

[Boom! Lawyered: Rapid Reaction—The Latest Birth Control Battle at the Supreme Court](#)

Imani Gandy: Hello, fellow law nerds! Welcome to a special episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that really just wants nuns to stop complaining. I'm Imani Gandy.

Jessica Pieklo: And I'm Jess Pieklo. Rewire.News is dedicated to bringing you the best reproductive rights and sexual health 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: We also want to shout out our amazing new donors.

Jessica Pieklo: Yes.

Imani Gandy: Holly, John, Mary Ann, Tessa, Sharon, Laura, Sierra, Ben, Rachel.

Jessica Pieklo: And an extra big thanks to our newest monthly donors! Those folks are Clarissa, Stacy, Alan, Dana, and Jillian. We're blown away by your support, y'all, and you can join these folks at rewire.news/boomgive.

Now Imani, let's dive in.

Imani Gandy: So Jess, this is a big day for us. Just as a team-

Jessica Pieklo: So big.

Imani Gandy: ... As a nation. I mean, we had our first live tweet of oral arguments where we're just sitting at home, in our underwear. Like, you're not in D.C., you're not sitting behind some pillar trying to figure out who's speaking and how you can see and what they're saying. I mean, this is a big deal. How did you feel about these virtual arguments?

Jessica Pieklo: Well, I wore a bra.

Imani Gandy: Well that's good!

Jessica Pieklo: I figured we'd keep it professional, you know. I was very excited about the idea of being in my home office in yoga pants, but not just because ... Like I love going to the Court. Going to the Court is a privilege, it's an honor, and absolutely it is something that is an important part of the work that we do. But the Supreme Court is one of the last bastions of the lack of transparency and democracy. And it is so exciting for me, as a law nerd, as I know it is for you, for the ability of our listeners to be able to be in the courtroom with us. To hear Justice Alito sneer at counsel, right? To have him like spit out a question and be like, "I hate birth control. Stop being mean to nuns."

Imani Gandy: Right, it doesn't really come forth off the page as much as when you hear it, right?

Jessica Pieklo: Right.

Imani Gandy: And also, what's up with chatty Clarence Thomas. I mean, what? That man has a lot to say, apparently. Who knew?

Jessica Pieklo: Who knew? So this was one of the like ... I mean yes, big moment, live streaming arguments, and the way in which the forum changes the event, I think, is so really interesting. Clarence Thomas is asking questions. This is the first time he's spoken in cases in years, right? Like we were joking around about what's he going to do, is it going to be like, "Justice Thomas pass," like each time. He missed the first question. I joked on Twitter that maybe he was off washing his hands.

Imani Gandy: I think he might have been on mute. I think we're getting that thing that all of us are going through in Zoom meetings where somebody's on mute, somebody might be like on the toilet, you know what I mean? Like who knows what's going on?

Jessica Pieklo: And Ruth Bader Ginsburg showing up, coming out swinging from a hospital bed. Had we not been in the middle of a pandemic right now and the court having to make these kinds of adjustments in the way it conducts its business like everybody else, this case would have gone on last week, except Justice Ginsburg may or may not have been there, right? Like I mean all sorts of things are different now and so that is really interesting. I really hope that the Court does not go back. Not because I don't want to go to D.C. I love you D.C. I have lots of friends there. We loved it. However, everybody needs to see how the Court works. This is too important to keep behind closed doors, to keep locked in pillared rooms, and so this is a real important moment for democracy and I'm glad I got to celebrate it with you.

Imani Gandy: It's 2020, what are we doing here, people? There is literally no reason why the Supreme Court arguments shouldn't be, at a minimum, audio streamed. I would like for them to be video streamed as well, but at a minimum, everyone in this country should be able to hear what goes on in that courtroom. I mean, they are deciding really important issues, like whether or not employers can avoid providing birth control coverage in the health insurance plans that they offer their employees. That was the nug of this argument. Well, not even the nug of this argument. The nug of this argument was the APA, but for some reason we didn't seem to be talking about the APA too much.

So let's get into the substance of the arguments. What was your impression of how these arguments went in terms of what they were supposed to be talking about versus what they actually did talk about?

Jessica Pieklo: So this is actually the third time that the Supreme Court has had the Birth Control Benefit in the Affordable Care Act before it, which is bonkers.

Imani Gandy: The third time. It's unbelievable. The third time ... We first started covering these cases, Jess, in 2012.

Jessica Pieklo: That's like a glimmer of a memory of times past.

Imani Gandy: It's a whisper, of yesteryear.

Jessica Pieklo: Did I have both my kids by then? I think I did. I don't even know, that was so long ago.

