

Imani Gandy: Hello, fellow law nerds. Welcome to a special reaction episode that is live, very exciting, an episode of "Boom! Lawyered," a Rewire News Group podcast hosted by the legal journalism team that's live and in your face, and wants you to know that race exists, and Black people, we still exist. Amazing, I know. I'm Rewire News Group's Editor-at-Large, Imani Gandy.

Jess Pieklo: And I'm Rewire News Group's Executive- I'm Jess Pieklo, Rewire News Group's Executive Editor. I'm so excited to be live, I stepped on my own line immediately. This is amazing, though. Rewire News Group is the one and only home for expert repro journalism that inspires you to, first of all, give it up to Imani Gandy for live-tweeting the downfall of affirmative action with GIFs and humor and grace. The "Boom! Lawyered" Podcast is part of that mission. A big thanks to our subscribers, a welcome to our listeners, and hello, viewers, live! We're live. We're live, Imani.

Imani Gandy: It's very exciting.

Jess Pieklo: We're live. Whew, OK, but why we're live isn't the greatest, all right? The Supreme Court is actually still, now, we had originally scheduled this for what was supposed to be the end of arguments, but they're having so much fun, they're still going. Today, they're hearing arguments in two cases that will likely overrule more than 40 years of precedent regarding race-based affirmative action in higher education. It's a mess.

Imani Gandy: It is a mess. Both cases, Students for Fair Admissions v. Harvard University and Students for Fair Admissions v. University of North Carolina, were filed by none other than Students for Fair Admissions.

Jess Pieklo: Wow.

Imani Gandy: Which is a, it's an anti-affirmative action organization that is backed by a lot of dark money, but it's led by conservative Edward Blum. And just so you guys will know who Edward Blum is, do you remember Abigail Fisher you know, Becky with the Bad Grades? The woman who lost her case in 2016. She tried to overthrow affirmative action. The court was like, "Nah, dude. Affirmative action, it's still legit."

Well, here we are again with Students for Fair Admissions back in front of the Supreme Court, asking the Supreme Court to ban the use of race in admissions despite 40 years of precedent. Forty years of precedent in which 12 justices, nominated by nine different presidents, have already ruled that schools may consider race as a factor, not as like, an ipso facto situation, but just as a factor when considering school admissions.

Jess Pieklo: So, Imani, before we really get into the nugget of the case here, and the details here, race-based affirmative action has been around for a long time, like 40 years-plus, right? Why, today, are we, it's Halloween, why are we hearing these arguments today? What's going on?

Imani Gandy: Forty-year itch, that's my answer, because over the last couple of terms we've seen the court overrule precedent, and it always seems like that 40 years is the target. It happened with the union case, I think it was 2019, remember? It happened in *Roe v. Wade*, that's a 40-year precedent. I believe it also happened, was it the gun case was also a 40-year precedent? I don't know what the deal is with this court and 40 years, but I guess it has decided that after 40 years all bets are off.

But the actual serious answer is that we have the FedSoc Six now, right? The conservatives have made it their main goal to capture the courts so that they could do stuff like this, so that they could move forward with this project of white dominance and white supremacy. So that's why we're hearing it now, simply because they can. And let me tell you how bizarre this is, right? So the University of North Carolina case, which is one of the cases, didn't even make it to appellate review.

Jess Pieklo: What does that mean? Hold on, what does that mean?

Imani Gandy: OK, so when the Supreme Court grants cert, right. A party says, "Hey, Supreme Court, you know, the appellate court got this wrong. Can you please review this case?" What the Supreme Court did in this situation is they granted cert before judgment, which means that the Fourth Circuit Court of Appeals never weighed in on this case. They just skipped that level of review and went straight to the Supreme Court. And the Supreme Court was like, "Yeah, we'll take it." Why? Because there are no rules. They're not abiding by any of the institutional norms that they used to. Norms like let an appellate court decide the case before you take it.

Jess Pieklo: Right, and I mean, it would probably be good to point out that the Fourth Circuit is one of the final circuits left that is not completely overrun by Trump judges. But let's talk about the two cases real quick so that folks know what the court was hearing arguments about. And then we can talk about the walkabout through what is race even, Imani, that the Supreme Court Justices did today.

All right, so we had two cases before the court. One is *SFFA v. Harvard*, and in this case, SFFA is challenging Harvard's admission practices under Title VI of the Civil Rights Act. And they're arguing that Harvard intentionally discriminated against Asian American applicants and that its policies failed strict scrutiny and are unlawful under current precedent- which, current precedent schmedecent with this Court. Okay, so real quick, Title VI is the federal law that bans discrimination on the basis of race in public schools and any sort of federally-funded institutions of higher education. All right, in this case, the district court and the First Circuit Court of Appeals, so we actually had some appellate review here, sided with Harvard, finding that Harvard's policy survived strict scrutiny, so it was hella constitutional right?

