

[Boom! Lawyered: How the Supreme Court Could Use the Census to Bless White Power in America](#)

Imani Gandy: Hello, fellow law nerds. Welcome to another episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that is really excited about the Women's World Cup, or at least half of us is.

Jessica Pieklo: Oh, you don't know.

Imani Gandy: The other half is supporting that first half who is, again, very excited about the Women's World Cup. I'm Imani Gandy.

Jessica Pieklo: I am super excited about the Women's World Cup, and I'm Jess Pieklo. Rewire.News is dedicated to bringing you the best reproductive rights and social justice news, commentary, and analysis on the web. The Team Legal podcast is part of that mission, so a big thank you to our subscribers and a welcome to our new listeners.

Imani Gandy: Hey, Jess.

Jessica Pieklo: Yes.

Imani Gandy: What if I told you that there's a woman who has just given the Supreme Court an opportunity to help save this country from becoming a KKK hellscape?

Jessica Pieklo: What?

Imani Gandy: I said what if I told you that there's a woman who has just given the supreme court an opportunity to save our democracy from becoming a KKK hellscape?

Jessica Pieklo: Considering there are few things, I think, worse than a KKK hellscape, I'd say that's fantastic.

Imani Gandy: It is fantastic. What makes this fantastic story especially delicious is that the woman, Stephanie Hofeller, did so because she thought her dad was kind of an asshole.

Jessica Pieklo: Wait. Hold on. Who's her dad?

Imani Gandy: Okay, so Stephanie Hofeller's dad's name is Tom Hofeller. He's a Republican redistricting expert, and he is at the center of this fight regarding the census and the Trump administration's efforts to whiten America. In this episode, we're going to talk about the fight over the Trump administration's questionable efforts to add a citizenship question to the census, whether or not the Supreme Court will bless these efforts, and what is at stake if they do.

Jessica Pieklo: And we're going to talk about administrative law, which you know is super exciting. You know how much I love administrative law, right? Administrative law.

Imani Gandy: I do. You think it's super, super sexy.

Jessica Pieklo: Imani, it's the sexiest thing we've got going on right now. I'm just saying.

Imani Gandy: Okay, Jessie, calm down, just calm down.

Jessica Pieklo: Just saying.

Imani Gandy: We've only got a couple of weeks left in the Supreme Court term so, naturally, we're waiting on some big cases, including one that, if the Court gets wrong, could help further entrench white political power for decades to come.

Jessica Pieklo: The case is called State of New York Versus United States Department of Commerce, and the decision could affect nearly every aspect of our national life. At issue is whether next year's federal census form can include a question asking whether each member of a household is a US citizen. The case has constitutional elements to it since the census is a creature created by the Constitution, but it's really a case about administrative law.

Imani Gandy: Of course it is.

Jessica Pieklo: I mean, I'm going to find a way to bring it back to administrative law any chance I get, but it is. It's really a case about administrative law and whether or not the Trump administration followed the proper procedure when trying to add the citizenship question to the census.

Imani Gandy: The case is also about a Republican redistricting expert named Thomas Hofeller, who was helping Republicans draw redistricting lines that he thought would ensure that the GOP maintained a majority in Congress. Hofeller wrote a memo back in 2015 in which he concluded that adding a question about citizenship to the census would, quote, be advantageous to Republicans and non-Hispanic whites.

Jessica Pieklo: Now, that matters because it contradicts the reasons that the Trump administration gave for adding the citizenship question. They said gathering citizenship data would help them, get this, Imani, enforce the Voting Rights Act.

Imani Gandy: [unhappy noise]

Jessica Pieklo: That is, honestly, the only appropriate reaction, I think, to any time we hear the Trump administration expressing a desire to enforce the Voting Rights Act, but that's what they did here.

Imani Gandy: It's ridiculous. Why don't you explain what this case is about, and then we'll come back to talking about Hofeller's efforts to, essentially, make America white again.

Jessica Pieklo: Okay, sure, but first I'm going to have to give our listeners a brief history lesson.

Imani Gandy: Love it. Love a history lesson. Go for it.

Jessica Pieklo: All right. I'm gonna put my glasses up a little higher, straighten up here. All right, settle in. In setting up our system of representational democracy, the framers created the House of Representatives, right? That's, quite literally, the people's house, and that's to have seats fairly distributed across the states. They put in the Constitution that representatives would be awarded to states, quote, according to their representative numbers and that those numbers would be determined by a new count every 10 years.

Imani Gandy: A little sidebar here, that's where the whole three-fifths business comes into play, right?