Imani Gandy: You at least had the one!

Jessica Pieklo: I at least had one. Anyway, we've been doing this a long time. The third time that the case has been before the Court, and you could tell that the justices were frankly over it. In a lot of ways, these arguments were a retread of Hobby Lobby, the very first case. And that case was about can some for-profit businesses, like Hobby Lobby, like Conestoga Wood Specialties, a cabinetry business out in Pennsylvania, do they have to provide birth control coverage for their employees if they have a religious objection? Or is there some alternative that they can avail themselves of in which to avoid that?

And in Hobby Lobby, the Court said, "You know what? There's an alternative. There's an accommodation. We think it's probably okay, but maybe we should look at an exemption also." And so conservatives said, "Let's look at the exemption." That was the second time that the Court heard the Birth Control Benefit cases in Zubik. They didn't decide anything. So this case is effectively all of those fights coming together.

Imani Gandy: So I just wanted to backtrack a little bit just to remind our listeners that the Zubik case you're talking about is Zubik v. Burwell. And that was a series of cases in which the Little Sisters of the Poor again were involved, regarding religious nonprofits and their responsibilities under the Birth Control Benefit.

So back when Zubik was heard, we were in 2016, we were still months away from literally probably the worst day in all of our lives, which is when Donald Trump was elected. But if you'll recall, Scalia had just died, so we had a 4-4 split. And so rather than actually tackle this issue about whether the accommodation was fair or whether it was proper under the Religious Freedom Restoration Act, the Court just sent it back to the lower court, to the circuit court and said, "You know what? Figure it out. There's got to be a compromise here that you can work out."

Jessica Pieklo: And as Chief Justice John Roberts asked in arguments today, like, why can't we all get along? Why can't we just come up with some sort of solution? And this

case, this Little Sisters of the Poor and Trump versus Pennsylvania, these cases are hopefully going to answer this question of can we all get along? I don't know.

So as Imani said, the nug of the question is, can your employer refuse to offer coverage for birth control in your employer provided health plan? And the court doesn't seem ready to answer that question just yet.

Imani Gandy: Which, why? It's been eight years. Can we get an answer to that question, please? Because it's starting to drive me a little batty.

Jessica Pieklo: Seriously. So the fight, did the Trump administration do the right thing, basically, when it issued exemptions that said, "You don't have to comply with the Birth Control Benefit if you have a religious objection or if you have a moral objection." And this moral objection is like a huge thing and the Court only spent a couple minutes on it and that's kind of troubling.

Imani Gandy: It's alarming because what we're talking about here, it's one thing to say that a religious group, like a house of worship, or even a religiously affiliated group, a group like the Little Sisters of the Poor or any other nonprofit organization that is sort of steeped in a religious belief. It's one thing to make an argument that, "Those sorts of organizations shouldn't have to comply with the Birth Control Benefit because it is an affront to their religious sensibilities." I don't agree with it, but I understand the argument.

What Trump has done now, has added a moral objection on top of the religious objection. And again, I think you tweeted this and we mentioned it last week, the statute is not called the Moral Freedom Restoration Act, right? It's called the Religious Freedom Restoration Act. So why morality has come into it is ... We shouldn't be sitting here talking about the morality of birth control or anything because morality is subjective, right? So as soon as we start talking about something that's subjective, then the exemption ends up swallowing the rule. And that's what we have here. Trump has made it so this exemption to the Birth Control Benefit has swallowed the rule to such a point that even secular organizations can now avail themselves of this. And that's just bonkers. As long as they're not publicly traded, right?

In-N-Out Burger, if you're in California, In-N-Out Burger, they are a restaurant with a really great burger, but it's run by a religious family. They used to support a lot of anti-choice organizations, Operation Rescue and what have you. So are you telling me now that the person who is taking my order at In-N-Out Burger can now be told by In-N-Out Burger that they are not going to provide health insurance that includes birth control because they have a moral objection to it? They're not a religious organization, they're a burger shop. But now burger shops can say, "I'm sorry, you don't get to have birth control because we don't like it." That's a real, just vast expansion of what this rule was ever supposed to be.

Jessica Pieklo: And this was a point that Justice Sotomayor and Justice Ginsburg really honed in on with the Deputy Attorney General from Pennsylvania, right? He was the one who pointed out that, well, if you are an employer who has a moral objection to women in the workplace, generally, then you could opt out of this coverage and why not take advantage of that?