Imani Gandy: Hella constitutional, is that a technical term? Yo, this shit's hella constitutional, son.

Jess Pieklo: But also, and most importantly, that the statistical analysis didn't show any bias against Asian American applicants.

Imani Gandy: Yeah, yeah, that's the Harvard case. And just so you know, the court is probably right now listening to arguments in the Harvard case. They're just now getting into those arguments.

Jess Pieklo: They were supposed to be done with all of this, but they're having so much fun, they're just gonna do this all day, all week, maybe, who knows?

Imani Gandy: Who knows. So the second case, the one that we actually were able to listen to oral arguments 'cause they heard that one first, is Students for Fair Admissions, SFFA, v. the University of North Carolina. And SFFA is challenging UNC's admissions practices under Title VI, just like Harvard, but then also under the Equal Protection Clause of the 14th Amendment.

And the reason why UNC is making Equal Protection Clause arguments, but Harvard isn't, is because UNC is a public institution, it's a public university, therefore the 14th Amendment applies. Harvard, 14th Amendment doesn't apply 'cause it's private. But SFFA is arguing that UNC's race-conscious policies discriminate against white and Asian American applicants in favor of Black and brown applicants.

And I just wanna say, just the phrasing of that- "discriminates against white and Asian American applicants"- and we saw that a lot in the arguments today, when people were asking questions and responding to questions by talking about white and Asian American applicants, as if this case wasn't purportedly brought on behalf of Asian American students, right, Asian American applicants and those who felt that they were being discriminated against, or rather those who conservatives convinced were being discriminated against when really they're not. It's really, you know, mediocre white folks and white women who have benefited the most from affirmative action.

But what is critical, and what I really loved to see this morning, is that Justice Jackson was able to participate in the arguments regarding the UNC case. And she is not participating in the Harvard case because of her ties to Harvard, which I still think is crap. But whatever, her ties to Harvard. Being a Black woman on the bench she's held to a higher standard. She holds herself to a higher standard and so she recused herself from Harvard. But it's not a big deal because she was there for the UNC arguments and she made all of the points that she needed to make and we're gonna get into that. We are going to get into that.

Jess Pieklo: Was she there! All right, there's a lotta policy though, right? Like, this was an argument that was mostly vibes.

Imani Gandy: Yeah, vibes, hubris, boxed wine, maybe just, like, a soupçon of whiskey, I don't know what was going on this morning, but they were having, like you said, just a proper walkabout.

Jess Pieklo: They really were, you know. And so, one of the things that struck me the most is that we could boil this down to a case about white grievance, right? As you said, it was sort of the like, check box, are we talking about Asian American students? I don't know. But truly it was about white feelings.

And Justice Jackson, I think, probably honed in on this the most with regard to questions of standing, right? And can you bring a case if basically the folks challenging North Carolina's admission policy couldn't show any real injury. She was like, "I know you feel hurt, but are you hurt? And if you aren't actually hurt you have no standing to bring a case."

Imani Gandy: Right, and if you have no standing to bring the case, then you have no remedy. And you know, you messaged me in the middle of these arguments something like, "KBJ on fire, says that white grievance isn't redressable, or white feelings aren't redressable."

Like, because you feel bad or because you feel that someone, quote, unquote "less qualified" took your spot doesn't mean you were actually harmed if it turns out that the admissions process did not use race as a factor, as an if not, but for a factor, right? Like, that's just not what is happening. The lower court, well, the one lower court that heard the North Carolina case, found that that wasn't happening. But what SFFA is doing is just basically relitigating facts. Just relitigating facts at the Supreme Court.

Jess Pieklo: And so look, I mean, you know, we make a lot of predictions on this podcast 'cause we think that probably we can, and I will say that there's clearly enough votes to end race-based affirmative action programs in higher education.

The question is, do we end it immediately and/or do we find some kind of finish point, or, you know, is it something along the line of, you know, do we create such a race-neutral policy that up is down and black is white, white is black.

Imani Gandy: Look, clearly this has been a project that has been ongoing since at least a year ago when the great critical race theory debacle of 2022 began, which basically purports to say that talking about Black people is essentially racist. Teaching history is essentially racist.

Jess Pieklo: Yep.

Imani Gandy: And I think that the larger agenda here, right, is to talk about race on white people's terms, right? And race is only a factor when white people say it is. So, if a Black person gets a spot and a white person doesn't get a spot that's a zero-sum game. And we heard a lot of talk today about a zero-sum game. Like, if a Black person gets a spot at the University of North Carolina then a white angel loses its wings.

Jess Pieklo: Absolutely.

