme Court. You feel the gravitas of it. You feel the cultural moment when you're listening to it. And for me, I still get goosebumps when I think about it.

Imani Gandy:

What impressed me about Sarah Weddington is just how prepared she was. She knew what she had to argue. She knew what results she wanted. And so she provided several different constitutional paths to get the Justices to where she wanted them to be. So she says, okay, I got the ninth amendment, you want to go ninth amendment arguments? Here, I got your ninth amendment argument. You want to go 14th amendment? Hey yo, I got your 14th amendment argument. So she was prepared in every respect to push back on any of the nonsense that the justices were throwing at her. One minor exception when she sort of conceded that often your eight year old [inaudible 00:09:51] But you know, as we said in this series, she sort of didn't have a choice but to make that concession, unfortunately. But aside from that, she was ready as compared to the dudes in the Texas attorneys who were arguing who are clearly not ready, they weren't ready for her jelly.

Marc Faletti:

So, speaking of those guys. And kind of also Justice White, which of the arguments pissed you off the most?

Jessica Pieklo:

Yeah. So it's kind of hard to say. I mean the you can move and you made your choice when you had sex are just wild to me. We hear that from anti-choice folks now, but really just to hear an attorney go up there to the podium and be like, nope, you made your major choice when you decided to have sex and sort of tough breaks. That gets my blood boiling. And the idea that Justice White was up there basically advocating for the state of Texas is still something that chaps my hide.

Imani Gandy:

Yeah. The you can move thing really just, I mean we're talking about people who have roots in the state of Texas who may have never lived anywhere else, but taxes. They have families, they have children. And this idea that once you live in Texas, you've already made your choice. Anytime you have sex, whether it was consensual or not, you're responsible for the pregnancy that results. That is insulting. And I found it really just deplorable.

Marc Faletti:

As they say, writers have to kill their darlings and it does sometimes genuinely suck. Were there any details or ideas that you were sad to leave out of our series?

Jessica Pieklo:

You know, Imani has a great string of jokes -- being a Gen Xer, I think all of us are Gen Xers so I sort of tend to live in that cultural zeitgeists -- and I was really upset. I had a whole sort of joke situation, a joke-

Imani Gandy:

A bit. It was a full bit.

Jessica Pieklo:

I had an entire bit about promiscuous sluts, right? About how the fact that the state of Texas thought that these women were promiscuous, sluts and therefore it didn't deserve to have abortions because hey lady, keep your legs closed. And then at the end of this bit I was able to sort of shoehorn in a Jane you ignorant slut, which is funny on many levels because A, the promiscuous slut routine and then B, Jane. Jane Roe. I mean that was their actual name. And so that's a callback to a bit from Saturday Night Live with Dan Akroyd and Jane Curtin, which is one of the most hilarious bits. And if you're not a Gen Xer, you might not recall it.

Jane Curtin:

Dan, there's an old saying behind every successful man, there's a woman, a loving giving, caring woman. But you wouldn't know about that Dan, because there's no old saying about what's behind a miserable failure.

Dan Akroyd:

Jane, you ignorant slut.

Jessica Pieklo:

Yeah, I was really sad.

Imani Gandy:

It was really funny.

Jessica Pieklo:

I was sad to lose that one.

Imani Gandy:

It was really funny.

Marc Faletti:

Can I throw one in there?

Jessica Pieklo:

Yeah, definitely.

Imani Gandy:

Yeah, please.

Marc Faletti:

When we were demoing and playing around with the format, I found this trailer for a 1989 TV movie called, you'll be shocked to hear this. Roe versus Wade. Do you guys remember who played Norma McCorvey, AKA Jane Roe?

Imani Gandy:

I believe it was Holly Hunter. I wish I could do Holly Hunter's voice because she's got a very, very specific way of talking that I love. But yeah, Holly Hunter.

Marc Faletti:

And do you remember who played Jay Floyd?

Jessica Pieklo:

It was that dude from Lost, right?

Marc Faletti:

Yeah. Terry O'Quinn, the guy who played John Locke on Lost.

Jessica Pieklo:

That's so wild.

Imani Gandy:

It is so wild.

Terry O'Quinn:

Children's lives are depending on me. This is the one I have to win.

Narrator:

Oscar nominee Holly Hunter in the film, People Magazine called the best TV movie this year. The motion picture event of the year Roe versus Wade, Monday.

Marc Faletti:

There's just something really odd about that connection, but Locke and Floyd I'm really fascinated by, and I wanted to work that clip in so badly.

Imani Gandy:

Especially because when you think about the Kansas Supreme Court's ruling on abortion, finding a right to an abortion in the constitution, they talk about John Locke in the opinion.

Marc Faletti:

Well now you're really blowing my mind!

Jessica Pieklo:

This is what's so amazing about this series is that this case brings all of these other random stuff up.

Marc Faletti:

Normally we're spread around from Philly to Boulder to Oakland. Was there anything about recording in studio together that felt really different?