I mean, what the administration is doing is creating a bunch of incentives for employers to basically trim down health benefits. Because one of the things that I yell about, about this case, about these fights all the time is that this is not a fight about free birth control. This is a fight about not discriminating in the delivery of employee benefits. I pay health insurance premiums. Those health insurance premiums cover preventative care. Birth control is preventative care. That is what the Birth Control Benefit in the ACA was intended to sort of complete that circle, close that loop. That was Ruth Bader Ginsburg's point in oral arguments and the Trump administration has turned that on its head. The big question is whether or not the Roberts Court is going to allow them to do so.

Imani Gandy: And one point that I wanted to just add on is that not only are we not talking about free birth control, but we're not talking about some sort of employer giveaway or some sort of employer freebie, some extra thing that they've decided to permit their employees to have. Because it's part of your wages, right? Like employee benefits, like health insurance, it's basically the same thing as wages. You are earning those benefits through your labor. So by removing a specific benefit from your health insurance, you're taking money out of someone's pocket, essentially.

And if you're not going to give that money back in some form of increased wages, increased salary, so that they can then take their money and then go buy the health insurance that they need. Which in and of itself is a problem because studies have shown that the more hoops you make people jump through in order to get birth control, the less likely they are to actually even get birth control in the first instance or get the birth control that is most effective for their body, for their situation. Because we all have different bodies and there are a lot of different kinds of birth control and some of them work for some people, others don't. It's not a situation where you can just pop into the nearest pharmacy and grab birth control off the rack and be like, "Yeah, this is great." So it's just very frustrating on multiple levels.

Jessica Pieklo: That's exactly what Solicitor General Noel Francisco made it sound like, though. He really pressed this idea that there's no harm to employees here because contraception is widely available. And he did that without even showing any sort of recognition, any shame, in the fact that the Trump administration is attacking contraception access in its Title X programs, right? That the administration is right now trying to repeal the Affordable Care Act in its entirety. Like Francisco is up there being like, "Oh no, all you got to do is go down to the 7/11 and you get a pack of pills." That's not how it works.

Imani Gandy: Not at all.

Jessica Pieklo: And between those assertions and then Paul Clement, who was representing the Little Sisters here, being like, "Well you know, if you make those nuns fill out a form, they're going to stop giving care to the elderly." I needed whisky.

Imani Gandy: What in the world was that? That literally blew my mind and here's why it blows my mind. This is what I've been yelling about ... I mean, I was pestering you yesterday. Like Jess, I don't understand.

Jessica Pieklo: It's true, she was.

Imani Gandy: I don't understand. Why are they here? I don't understand. And here's why I don't understand. The Little Sisters of the Poor have a church plan, right? It is a church plan that covers the sort of health insurance policies that they operate, right?

Jessica Pieklo: Yep.

Imani Gandy: That church plan means that they will never, ever, ever be forced to provide birth control to their employees, ever. You know, back during the Obama administration, the Little Sisters of the Poor became the sort of face of this litigation because, "Oh look, they're cute little nuns and they're providing all of these lovely charitable services for poor people. And if you force these nuns to take or dole out birth control to their employees, then A, how dare you force nuns to take birth control and B, the nuns are just going to stop caring about the poor. They're not going to give a shit about the poor anymore. They're just going to go out of business."

Which, no they are not. Because again, they have a church plan and under a law, a 1974 law, one of the most boring laws in the history of laws, called the Employment Retirement Income Security Act, or ERISA, ERISA says that there can be no government regulation of church plans. There can be no government regulation of church plans. So the Little Sisters literally have no claim. I don't understand why they are even here. Honestly, I don't understand. The third circuit, which is the lower court in this case, allowed them to intervene as a defendant, which is ... I mean, I don't want to get into a whole civil procedure thing here, but that's an unusual thing to do. And allowing them to intervene as a defendant to take sides with the Trump administration in a case where they would be under no requirement to provide birth control. It's bizarre.

And I was actually thinking about why in the world did this third circuit permit them to intervene? Because the lower court said, "No, you can't intervene. Like what are you even doing here?" And the third circuit said, "No, no, actually they can intervene."

So what did I do last night when I was yelling about this in my house? I went and looked to see who the panel of judges were on the third circuit. Would it surprise you that it was three Republicans? It was one Trump appointee, one

Reagan appointee, Reagan, 80s Reagan, and one Bush appointee, W. Bush appointee. So do we even have a rule of law anymore? Are we even paying attention to the federal rules of civil procedure or are we just allowing cute little nuns to bring lawsuits or intervene in lawsuits because they're cute and they put a good face on an issue that the Trump administration is trying to essentially just blow up, right? He's blown up the Birth Control Benefit and he has pushed nuns out in front of him to do so.