Jessica Pieklo: Oh, yeah.

Imani Gandy: Because black people were only three-fifths of a person, and they weren't full people for for purposes of the census. That's a little history sidebar, but let's talk about how the hell the Congress conducts the census. It's such a huge undertaking. How does it even happen?

Jessica Pieklo: Sure. Congress doesn't actually conduct the census. They conduct it by delegating that power to a federal agency. Agency law.

Imani Gandy: Administrative law, woo.

Jessica Pieklo: Yay. Seriously, I shimmy, at this point, every time we talk about administrative law.

Imani Gandy: She was absolutely shimmying.

Jessica Pieklo: Congress passed the Census Act, and that statute created the Census Bureau, which runs the show in conducting the census. The Census Act directs how the census is going to go. In particular, it restricts what information the government gathers during the census, how that information can be collected, and what the government does with it. One way they gather that information is through the census questionnaire. That gets mailed to you, and you fill it out. The Census Act dictates that the information the government gathers from that questionnaire should only be, quote, unquote, necessary to balance against it being overly intrusive.

Imani Gandy: Now that we've given you some background, a little history on how Congress conducts a census, let's talk about this lawsuit.

Jessica Pieklo: Yeah.

Imani Gandy: In March of 2018, Secretary of Commerce Wilbur Ross directed the Census Bureau to add a citizenship question to the 2020 census saying it was necessary to help the administration enforce the Voting Rights Act.

Jessica Pieklo: Maybe our listeners don't remember, but Wilbur Ross is that dingdong who said that people should take out personal loans to help them get through the Trump shutdown.

Imani Gandy: Oh my god, that was so fucking obnoxious. Jesus Christ.

Jessica Pieklo: He's the one directing redistricting. This is fascinating. It's going to go great. It's going to go amazing.

Imani Gandy: Yeah, yeah, this is already fantastic. A group of states, cities, counties, and civil rights groups sued saying that adding the question would have the effect, perhaps intended effect, and I would say perhaps is definitely intended, so they're saying that adding this question would have the effect of under-counting non-white households. Under-counting those folks in non-white households would lead to a reduction in federal funding of those districts and fewer representatives in Congress. Now, a federal district judge in New York, a dude by the name of Judge Jesse Furman, said that this wasn't legal. After a three week trial, he issued a 277-page opinion.

Jessica Pieklo: Holy crap.

Imani Gandy: 277 pages-

Jessica Pieklo: That's a lot of pages.

Imani Gandy: ... is a lot of pages, but this opinion said that the citizenship question was rushed onto the questionnaire as part of a power play by Republicans and the Trump administration. Judge Furman called the decision to add the citizenship question a, quote, smorgasbord of classic clear-cut violations of the Administrative Procedures Act. Administrative Procedures Act, Jess.

Jessica Pieklo: Yay.

Imani Gandy: Shimmy, shimmy, shimmy. Now, the APA is a federal law governing administrative agencies. Under this law, the judge said that the government's actions were arbitrary and capricious. Jess, maybe you might want to, since you're the admin law nerd, explain what arbitrary and capricious means because I know those are probably two of your favorite words in the English language.

Jessica Pieklo: I'm going to fan myself for a second, pull myself together here. We did an entire episode on arbitrary and capricious. What it means is, effectively, that the government acted without any good reason and couldn't show it, right? They just basically acted with a hair up their ass is a good way to describe it.

Imani Gandy: Yes, indeed.

Jessica Pieklo: Please don't put that in a law school exam though, but it might help you remember arbitrary and capricious.

Imani Gandy: Right, arbitrary and capricious equals hair up the ass. Boom, nailed it.

Jessica Pieklo: Self high-five. Anyway, okay. Furman also said that the administration had misled Congress and the court on how the citizenship question was developed. This is super important. He said that the expert testimony clearly established that the citizenship question would make the census less reliable, not more, and thus a clear-cut violation of the Census Act.

Imani Gandy: That's because noncitizens filling out the form might be worried that the government will use that information for immigration enforcement. In this climate, that makes a lot of sense.

Jessica Pieklo: Seems reasonable.

Imani Gandy: They don't return the census form. Instead, they just throw it away, and we don't have an accurate count of the populace.

Jessica Pieklo: Yeah, absolutely, so the Trump administration did what the Trump administration does and appealed that ruling directly to the Roberts Court. In this case, the Roberts Court decided to take it up, and they heard oral arguments at the end of April. Now, the Trump administration has said, "Look, adding the citizenship question is no big deal because the government has asked about citizenship on the census before." They also say that the challengers don't have standing to sue because they can't show how they'll be hurt by the decision to add the question back onto the questionnaire. Finally, the Trump administration argues that, even if the challengers do have standing, the courts don't have the power to resolve this fight because Congress has virtually unlimited discretion in how it carries out the census.