Imani Gandy:

Yeah, it was nice to be able to look at Jessica and see her reactions and play off of her reactions and also it was just kind of nice to be in like a fancy real studio. I felt like an actual podcast or a real talent, which was really nice and it was also nice to be able to look at you, Marc, to sort of see your reactions to what we were doing. Because I could tell if he was about to say, okay, we got to do that again. So I would just immediately just start to do it again.

Marc Faletti:

Yeah. I really enjoy that by the end, you guys were basically self-directed. I know it, I know it.

Jessica Pieklo:

We don't get a share snacks when we record Boom, Lawyered because we're remote. And so being in the same room and being able to share snacks was really great too.

Marc Faletti:

Could you tell me about that?

Imani Gandy:

We literally, we have a community apple, we have community apple. And the first day of recording Jess said that her husband had this idea that when you get really phlegmy you eat an apple, and that's supposed to help. And I'm like, oh, come on. That's absurd. So she pulls out this honey crisp apple. I love honey crisp apples and I take a bite and I'm like, holy crap, that actually works. So we just have had this apple sitting between us for the past two and a half days that we've both been taking chunks out of just this community apple.

Marc Faletti:

Minor correction. You have actually not had one apple for three days.

Imani Gandy:

No, that would be really gross. One apple each day.

Jessica Pieklo:

And I would just like the record to reflect that our recording engineer, Kyle also reinforced this idea as the apple is a palette cleanser for recording, so I feel is specially vindicated.

Imani Gandy:

And I'm sure your husband Kelly does as well.

Jessica Pieklo:

He was like, yes.

Marc Faletti:

I will put a picture of the apple in the Facebook group. That's a Boom, Lawyered Facebook group for anyone who wants to go see a picture of one of the three apples. That played a key role in our recording sessions. Okay. Back to the actual content here that we covered. The arguments felt like a route. It was Weddington in a landslide. Was the decision as big of a landslide though?

Imani Gandy:

I mean it was a seven, two decision and so you would think that would have been a landslide. You know, abortion rights for everyone, woo-hoo. But that's not the case and I think that's because of the subject matter. I don't think that Sarah Weddington could have done any better of a job to get any better of an opinion. I think abortion is fraught with emotion. You know what I mean? It's fraught with nonsense. I was going to drop an F bomb, but I'm not going to do that. I'm going to be mature.

Marc Faletti:

Classy.

Imani Gandy:

I'm going to be classy, classy Gandy. So I think that what's interesting is that she made this argument, she did the best that she could, but I don't think there was any way this group of nine dudes was going to say abortion on demand. You know what I mean? Justice White was so concerned about finding a

fundamental right to abortion leading to abortion on demand. So what ended up happening is they sort of split the baby, right? Pregnant people have-

Jessica Pieklo:

No pun intended, sorry.

Imani Gandy:

No pun intended. So you know, pregnant people have a right to an abortion through the first trimester. But even through that part, states can still impose regulations, quote unquote informed consent laws and ultrasound laws and all of these things that we've seen today. And then as the pregnancy progresses, the pregnant person sort of loses her interest or their interests in their own reproductive autonomy. And the state's interest grows and grows and grows until you get to fetal viability and the state can say, okay, that's it. You're cut off. No abortion for you. So while it was seven, two in favor of finding a right to an abortion, the way that they found that right is not as much of a landslide as I would have wanted it to be.

Marc Faletti:

And what did it say about fetal personhood? We open with that as the topic because it's so central to all of these issues.

Jessica Pieklo:

So we talked about it in the series, but ultimately the court decided that a fetus isn't a person for purposes of the constitution. So hooray, that's great news. But they punted, like we said on this question that Texas wanted them to answer of when life begins. And that's really important because as we see these direct challenges to Roe versus Wade come up, that's where anti-choice advocates are going to focus in on their intent.

Jessica Pieklo:

So by leaving that open, even though the decision ultimately found the right to an abortion, as Imani talked about, it's a compromise opinion. That right exists. The state has interest and then there's the possibility that the developing pregnancy also has interest. But even in the pregnant person's interest, the court wound that all up with various ideas of needing to consult with a physician with people trusted advisors, that kind of thing. So as Imani said, the idea that abortion is fraught is sort of baked into the cake of the Roe decision and we've never been able to get away from that and it really informs the conversations we still have about abortion in the courts today.

Marc Faletti:

And what about standing and pregnant people and the right to sue? We talked about Jay Floyd spent so much of his time trying to prevent Roe from even being on the table. What did they say about that in the decision?

Imani Gandy:

Basically they said, bite me. You know what I mean? But you know, he spent 15 minutes talking about standing and trying to make the case that Jane Roe shouldn't even be here because she's no longer pregnant. And the court was just like, obviously she can be here, let's move on.

Marc Faletti:

Did they write a whole big thing?

Imani Gandy:

No, it's like a sentence.

Jessica Pieklo:

Yeah, it's one or two sentences in the opinion. It's wild.