Imani Gandy: That's essentially what the argument was and it's very frustrating. We're entering a period where Black people, brown people, Indigenous people are being removed from society, removed from the ability to be socially, upwardly mobile.

Jess Pieklo: And we can contrast this really well between Justice Alito and Justice Jackson, right? Justice Alito specifically talked about race as a factor in admission as a plus one and straight up asked counsel, "Well, then doesn't that mean it's a minus one for white applicants?" That that implies a bias against white applicants, which is bananas, okay.

Imani Gandy: Absolutely.

Jess Pieklo: As you said, it's not a zero-sum game. But then you had the hypothetical by Justice Jackson, which is a resident, a Black resident of the University of North Carolina, wants to stay in state and attend this school that their family has been historically excluded from in part on the basis of their race, and they don't have the ability to talk about that experience, what does that mean?

That hypothetical immediately grounded it into the reality of race and experience and the really weird ways that the white conservatives on the bench were talking about it. Like Justice Alito was like, "So here's my hypothetical. Let's say you're an African immigrant and you move to rural North Carolina. You don't actually experience racism, but there's strong cultural differences."

Imani Gandy: Which, what are you talking about? As a Black immigrant moving to North Carolina you don't experience racism. Racism doesn't ask what country you're from. Racism looks at your skin color and categorizes you one way or the other. That's why, you know, the quote unquote, "light-skinned Black people" still are subjected to racism because they read as Black.

White people code people as Black or brown and then interact with us based on that. And when they seem to think that our Blackness or our brownness is gaining us some advantage, when really it's not an advantage, it's just a bringing up to the level of white people, right? A sort of fomenting of equality, then suddenly we can't talk about race. You made up race to discriminate against Black people and now when we want a modicum of equality, suddenly race doesn't matter. And a Black African immigrant from Nigeria, who's moving to fricking, I don't know, wherever North Carolina isn't gonna experience racism. That's absolutely absurd. That's literally absurd.

Jess Pieklo: I mean, Alito was just an exercise in racial absurdity all day.

Imani Gandy: Absolutely.

Jess Pieklo: Oh, but can we talk a little bit about Justice Amy Coney Barrett wanting to experience racism, please?

Imani Gandy: Listen, I can't with this woman and her Black children, who she, I don't know what's going on in that household, but I don't understand, No, I do understand. I don't like the ways in which she seems to be unwilling to step inside the shoes of her children and perhaps look at the world from that perspective.

Jess Pieklo: Yeah.

Imani Gandy: Because if you do that for a moment, really sit them down and talk to them about what it must be like in Indiana or wherever it is that they live, whatever, you know, rural, primarily white enclave in which they live. What's that like being the Black child of a white parent in that region?

Jess Pieklo: I mean, the idea of experiencing race, right? What does that mean?

Imani Gandy: You sounded like Rachel Dolezal shit.

Jess Pieklo: It is. I was singing to Imani in the chat that this is the equivalent of Amy Coney Barrett going, ♪ I wanna know what race means ♪ Right, like.

Imani Gandy: It really is.

Jess Pieklo: It's bizarre. But we expected bizarre from them.

Imani Gandy: Okay, so I have a question for you.

Jess Pieklo: Oh boy. I don't know that I-

Imani Gandy: Do you think this decision could extend outside of colleges and universities to other situations, to workplaces, to schools, that sort of thing? Is this gonna stop with higher education or no?

Jess Pieklo: No, Justice Barrett even suggested so herself, right? She had the whole line of questioning around affiliate housing and things like that. One of the things that we know is that. Okay, so let me back up and explain a little bit of the law here. So, there's a statute at challenge here, Title VI of the Civil Rights Act. And that deals, like I said, with race in admissions. And it's part of a bunch of civil rights statutes. So there's Title VI, there's Title VII we talked about last week in the Bostock decision. That's the federal civil rights statute in employment. They're all supposed to be kind of read together and along the same ways.

And so if we have a race colorblind approach to admissions in higher education, we will soon see a race colorblind approach to remedies in housing discrimination, for example, or remedies in employment discrimination possibly, or, you know, remedies in public accommodations. There's no end point truly, once we read out the original intent of what was going on in, not only

the 14th amendment, and it's wild to be on the originalist side here, but in Title VI of the Civil Rights Act here. So, absolutely and you know, it's not even like they'll be okay with the race-neutral test that the court cooks up at the end of these arguments. The SFFA lawyer said, "Hey, we plan to challenge any race-neutral policies too." And even at one point suggested it would be fine for universities to put their thumb on the scale for male applicants. So like, the gig is up. They plan on rolling it all back.

Imani Gandy: Not not just for Black folks, but for women too.