Imani Gandy: Challengers are saying that they can show that they are injured. They point to the Census Bureau's own research on what the impact would be. By the Census Bureau's own estimates, about 6.5 million people will be discouraged from responding to the census. If they are not in the census, if they don't respond to the census, then they won't be counted for at least another 10 years because the next census won't happen until 2030.

The challengers say that the decision to use the citizenship question violates two specific provisions of the Census Act. One is the provision that requires the use of administrative records instead of adding new and direct questions on the census. The second is a provision that requires the secretary to propose the subjects of the census questions to Congress three years before the census takes place. That means that, if they wanted to add this question, they should have asked Congress three years ago, and they didn't.

Jessica Pieklo: Instead, Wilbur Ross was telling everyone to go get a loan.

Imani Gandy: Right, exactly. They also say, of course, the courts can review the decision here and that there's nothing in either the Census Act or the Administrative Procedure Act, which again is the federal law that governs review of agency actions. There's nothing in either of those pieces of legislation that would prevent the courts from weighing in here, so the Trump administration is wrong when they say that they have unfettered discretion in how they want to run the census.

Jessica Pieklo: I love the Administrative Procedures Act so much, we've clearly established that, but one of the reasons why is because the worst of the worst of the Trump administration's policies they have tried to just enact by fiat and by totally disregarding the rules and just doing whatever the hell they want and then kind of saying, "Oh, no, no, no, it's fine. We're the federal government. We can do this." This is exactly what the Administrative Procedure Act was put in place and designed to do was to protect against the government just being sort of a captured creature of one political party and going off to the races as a result of it, right? It is a function of checks and balances. We've seen Republicans in Congress completely unwilling to do their jobs, so I am here for this creatures of statute coming in and like doing it, so give it up for the APA. Sorry, I'm done, but it's really important.

Imani Gandy: Cute. Yes, listener, she just said, "Give it up for the APA." I think we've established that Jess is really into the APA, but we should talk about what this case is really about, like the motive behind this case. Maybe we can give Jess an opportunity to fan herself, maybe take a cold shower. Let me tell you why it is or how it is that plaintiffs in this case came to find out that the Trump administration was lying about the reason that it decided to add the citizenship question. It all has to do with this woman named Stephanie Hofeller who I was talking to you about in the upfront.

Jessica Pieklo: Who is Stephanie Hofeller?

Imani Gandy: She's the daughter of Tom Hofeller. Tom Hofeller is the Republican redistricting expert. He wrote a memo in 2015 in which he concluded that it would be, quote, advantageous to Republicans and non-Hispanic whites to add a citizenship question to the census.

Now here's the kicker. We wouldn't even know about this 2015 memo that he wrote, and we wouldn't know about a 2017 document that he also wrote which contains language that ultimately made it into the DOJ memo about this subject. We wouldn't know any of this shit if it weren't for Stephanie Hofeller who was digging through her father's belongings after he died.

Jessica Pieklo: What?

Imani Gandy: Her father died. She found this evidence in his belongings and mentioned it in passing, really, to Common Cause, which is a liberal advocacy group, and Common Cause ultimately turned this evidence over to the judge. This is like a-

Jessica Pieklo: What?

Imani Gandy: ... completely wild and bananas story, right? Stephanie Hofeller didn't even know that her father had died at first. That's how estranged they were. They'd been estranged for five years. She found out about his death by accident after searching his name on the Internet. Can you imagine?

Jessica Pieklo: What?

Imani Gandy: Yeah.

Jessica Pieklo: What?

Imani Gandy: Yeah.

Jessica Pieklo: You're googling your dad, probably because you're pissed about something, and then you find out that he's dead.

Imani Gandy: Right. Yeah, yeah.

Jessica Pieklo: She didn't even know he died?

Imani Gandy: She didn't know he died. It gets even better. After she finds out via Google that her father died, she heads to her parents' retirement home to see her mom and to start going through her father's personal effects, basically looking for some stuff that she had asked her father to save for her presumably five years prior because they'd been estranged all this time.

When she was rifling through her father's stuff, she found a clear plastic bag. In this clear plastic bag, there were 4 external hard drives and 18 thumb drives. Now, on these thumb drives and hard drives, it turned out there were backups of data on Mr. Hofeller's laptop. Now, her mother gave Stephanie Hofeller these backups, and they turned out to hold something like 75,000 files. Some of these files were personal items, family photographs and the like, but there was also

this huge treasure trove of documents related to Tom Hofeller's work as a Republican consultant.