Imani Gandy:

Yeah.

Marc Faletti:

Ouch.

Imani Gandy:

Yeah, exactly. Good waste of time there, pal.

Marc Faletti:

Since the decision though, a lot of laws and cases have chipped away at the fundamental right to abortion. So which of those have done the most damage in your opinion?

Jessica Pieklo:

Well one that jumps out immediately is the Hyde Amendment and for our listeners who don't know what that is, that is a prohibition on federal family planning dollars being used to provide abortion care and so that keeps abortion effectively out of Medicaid. And that's huge because that means that if you are someone who is low income, in a vulnerable population relying on Medicaid for insurance coverage, you don't have coverage for comprehensive reproductive health care. Abortion is cut out of that. And the Supreme Court said that was just fine.

Jessica Pieklo:

And the decision that upheld that, *Harris vs McRae*, Chief Justice William Rehnquist wrote it and effectively he said, okay, fine. Well, we maybe, as the court found that the right to abortion exists. We don't particularly like that. And so what we don't have to do is say that the government has to make that available, has to make it accessible. So if the government wants to throw up whatever obstacles it can, it's not doing that because you're pregnant, it's doing that because you're poor and that's okay and it's just cynical and terrible. And so that really set the stage I think for the idea that abortion is in this country is still legal in name only for many people that it is sort of an aspirational right. It's something that exists, but they don't have the ability to really access or take advantage of when need be. So I mean that's immediate. And what else, Imani?

Imani Gandy:

I have to go with the 2007 decision. *Gonzales v Carhart*. And that's the case where the court upheld the federal quote unquote partial birth abortion ban. And the most sort of insidious part of that decision

came from our old friend Tony Kennedy, who essentially without having any authority to back it up said, I think it's pretty common to think that women tend to regret this choice. They're basically killing this life that they've sustained in their womb.

Imani Gandy:

And so it set the stage for anti choicers to begin this idea that, or not to begin, but to continue this idea that abortion is this really traumatic emotional decision that pregnant people make, but that they really hated and causes all this trauma. They may, after all suffer from post abortive trauma syndrome, which means that they might become suicidal or turn to drugs, or every time they hear a vacuum cleaner, they're triggered all of this stuff that is just simply not true across the board. That is not to say that there aren't some people for whom this is a very difficult decision, but studies show that something like 95 to 97% of people who get abortions don't regret it. And so the idea that Kennedy inserted this, abortion regret syndrome into Supreme Court jurisprudence without having anything to back that up, just set the stage for anti choicers to continue to claim that abortion is this horrible thing. And I think that that's really unfortunate.

Jessica Pieklo:

And in between the Hyde Amendment and Gonzales, I think we have Planned Parenthood versus Casey, which is like-

Imani Gandy:

The big daddy.

Jessica Pieklo:

Because that case, not only... It's this gas lighting of an opinion, right? So Planned Parenthood versus Casey says we're upholding Roe versus Wade, we're upholding the right to an abortion and then the rest of the opinion dismantles that right. And changes the analytical framework and really opens the door for all of the shenanigans that we see at the state level now in terms of abortion restrictions.

Marc Faletti:

So Harris versus McRae, Gonzales versus Carhart, Planned Parenthood versus Casey. I feel like we have some candidates for a season two.

Imani Gandy:

Oh, I think we do.

Marc Faletti:

Alright, well thank you both so much for sitting down and having this conversation!

Jessica Pieklo:

Oh, thank you. This has been amazing.

Imani Gandy:

This has been the best.

Imani Gandy:

And that's it for our season.

Jessica Pieklo:

If you liked this new series and want us to make more of it, we need you to do a couple things.

Imani Gandy:

One, share it. Please help us spread the word, introduce people to the courtroom drama that actually affects their lives.

Jessica Pieklo:

And two, please rate and review us on Apple podcasts. Every review, even a super short one, helps us rise up the rankings and more people need to see abortion related pods in their feeds. Right?

Imani Gandy:

Right. And three, tell us what you think you can find us on social media. I'm @AngryBlackLady on Twitter and Jess is @Hegemommy. That's H-E-G-E-M-O-M-M-Y.

Jessica Pieklo:

You can also join our Boom! Lawyered Facebook group where you can discuss what you thought about the series with other fans of the show. We've got over a thousand folks in there, so come please be part of our family.

Imani Gandy:

And that's a wrap. Until season two of We'll Hear Arguments, please find us on our regular podcast. Boom, Lawyered. That's where we cover the biggest cases in the present day.

Jessica Pieklo:

Thanks for listening folks, and we'll see you on the tubes.

Imani Gandy:

See you on the tubes.

Jessica Pieklo:

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

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Jess and Imani write and host the series, Marc produces and edits it for Rewire.News.

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Imani Gandy:

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Jessica Pieklo:

Research support is provided by Joe Constantz.

Imani Gandy:

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Jessica Pieklo:

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