Jess Pieklo: Women too, for literally for, you know, for anybody who's functionally not a white guy and that's basically what they said in arguments. But let's get back to race-based affirmative action here for this, because Imani, what happens if, when they do away with affirmative action in college admissions policies. I think we heard the justices try to get to that a little bit, but really what happens? What does this look like?

Imani Gandy: The enrollment of Black and brown students will plummet.

Jess Pieklo: Yeah.

Imani Gandy: It will just absolutely plummet. I remember when I was applying to law school, lo those many years ago and it was maybe '97, '98 when I was looking at law schools and California had just passed Proposition 208, which plummeted the number of Black students at University of California, Berkeley, which is where I wanted to go, which is where I got in and I wrote a letter saying, "Yeah, I'm not coming because of Proposition 208 because I don't wanna be the one Black kid in the constitutional law class who's expected to speak for 'my community,' quote unquote, on all issues related to Black people."

And that's a situation that Black people are put in anyway. Because even with affirmative action policies, even with considering race when trying to mold a more diverse student body, there still are not a lot of Black kids that end up at primarily white institutions, right? These PWIs.

Jess Pieklo: Right.

Imani Gandy: So you still are in a place where you are kind of expected to speak for your community, where you are flooded with, you know, white high school kids who may have never met a Black person before they got to college, and now you're rooming with one. And they're like, "What's your fucking deal?" You know what I mean?

Jess Pieklo: Really.

Imani Gandy: That's just not a comfortable place for me, and that's not a place I wanted to be. So I said, "You know what? I'm not going."

Jess Pieklo: That, I mean, I obviously can't even imagine as a white woman what that even experience was like. Also, I appreciated that we had the solicitor general in these arguments talking about what this means beyond just what we're thinking in terms of admissions policies and the effect that this has pipelining for things like service industry and the military. I think about these things a lot, so do you. And that was an argument that I hadn't even really thought about, was how upending race-based affirmative action programs will have the effect of whitening the military pipeline and what that means at this moment for democracy right now, when we see such an infiltration of white supremacist forces within military and services.

That sent a chill down my spine when I was listening to those arguments because that was another layer that even I was like, and there's a whole democracy attack. But of course there is because right, isn't that the whole argument again, that Justice Jackson was making is that diversity is inherently a part of the democratic exercise. And if we are anti-diversity, we are anti-democratic.

Imani Gandy: And we're also anti-fairness, right? I mean, Kagan talked about that quite a bit when she talked about the pipelines for leadership. The pipelines for leadership in business in medicine in law, in politics, in government, these are all, places like the University of North Carolina and Harvard University, these institutions of higher learning, they are pipelines for people to maintain, to get to these leadership roles. And if Black and brown people are excluded from these universities, then they're excluded from those pipelines, right? And by the time Black and brown kids get to school, they've already been excluded from opportunities, right?

I mean, Sotomayor talked about that, about the ways in which schools are under-resourced. Schools in Black and brown neighborhoods are under-resourced. We're seeing just a tremendous attack on public education right now, banning books and that sort of thing. So if you're in a public school where you're not even getting a full education, then once you get to college you're already a little bit behind. And then if you can't get into a good college because those colleges, or the college that you want to because those colleges are not taking race into account in order to develop a more diverse student body, then you're asked out of life essentially. And how is that good for democracy?

Jess Pieklo: It's not, it's not.

Imani Gandy: It's really not. Can we talk about originalism though for a moment?

Jess Pieklo: I mean-

Imani Gandy: Can we just.

Jess Pieklo: OK.

Imani Gandy: Because, you know, Jackson was all over it, like brown on rice. Kagan was all over it like white on rice. And it was just, you know, what do you think the originalists would have

to say about this? And you heard the attorneys for this Strawbridge character, the attorneys for SFFA saying that the Constitution is colorblind. The 14th Amendment was always meant to be colorblind. And that is just an abject lie. It is not true. The 14th Amendment is a Reconstruction amendment. What we were trying to do-reconstruct the country after the Civil War-that was not a race-neutral exercise. That was not a colorblind exercise. The Freedman Bureau when they wrote all of those laws that were supposed to help Black people, which then Andrew Johnson was like, "Eh, we're not doing that." Those were race, those were race, I don't know, what's the opposite of race-neutral?

Jess Pieklo: Race-conscious.

Imani Gandy: Race-conscious, thank you very much. Those were race-conscious measures because we were coming out of a period where how many hundreds of millions of people, or not hundreds of millions. How many millions of people were enslaved? Four million slaves. How do we bring formerly enslaved people into the fold to grant them equality with white people? You give them extra shit, that's what you have to do. That's the only thing that makes sense. And that's not even me just saying that trying to be extra woke. Unless you consider the architects of the 14th Amendment woke, because that's what they intended.