Jessica Pieklo: Yeah, I mean, that was from the beginning. When President Trump announced three years ago, this whole thing, he had the Little Sisters of the Poor in the Rose Garden. He called them up and was like, "I'm going to win your lawsuit for you with an executive order. How neat is that?" I mean, it's just bonkers.

But how great was it during oral arguments when Justice Sotomayor honed in on this point? That what are the Little Sisters even doing here?

Imani Gandy: I yelled.

Jessica Pieklo: Because she didn't even bother with addressing that with Paul Clement, with the attorney for the nuns, because why give him the oxygen and the time to try and craft an excuse. She went right to that point with the Deputy Attorney General from the state of Pennsylvania and it was beautiful.

Imani Gandy: It was.

Jessica Pieklo: It was like dramatic and it was just like, "Oh, so you're telling me their claim is moot," and she just left it and let it like sit there. And so another benefit to virtual arguments is that it is not at all weird when I'm like fist pumping and going, "Yeah! Fuck yeah, Soto!" I can't do that in the courtroom.

Imani Gandy: No, no you'd probably get thrown out.

Jessica Pieklo: But I can do that in my office.

Imani Gandy: But yeah, you're right. I yelled, "Thank you," when she said that, because this is just a cynical ploy, right? It's a cynical ploy. They're being used to tug at people's emotional heartstrings. A lot of people don't know what the hell ERISSA is, I barely know what the hell ERISSA is and I'm a lawyer. Like nobody cares about those sorts of statutes and that sort of statutory construction. But it's really important because the Little Sisters have no business being in court. This case has no business being heard right now. I mean it's just-

Jessica Pieklo: And you started to get that sense in the arguments, right? Like it was almost like you hear a couple rehashing an argument from a decade ago. Like, "That time we were out at the bar and you got drunk and flirted with the other person." Like, "We're going to be mad about it still and work that out now." That's a lot of what this argument felt like, except that we've got a couple new additions on

the Court, right? This is the first time that the Court is hearing a challenge to the Birth Control Benefit with both Justice Neil Gorsuch and Justice Brett Kavanaugh on it and that could very well change the way in which the Court approaches this.

At the end of oral arguments though, it wasn't totally clear to me how the court was going to come out of this case. What about you, Imani?

Imani Gandy:

Yeah, it's not clear to me either. Justice Roberts' sort of, "Why can't we all just get along?" attitude is a little bit uplifting. Also, I mean, even if you go back six years ago to the Hobby Lobby decision, even the Hobby Lobby decision sort of indicated or intimated, that this accommodation that we're fighting about was just fine, right? Like it's just fine. They've got this accommodation, so why don't you let closely held for-profit corporations also avail themselves of this accommodation. Then here we are, six years later, now arguing about whether or not this accommodation is fair.

And I did just want to touch a minute on something that AG Fischer, who is the Attorney General for Pennsylvania, brought up and that is, what are we talking about here when we talk about a substantial burden, right? Because the Religious Freedom Restoration Act says that the government cannot substantially burden a person's sincerely held religious beliefs. So it seems to me that if filling out a form is a substantial burden, then substantial doesn't mean anything. We're just reading the word substantial out of the statute and now it's going to say, "A government is not permitted to burden the religious rights of individuals," and that cannot be.

It cannot be that we are just going to allow individual people to decide for themselves what constitutes a substantial burden or not. And then the court just has to accept that. Because rules of statutory construction tell us that Congress adds words into statutes for a reason. They don't just throw words in there for just the hell of it. They added substantial for a reason. So that word substantial must come into play somehow and it doesn't seem like it's going to. It just seems like anybody who has any kind of objection whatsoever, whether they're burdened, substantially burdened, minorly burdened, insubstantially burdened, it doesn't matter. And that concerns me because it means that laws don't mean anything. The words that Congress uses to craft laws don't really have any meaning because the Court can just read some words right out of the statute if they want to.

Jessica Pieklo:

This is why I was so appreciative of the fact that Justice Ginsburg got to participate in today's arguments because honestly, she didn't ask any questions. She had the classic, "I've got more of a comment than a question," each time that she was up. And her entire purpose in today's argument seemed to be to remind the attorneys there of two things. One, that when the court decided Hobby Lobby, it did so because as you said, it was operating under the assumption that the accommodation and exemption processes that the Obama administration had put in place, were good. That they were something that we

all agreed were important and that folks could avail themselves of. Not that in a few years later that religious conservatives would be back before the Court challenging those very vehicles to say that they are too burdensome. She said that's hogwash.