Jessica Pieklo: I refuse to believe this isn't a John Grisham novel. I'm sorry. Seriously. It's just getting weirder and weirder. At some point, I'm expecting Tom Cruise to come sprinting in front of me because that's what he does. This is very like The Firm, right?

Imani Gandy: It's very, very different.

Jessica Pieklo: Absolutely. We're going to get, maybe, Matthew McConaughey.

Imani Gandy: Yeah, maybe Matthew McConaughey'll show up. Sam Jackson'll start screaming, "But I hope they burn in hell," all of that good stuff.

Stephanie Hofeller is going through these thumb drives, and she doesn't really think that there's really anything to it because she thinks, well, probably all of this stuff is in the right hands anyway, but she calls up Common Cause, not even to talk about these thumb drives and this information. She calls them up because she's looking for someone to handle her father's estate, right?

Jessica Pieklo: Okay.

Imani Gandy: She's talking to the attorneys at Common Cause, and she happens to mention that she's got these files and that, I don't know, maybe these... She actually says, jokingly, to the lawyers at Common Cause, "I don't know. Maybe an expert on gerrymanders might find a lot of this stuff really interesting."

Jessica Pieklo: You think? This is wild. Oh, my God.

Imani Gandy: It is.

Jessica Pieklo: Keep going. Keep going.

Imani Gandy: After she calls Common Cause looking for a lawyer and she mentions these gerrymandering documents in passing, obviously the lawyer's ears perk up immediately.

Jessica Pieklo: I can imagine.

Imani Gandy: Do you know why? They had just filed a lawsuit in state court challenging gerrymandered maps in North Carolina, and guess who had drawn those gerrymandered maps?

Jessica Pieklo: Get out. Yeah, yeah, no.

Imani Gandy: Thomas Hofeller.

Jessica Pieklo: No, sorry.

Imani Gandy: Thomas Hofeller.

Jessica Pieklo: This was scripted. There is like...

Imani Gandy: Yeah. This is shit that actually happened.

Jessica Pieklo: I think Amy Adams plays his daughter. I'm sorry.

Imani Gandy: No. Amy Adams is playing you when they make a movie about us, and Janelle Monet is playing me. Hollywood, write that down. Okay, but back to this wacko story about Stephanie Hofeller. The lawyers who are talking to Stephanie Hofeller are like, "Hmm, I bet you there's some fuckery afoot," right? They had actually filed this lawsuit. They knew that there was some fuckery afoot, but they didn't have a smoking gun to prove it.

Jessica Pieklo: Totally.

Imani Gandy: When they talked to Stephanie Hofeller, there was their smoking gun, right? These documents revealed that Hofeller had played this crucial role in the Trump administration's decision to add a citizenship question to the 2020 census.

Jessica Pieklo: This is like a lawyer's dream.

Imani Gandy: I know. It is.

Jessica Pieklo: Seriously, it is. I just filed a lawsuit and get a random call and be like, "Oh, hey, here's all the evidence you need."

Imani Gandy: Right? Exactly. I mentioned that there was this memo that he wrote back in 2015 in which he said, "We got to gerrymander the fuck out of everything because it will basically help us and non-Hispanic white people." Republicans are doing this in order to gerrymander Democrats just sort of out of existence because they're losing the demographic wars, they're losing the moral wars, and so the only way that they can hold onto power is by suppressing votes and trying to gerrymander just the hell out of everything, which is what I just said.

Beyond just writing this memo in 2015, he actually began to urge Trump's transition team, this is back when Trump had been elected but was not yet inaugurated, he began to urge Trump's transition team to add this question onto the census. He then ended up writing a key portion of a draft DOJ letter claiming that the question was needed to enforce the 1965 Voting Rights Act. That's the rationale the administration would later use to justify its decision to add this question to the census, but of course that rationale was bullshit. Stephanie Hofeller, this estranged daughter who happened to go rifling through

her dad's things, didn't even know he was dead at first, just blew up the Trump administration's case for adding a citizenship question to the census.

Jessica Pieklo: This is seriously like the stuff of Hollywood drama, not even a little bit, but a lot, like this slow burn of political gerrymandering that then gets caught up in this big eruption, and the court is still sitting on the case.

Imani Gandy: Right.

Jessica Pieklo: I'm agog, honestly, at it. It's like...

Imani Gandy: Agog.

Jessica Pieklo: I'm agog.