Jess Pieklo: Yeah.

Imani Gandy: Right? And you're never gonna get the originalists on this bench to even come close to admitting that. You're never gonna get Clarence Thomas to admit that the 14th Amendment was a pro-Black amendment.

Jess Pieklo: No, no, in fact, Justice Alito was so upset about that, that he kept going back to the one-drop rule. How Black is Black? How Black is Black? When will we know that you are actually Black or white? Right?

Imani Gandy: Which like, and can we talk about how that does not bode well for this nonsense that Louisiana is trying to do where they're trying to redefine what Black is for purposes of voting rights, for purposes of districting. And a lot of this sort of race neutrality language, this colorblindness language really harkens back to the Merrill v. Milligan arguments, right? The voting rights case out of Alabama involving redistricting, where, you know, Alabama was trying to say that their maps, which drew one majority Black district in a state that is 27% Black, that when trying to figure out whether or not Alabama could draw an additional map, was a second map that was majority Black, you had these clowns in court arguing that that was a race-neutral exercise. That you could try to figure out a way to have a majority Black district without asking who's Black.

It doesn't even make any sense. And so you have the same thing here where you're trying to just whitewash history, whitewash textualism and originalism in favor of this white dominance project. And it's just the level of hypocrisy, like, I know you're never gonna get Alito or Thomas to admit that hypocrisy, but just so you know that hypocrisy exists, right, you viewer, I'm not

pointing at Jess, Jess knows. But just so the viewers and listeners know that it is abjectly hypocritical and you should honestly point out how Justice Jackson, again, is doing originalism better than originalists. Justice Kagan is doing originalism better than the originalists. But the point is, originalism is never for the benefit of Black people. Originalism is for the benefit of white people. And that's how it's gonna be, and that's how it's, I mean, that's what we're looking at here.

Jess Pieklo: Always. Can I talk about Brett Kavanaugh's bad faith for a hot minute here? Maybe two.

Imani Gandy: Yeah.

Jess Pieklo: Three or four, depending on if the spirit moves. So, okay, obviously he is going to vote on the side of upending race-based affirmative action programs. But I loved how he waltzed in and was like, "I want to understand this argument that religious institutions are gonna have a RFRA claim to ignore our ruling that they can't account for race because they are so interested in considering race, because racial diversity is so important to their mission." Because it's so important to their mission! Evangelical schools are convinced that racial diversity in their ranks is a critical mission.

Imani Gandy: Yeah, that's happening.

Jess Pieklo: I'm just gonna go ahead and call bullshit on that.

Imani Gandy: Yeah, that's happening.

Jess Pieklo: So two things. One, we should be very terrified because that is a clear pipelining. Okay? So one, it's a signal that the court is going to upend race-based affirmative action program. But Kavanaugh's also signaling what conservatives hope to do.

And that is to pipeline students out of other institutions like the University of North Carolina, like the University of Virginia, like University of California, Berkeley, like the University of Wisconsin, high-end state schools that have traditionally been pipelines for upward mobility, they wanna move 'em into religious institutions.

Imani Gandy: But also the flip side of that, which of course the Court would never accept as a legitimate reason, right?

Jess Pieklo: Yep, yep.

Imani Gandy: But what if, like, an HBCU used, I mean obviously HBCUs are taking race into account, but let's say there's an HBCU-adjacent school, like not founded as an HBCU, but let's say there's a religious school that thinks that diversity is a part of their mission. Do you think this court is going to accept racial diversity as a sincerely held religious belief?

Jess Pieklo: I mean.

Imani Gandy: I'm gonna go with no, I'm gonna go with no.

Jess Pieklo: You know, I do know that Justice Barrett was very concerned about the possibility of conservative students being discriminated against based on their religious beliefs at public institutions.

Imani Gandy: Because that's happening too. That's a thing that is actually happening right now. The bad faith is what's so frustrating, just not with these oral arguments, but with this term generally, because you can't take anything that they say at face value. You can't take anything that they say as being grounded in fact, because they're making up their own facts and they're making up their own laws and rules as they go along in order to get to the place where they want to be, where the Federalist Society has told them they need to be.

Jess Pieklo: Yeah. One of the things that cracks me up in a certain way about the conservatives' insistence on going to this colorblind Constitution, which we are gonna hear all term. This is the new thing, is the Constitution is colorblind. And it's a literally a way to, as Imani has been saying, erase the progress of Black and brown folks, is that the conservatives basically want a Google invite for the end of racism.

Imani Gandy: They do, they do. Oh my God. So let's talk about this, right? So in 2003, the case Grutter v. Bollinger, right, Grutter v. Bollinger that's the case that said, "Affirmative action is okay, you can take race as a consideration when you're talking about admissions, if there are no race-neutral alternatives available."