And then also to point out on this burdens point that you bring up, that the burden calculus is a balancing. You've got to balance the burden on the employer against the burdens on the employees. And what about the burdens on the employees? When we're talking about hundreds of thousands of people who will lose an employment benefit in the middle of a pandemic. Like this is a really big deal. And why it's important to talk about this as a workers' rights case, right? That's why Paul Clement is there. Paul Clement is the attorney that conservatives bring in to defend two things, evangelical interests and corporate interests. So it is no, no, no coincidence that he is there representing the Little Sisters of the Poor because they are the face of bringing together evangelical interests and corporate interests to screw over workers.

Imani Gandy: Yep.

Jessica Pieklo: That's it.

Imani Gandy: Yeah, that seems like a good place to end. I mean, it's not exactly uplifting, but it's the truth. I mean, this is the world that we live in right now. And I just want to add one thing that was also discussed during these oral arguments, when does it end? Right? If we're going to say that it's okay for employers to, on religious grounds, prohibit offering birth control coverage to their employees on religious grounds, so why can't we just say that, "It's my religious belief that women should be paid less because their contributions are less, or because we believe that they should be incentivized to stay home, which is where God says they should be," right?

Or what if under my religious beliefs, "I can't hire black people because black people, as Cain said ..." Something Cain and Abel, and their sin, and whatever. You know what I mean? People use the Bible to justify slavery. You know what I mean? So there are religious reasons that you can hang on to, to justify almost everything. "It's against my religion to hire trans people. It's against my religion to rent a house to a gay couple. It's against my religion to permit gay people to foster children." There's a case in the pipeline about that. So it's like we are really in a place where religion is going to swamp civil rights and I don't want to live in that world.

Jessica Pieklo: Nope. And as Justice Sotomayor pointed out with Paul Clement, and really this is another moment where she just boxed him in and it was a beautiful thing to watch, people have religious objections to vaccines. So Clement's position, the Little Sisters position, the government could mandate a COVID-19 vaccine and employers could opt out of it because, as we know, folks have religious objections to vaccines. And Sotomayor wanted an answer from Clement on that and he got real wishy washy. So I think that those are the tells, right? When we

look for the tells in oral arguments, what are the ways in which advocates avoid answering questions is a tell. And that was one from Clement.

Arguments lasted an hour. They were more structured than they normally are, because they were teleconference. Will that change the actual outcome? I don't know, I guess we'll see in like a month.

Imani Gandy: Yeah, I guess we'll see. We've got a lot of decisions coming up that are making me very sweaty.

Jessica Pieklo: It's going to be a sweaty June, folks. A sweaty June.

Imani Gandy: It's going to be a very sweaty June and we're not even allowed to go outside and like get air. So we're just going to be sweating in our houses.

But that's going to wrap it up for us this week. Thank you for joining us here. Thank you for joining Jess as she took over the Rewire.News Twitter account and live tweeted her little heart out.

Jessica Pieklo: That was so fun.

Imani Gandy: I could tell she was having so much fun getting to be her best snarky self.

Jessica Pieklo: I only dropped one video of a country music star that I love too. I was pretty proud of the restraint.

Imani Gandy: We're very proud of you, Jess. You did a great job. Truly you did. But before we go, we do again want to thank all of you who have been donating to help keep Boom! Lawyered up and running. We really did not expect this level of support so soon. Thank you so much. Please just give what you can, share, please?

Jessica Pieklo: Thank you. Seriously, the support has been absolutely overwhelming and if, and only if, you have disposable income, please throw us a couple bucks so we can keep this wild ride going. As Imani said, we've got a bunch of decisions happening pretty soon, not just Little Sisters, we've got those Title VII cases, which could happen this week still. We've got an abortion case. Remember the abortion case? We were actually in D.C. for that. So it would only take a second if you could toss us a couple bucks and really every dollar counts. It really does.

Imani Gandy: The link is rewire.news/boomgive. That's rewire.news/B-O-O-M-G-I-V-E.

Jessica Pieklo: And it's also in the show notes in your app.

Imani Gandy: If you would like to talk more about this, the birth control cases, the Title VII cases, abortion, what you're watching on Netflix, you can follow me @angryblacklady and you can also follow @hegemommy, H-E-G-E-M-O-M-M-Y. You can and should follow @rewire_news and you should join our Facebook

group, Boom! Lawyered, look it up on Facebook, answer the questions. If you don't know the answers to the question, just make something up. Just make something up that's going to let us know that you're ride or die for repro rights and justice, and you're not some sort of anti-choice ding dong.

Jessica Pieklo: No anti-choice ding dongs, please.

Imani Gandy: We don't want anti-choice ding dongs in our safe space. But aside from that, what are we going to do, Jess?

Jessica Pieklo: We're going to see you on the tubes, folks.

Imani Gandy: We're going to see you on the tubes, folks.

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