Imani Gandy: I don't think I've ever heard anyone actually use that word in a real sentence. Well done. Now that you've established that you're agog, Jess, what do you think the court is going to do here? You're our resident court whisperer. What's going to happen?

Jessica Pieklo: Oh, well, I don't have a good feeling about this case. I think that there's probably five votes to bless the administration's actions here, and here is why. One, I mean we know that we have a conservative voting block, and we know that Chief Justice John Roberts is at the heart of that conservative voting block and will look for any excuse to basically interpret out of existence the Voting Rights Act. Here is another wonderful opportunity for him to do what he did in Shelby County and say, "We're post racial, so we'll gut the Voting Rights Act. Republicans are interested in protecting voting rights, so we are going to do what we can to diminish non-white and Democratic power across the board." I mean this has got Roberts written all over it. It also, honestly, Imani, feels a lot like the Muslim ban case, right?

Imani Gandy: Yeah.

Jessica Pieklo: Where we have direct evidence of the administration's bad, malicious, racist intent, and the court's going to go, "Oh, no. What? No, there, there, I don't see it. I don't know. What are you talking about?" It just feels yucky like that to me.

Imani Gandy: It does. If you take away one thing from this episode, it's that the Trump administration has been plotting to essentially whiten America by discounting millions of people of color, and these are people who would likely vote for Democrats. The Trump administration has been doing all of this shit and then lying about it, so what happens if the court lets the administration add this citizenship question to the census?

Jessica Pieklo: Well, I mean we've got the Census Bureau's own data that suggests that there's at least 6.5 million people who won't get counted. We've mentioned that that

will impact the number of representatives and, specifically, representatives in districts where those families live, so this is absolutely a political power play. It's racist at its core, but it is about Republicans holding onto and trying to entrench power while they still can. It'll impact federal spending too, right? We allocate federal dollars based on districts in many cases, and the fewer districts you have, the fewer dollars you get, and those are going to be fewer dollars going to districts that need it the most.

Imani Gandy: Right, and those are districts who have people of color. Low-income people, Democrat, Democrats.

There's this voting rights expert at the Brennan Center. The Brennan Center is a nonpartisan public policy and law institute. Her name is Wendy Weiser, and she summed it up perfectly to Adam Serwer, who wrote a really, really excellent article called A White Man's Republic If They Can Keep It for The Atlantic.

Jessica Pieklo: It's great.

Imani Gandy: Here is what she had to say. Yeah, everyone should read it, but here's what she had to say, "This kind of smoking gun evidence of what the real illicit reason is behind the government action is incredibly rare. Court decisions don't require it, and it's really quite shocking to read it so explicitly. Every procedural constraint on agency decisions was violated in this case, and the reason that was provided, every lower court found, was not the real reason that the Secretary of Commerce added the citizenship question."

Jessica Pieklo: They lied. Yeah, they lied.

Imani Gandy: They lied. Not only did they lie, but we have smoking gun evidence that they lied, and so if the court goes ahead and decides to let the administration add this question anyway, I think we can fairly say that John Roberts is okay with allowing the Trump administration to entrench white male power in this country. He is perfectly okay with white supremacy in this country.

Jessica Pieklo: We could know-

Imani Gandy: I don't know, does he want to be that guy? Do you think he wants to be that guy?

Jessica Pieklo: I mean we could know, as soon as Monday, if he is that guy. We've only got a couple of weeks left, and the courts are issuing their opinions on Monday, so we could know, as of next week, whether or not he's that guy.

Imani Gandy: Oh, God. Please don't be that guy, dude. Just don't be.

Jessica Pieklo: Don't be that guy. Chief Justice Roberts, don't be that guy.

Imani Gandy: Don't be that guy. Nobody likes that guy.

That's going to wrap it up for us today. If you'd like to continue talking about whether or not John Roberts is that guy and how we don't think he should be that guy, you can follow me on Twitter. I'm @AngryBlackLady. You can follow Jess on Twitter. She's @Hegemommy, H-E-G-E-M-O-M-M-Y. You can follow Rewire.News @Rewire_News. You can also, and you should, join our Facebook group. It is popping. People are asking questions. It's delightful.

Jessica Pieklo: It is.

Imani Gandy: If you look for it on Facebook, answer the questions that are there, and we will let you right in. Aside from that, what are we going to do, Jess?

Jessica Pieklo: We'll see you on the tubes. See you on the tubes. Boom! Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. This episode was produced by Marc Faletti, who is also our executive producer, and the Rewire.News editor-in-chief is Jodi Jacobson.