Jess Pieklo: Yeah.

Imani Gandy: And again, you gotta harken back to Merrill v. Milligan, how are you supposed to achieve racial diversity with race-neutral alternatives? I mean, yes, you can use socioeconomic class to a certain extent, but race is a simulacrum for race. Like, there's just no getting away from that.

Jess Pieklo: Right, right.

Imani Gandy: And so, it's very frustrating to listen to them try to act as if there is a way to get away from that. Right? So Grutter v. Bollinger says, "You can do this." And now, the SFFA is saying, "No, no, no, we can't do this anymore."

Jess Pieklo: Right, right. And Roberts is like, "OK, I hear that." Go.

Imani Gandy: I was just gonna say. And so in Grutter, Sandra Day O'Connor, right, she says, "Yeah, okay, we're gonna do this. If there are no race-neutral alternatives available, you can

consider race, but you know what? We think that there's gonna be a point at which there will be race-neutral alternatives that are as effective as race-based considerations. Right?

Jess Pieklo: Right.

Imani Gandy: And she just said, you know, "We think maybe in 25 years."

Jess Pieklo: Yeah.

Imani Gandy: So that's 2003. 25 years takes us to 2028.

Jess Pieklo: Yeah.

Imani Gandy: And so what Brett Kavanaugh and Amy Coney Barrett and all these people were talking about is, well, you know, O'Connor said there's a 25-year deadline. The SFFA attorney said there's a 25-year deadline. It wasn't a deadline, it was essentially a, you know, we think that things might be better in 25 years, let's take another look. Not in 25 years racism is gonna be over. And at that point whites are gonna rule again.

It's so disingenuous. But like as you said, they want to know what day they can mark on their calendar as the day that racism dies. It's such bad faith and it's so ridiculous. And it also harkens back to this, you know, Justice John Roberts with his, "The only way we can get over race is if we stop talking about race." You know, that's just a nonsense proposition from the outset.

Jess Pieklo: Yeah.

Imani Gandy: It's a proposition that is grounded in white grievance. Because they don't wanna talk about race anymore, you can see this in schools across the country. They don't wanna talk about race anymore because they don't wanna be made to feel bad about what it is that they are benefiting from when it comes to, you know, anti-Blackness. What it is their ancestors did to Black people, even if they themselves never owned slaves. And why should I be punished and not be allowed to get into school because of something that somebody else did? It's just the hypocrisy is really getting, it's grinding my gears, Jess. It's grinding my gears.

Jess Pieklo: Well, and so we'll be rewriting the law as we rewrite our history, as we rewrite our curriculum, as we rewrite what we're allowed to discuss in public forums, all in the name of advancing a very particular Christian white nationalist space. This is fun, super fun, love it here.

Imani Gandy: Yeah, good times.

Jess Pieklo: I have a question for you though.

Imani Gandy: Yes.

Jess Pieklo: If and when the Supreme Court ends these kinds of policies, are there options for schools that want to make applications fairer for racial student, for racial minority students, other than Kavanaugh's bad faith RFRA claim, like, other than going for Jesus?

Imani Gandy: Going for Jesus.

Jess Pieklo: Woke for Jesus.

Imani Gandy: I'm woke for Jesus. Yeah, there is a thing that schools can do. Stop the legacy nonsense. End legacies, right! Because who's benefiting from legacy programs? It's not a lot of Black folks.

Jess Pieklo: Yeah.

Imani Gandy: I mean, as Elie Mystal said on Twitter, I think both he and his wife went to Harvard. So he's like, "Yeah, my double legacy children are getting into Harvard and they're smarter than your dumb kids." But like, Elie Mystal is an outlier, right? There are not a lot of legacies, Black and brown legacies, that are going to Harvard, but there are tons of white ones. How did George Bush get into Yale? Not 'cause of his grades. Not 'cause he was a smart man.

Jess Pieklo: No.

Imani Gandy: Because he was a legacy. So that's one thing we can do. Another thing we can do, get rid of standardized testing.

Jess Pieklo: Oh, God, yes.

Imani Gandy: What do we need the SATs and the ACTs for? We already know that there's racial bias built into the SATs. We know that there's racial bias built into school systems generally, to such a degree that some schools aren't even teaching kids how to think they're just trying to teach kids how to pass certain tests. This is not a sensible way to educate a populace.

Jess Pieklo: No.

Imani Gandy: It's just not. So that's the way to do it. I think that, you know, obviously looking at things like socioeconomic class can help to a certain extent, but what are, I mean, you can bet your bottom dollar that Students for Fair Admissions are gonna be back in 10 years talking about how schools are using socioeconomic class as a stand-in for race. And one of the things that's so interesting about these affirmative action cases, right, is that the Bakke case, which was a 1973-'72?-case that said you can consider race, but you can't have quotas. Because University of California at Davis Medical School was setting aside, like, 16 spots for Black applicants. And the court said, you can't do that, but you can consider racial diversity. So fine,

you can consider racial diversity. And then Grutter says, yes, you can consider racial diversity if there's no race-based alternative. And then Fisher says, yeah, that's still accurate.

And now we have a case a mere five years, six years later that's saying, no, you can't consider race-based, you can't consider racial and ethnic characteristics in admissions. And then in 10 years from now, we're gonna hear, you can't think about socioeconomic status as a stand-in for race because, well, we know that they're gonna start looking at statistics about the number of Black people that are this socioeconomic status and how it's really just a stand-in. And how schools, when they were trying to get away from the quota system really picked up on the diversity system and really spent so many years and so many hundreds of millions of dollars trying to craft these policies.

Now they're gonna do the same thing for socioeconomic status and that's gonna be a problem in 10 years. I mean, I'm just rambling about that, but it just goes to show that nothing that these schools do will be enough when it comes to trying to diversify their student body until they cannot diversify their student body anymore. And I think that's the ultimate goal.

Jess Pieklo: Yeah, I don't think you're just rambling though. I mean, you're absolutely correct. We will see these cases, it's no surprise, as you said at the beginning of the segment, that we have this case now because it is part of a very specific network, an actual network of advocates and activists and dark money forces.

Like here we are sounding like all tin foily, except it's real and true, designed to cook up challenges to legal precedent they don't like. And what's that legal precedent? It's anything that has allowed racial progress, that's allowed gender progress, any of it. And so we will see these baked cases as long as there is this kind of conservative capture of the court the way that there is.

Imani Gandy: Yeah, and I just-

Jess Pieklo: There's nothing to stop 'em. Nothing to-

Imani Gandy: There's absolutely nothing to stop them when you have these six justices who are willing to do whatever they are told to do. When you have Clarence Thomas asking the attorneys repeatedly, "So what exactly is diversity? I don't get it. I'm just a caveman lawyer. I don't understand your rules and your mores. What is diversity? Are there any educational?" I mean, I understand-

Jess Pieklo: That's just crap.

Imani Gandy: Here's what he said. "I understand that people are in their feelings," is essentially what he said. "I understand that people end up feeling bad. They go to school and they're isolated," and yada yada. "But what are the actual educational benefits?" I don't know, Clarence, maybe when Black people go to a school and they don't feel badly about being at that school

and they don't feel like they're oppressed and they don't feel like they're excluded, maybe that actually benefits their ability to do well in school. Like, is this a serious question? These are not serious people. These are people who have a goal and they're gonna get to that goal. And these arguments, it was just the tenor of the arguments was so just heavy and dull and pointless.

Jess Pieklo: Dull is exactly it.

Imani Gandy: The argument seemed absolutely pointless, like, why are we even having what's gonna turn out to be three and a half, four hours worth of arguments when we already know what the rules are? We already know what the outcome is. Just let Justice Jackson and Justice Kagan lodge their dissent and let's move on. We know what Alito and Clarence are gonna say. Ugh.

Jess Pieklo: All right.

Imani Gandy: I just did a very Jewish grandma thing. Ugh.

Jess Pieklo: You did, you did. But I do wanna hear what your sort of highlights and lowlights were, because I mean, I do agree with you that the arguments and tenor were dull. It was like the most polite fight in the world in that sense, but you know, what'd you think?

Imani Gandy: I mean, obviously my highlights were just Justice Jackson. You could tell that she was angry.

Jess Pieklo: Yeah, you really could.

Imani Gandy: Like, she was angry because and rightfully so. And I think that, you know, you raised this earlier, but when she talked about how there may be an Equal Protection Issue if a Black North Carolinian cannot talk about their Blackness in relation to their efforts to get into the University of North Carolina. Whereas a white lacrosse player can talk about how he's descended from, you know, generations of blue blood, white lacrosse players. That person can talk about that in their application, but the Black student is foreclosed essentially from talking about their identity because the Students for Fair Admissions want this process to be something akin to, you know, when you're auditioning for an orchestra.

I played music for years and years in college, and when they were trying to diversify the orchestras, they stopped doing, quote unquote, "blind auditions" where you would just go into a room and you'd sit behind a screen and you'd have to play. There are all kinds of biases and microaggressions and shit that happens to you before you even get behind that screen to start playing. Right? And so, it just doesn't make sense. And that's what conservatives want for these schools. They want race to not be a factor. They want race, if you're not white, to not be a factor.

Jess Pieklo: Yeah.

Imani Gandy: And Justice Jackson calling that out was a huge highlight. What was a lowlight for you? Because the lowlights for me were Clarence Thomas. I've already expressed that. What were your lowlights?

Jess Pieklo: I mean, look, Sam Alito.

Imani Gandy: Yeah.

Jess Pieklo: He's just kinda my lowlight of 2022.

Imani Gandy: Generally, yeah.

Jess Pieklo: I mean I was anticipating racism from Justice Alito. I was not necessarily anticipating that we'd go back to the, you know, one drop rule that we would be looking at. You know, I mean, he's such a partisan hack that even in his hypothetical, I don't know, maybe I'm reading too much into this, but took a swipe at Elizabeth Warren or ish, in the sense of, "Well, what if there's lore in my family that I have Native American descent?" Come on man, what is that about? Right.

Imani Gandy: He also said something like, "What if I identify as Native American?" Which seemed to be a slam against trans folks.

Jess Pieklo: Exactly.

Imani Gandy Like the way he emphasized that word was definitely a slam on trans folks.

Jess Pieklo: He just sneers, even when he, like, speaks, everything just comes out as a sneer and so Justice Alito. And then like, you know, I mentioned Justice Amy Coney Barrett's whole, you know, "Let me experience race. What's the experience of race like, talk to me about that." It's just, it's bizarre. But I do wanna give a moment to Justice Kagan because she was just not having it, and also not going to let Justice Jackson and Justice Sotomayor do all of the heavy lifting. And I think that's really important.

Like, you know, as the liberal white woman on the bench, she needed to come in and take some body blows for them, I think quite frankly, and she did. She was like, look, SFFA, you're full of shit. Like, to the extent that Elena Kagan would ever say that. And I mean, you know, what I will say is that we, you know, I think it perfectly encapsulates the fact that, you know, we had prepared for this live stream and built-in a bunch of time and all of this stuff and we hop on and they were still talking about the first case.

Imani Gandy: Yeah.

Jess Pieklo: Like, this is such a political and intellectual exercise for the conservatives on the bench especially. And what the liberal wing is trying to do is just tourniquet where it can.

Imani Gandy: And what's fascinating to me is that in a pair of cases ostensibly about bias against Asian Americans, nobody was talking about Asian Americans.

Jess Pieklo: Literally.

Imani Gandy: And there are actually, I mentioned this on the Supreme Court preview podcast, right, there are actually, with respect to Harvard, specifically, there are policies that Harvard adopts that do harm Asian American students. Not because they're accepting too many Black students, but because of the regional characteristics, right.

I think I said, if you're an Asian kid in San Gabriel Valley, you're gonna have a harder time than if you're an Asian kid in Des Moines. And, you know, maybe they talked about it during the Harvard part of the argument. I doubt it. Because the entire first hour when it came to talking about Asian Americans, Asian Americans were given short shrift if they were mentioned at all. This was a case about tearing down affirmative action policies for the benefit of white students.

Jess Pieklo: Yep.

Imani Gandy: And these conservatives were hiding behind Asian American students to do that. And I think we cannot forget that. They don't care about the number of Asian American students in schools, they don't care. They really don't.

Jess Pieklo: They really don't. They really don't. Imani, I think we did it.

Imani Gandy: Did we do it?

Jess Pieklo: I think we did a successful live stream.

Imani Gandy: Yes!

Jess Pieklo: I think so.

Imani Gandy: I mean, are we gonna get off this live stream and they're still gonna be talking in oral?

Jess Pieklo: They're still talking, cases still going on, and we're like 45 minutes in.

Imani Gandy: Oh, for crying out loud, we're just gonna go end this live stream.

Jess Pieklo: No law, just vibes.

Imani Gandy: I mean, it's just all vibes and just shenanigans. But if you wanna talk to us about these affirmative action cases or anything related to this new Supreme Court. Well, I'm not gonna say new, I'll say neo Supreme Court project in white dominance and white supremacy.

You can find me on Twitter @AngryBlackLady, me on Elon Musk's new Twitter @AngryBlackLady. You can find Jess on Twitter @Hegemommy, H-E-G-E-M-O-M-M-Y. You can and you should follow Rewire News Group. If you missed my live tweet, just go there and you can read it. You should follow us on Instagram and you should definitely subscribe to the YouTube channel here, because that's how you're gonna get notifications about our podcasts.

Jess Pieklo: Do it.

Imani Gandy: And that's a very exciting thing for you to be doing.

Jess Pieklo: So exciting.

Imani Gandy: Right. So what are we gonna do then, Jess?

Jess Pieklo: We're gonna see you on the Tubes, folks.

Imani Gandy: We're gonna see you on the Tubes and the YouTubes and probably back on Twitter where they're still talking about affirmative action.

Jess Pieklo: Seriously.