

[Boom! Lawyered: The Big, Bad 2019 Abortion Rights Supreme Court Preview Episode](#)

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 pretty jazzed about this impeachment situation. I mean, we're like, we're not going to put all of our ducks in a row or all of our eggs in one basket. But we're pretty psyched. I'm Imani Gandy.

Jessica Pieklo: 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. 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: Well Jess, it is all happening. Our national nightmare is beginning.

Jessica Pieklo: Oh God, I've lost track. What national nightmare is that?

Imani Gandy: The beginning of the next Supreme Court term starts in less than a week. And I have to say I've been dreading this term ever since Brad McBrayer was confirmed. There are so many rights up for grabs.

Jessica Pieklo: So many, we've got abortion rights.

Imani Gandy: Yep.

Jessica Pieklo: LGBTQ rights.

Imani Gandy: Yep.

Jessica Pieklo: And with the majority-conservative court, we have to rely on John Roberts to be our swing vote. And that's not good.

Imani Gandy: Not good as an understatement, Jessica. It's fucking terrible.

Jessica Pieklo: It's rough. It's real rough. And in this episode we are going to preview that upcoming Supreme Court term and tell you what we have our eye on, especially when it comes to abortion rights.

Imani Gandy: I think I need a hug.

Jessica Pieklo: Ah, okay. Well, you know I'm always up for a hug, Imani, so it'll be okay. I promise... Well, no, I can't promise actually. Probably not, but we'll do our best.

Imani Gandy: You're not welcome. Yikes. Yikes.

[Music]

So let's get into this. Jess, what are we in for? What is happening?

Jessica Pieklo: Nothing good. Imani? Nothing good. All right, so on Tuesday, October 1st it's the first conference for the Supreme Court's 2019-2020 term and it has the potential to be a doozy for abortion rights.

Imani Gandy: Ai.

Jessica Pieklo: Yeah. There are three cases, three that the Roberts Court is considering adding to its calendar just on this first conference.

Imani Gandy: Oh my God, I can't. I'm sweaty. Seriously, I'm fanning myself right now.

Jessica Pieklo: And Imani, we're not even talking about all the extreme bans past in Republican-run states. Those lawsuits are just getting started and probably wouldn't hit the Roberts Court for at least another year.

Imani Gandy: Oh my God. Okay, so hit me with some of the petitions that the court is going to be considering this term.

Jessica Pieklo: The first case the court is considering is a case out of Indiana called Box versus Planned Parenthood of Indiana and Kentucky.

Imani Gandy: PPINK!

Jessica Pieklo: PPINK! I love PPINK. This is actually a carry-over petition from last term when the court conferences on Tuesday, it'll be the third time the justices have considered taking the case.

Imani Gandy: That's a lot, isn't it? It's unusual for the court to conference on a case three times.

Jessica Pieklo: I mean with this court, we've seen them conference more and more on petitions that are more contentious. So it is a lot, yes, but it's also one of those things that's becoming more the norm. I mean, if we think back to like Masterpiece Cakeshop, they considered that case what like 13, 14 times before taking it.

Imani Gandy: Oh, that's right.

Jessica Pieklo: I mean, so yes, the idea that they're thinking about it, this shows that they're thinking about it. Right?

Imani Gandy: Right.

Jessica Pieklo: They didn't just read the petition and say, "Nope, sorry." So anyway, let's talk about it.

Imani Gandy: Okay.

Jessica Pieklo: Attorneys from the State of Indiana want the court to revive a Mike Pence era law that requires patients to undergo an ultrasound at least 18 hours before obtaining an abortion. So Indiana lawmakers in 2016 passed HB 1337 and this is one of those like monster omnibus abortion bills. This one amended a bunch of provisions of existing abortion regulations, including the state's mandatory ultrasound requirement.

Imani Gandy: This isn't the first time that the Roberts Court has considered provisions of this particular law. The court has already taken a look at a couple of provisions. For example, last term, it allowed Indiana's fetal burial provisions to take effect, but punted on the constitutionality of the state's reason ban. And we did an episode on that, which is why you may recall me saying "PPINK!" in a very excited manner. But that was the portion of HB 1337 that bans abortion based on the sex, race or disability of the fetus. Now, the seventh circuit blocked that provision and the Roberts Court kept that block in place.

Jessica Pieklo: And then Justice Thomas used the opportunity to write a completely bonkers opinion, equating the modern day family planning movement with eugenics. Remember that? That was super fun.

Imani Gandy: Yeah, and I also remember sort of losing my mind and going off on a huge rant about eugenics and Margaret Sanger, which I'm not going to do today because I'm feeling very calm and centered and I really don't want to upset the balance of my body. But let me just say-

Jessica Pieklo: Maybe a micro rant.

Imani Gandy: Maybe just a little like a micro rant. Let me just say that if a person chooses an abortion for whatever reason, that's an individual choice. That is not an ideology, which is what eugenics is. Eugenics is an ideology regarding population control and what sorts of people we're going to quote unquote allow to remain alive. If you choose to get an abortion, that's an individual choice. It's not some sort of eugenics plan that individual people are participating in. So Jesus, Thomas, can we get a grip?

Jessica Pieklo: Okay, serenity now. Serenity now. Breathe in.

Imani Gandy: Okay.

Jessica Pieklo: And out.

Imani Gandy: And out. And exhale.

Jessica Pieklo: Hold for three-

Imani Gandy: But carry on, Jess.

Jessica Pieklo: Exhale for five. Okay, so before HB 1337, patients in Indiana were required to have an ultrasound before they had an abortion, but they could just schedule it and have it on the same day as their abortion. HB 1337 though amended that law to require that the ultrasound now has to happen at least 18 hours before the scheduled abortion. So that means as a result of this 18-hour delay, patients would have to make two trips to a clinic to have an abortion.

Imani Gandy: This case has been around forever.

Jessica Pieklo: Forever.

Imani Gandy: Jesus, I mean honestly. In 2016 reproductive rights advocates sued arguing that the law unduly burdened abortion rights. In April, 2017 US District Judge, Tanya Walton Pratt, blocked the measure ruling that it quote, "Creates significant financial and other burdens on providers and patients." And then last summer, the Seventh Circuit Court of Appeals agreed and affirmed Pratt's decision. Then in Feb, attorneys for the State of Indiana asked the Roberts Court to step in and hear the case.

Jessica Pieklo: And let me just say this, there is no reason, not a single goddamn reason why the court should take this case. None. None.

Imani Gandy: Yeah. Yeah.

Jessica Pieklo: However, attorneys for the State of Indiana insist they should because it would give the Roberts Court the chance to, you're going to love this, Imani, clarify-

Imani Gandy: No.

Jessica Pieklo: To clarify. We want the Roberts Court clarifying things right now.

Imani Gandy: No. No, we don't.

Jessica Pieklo: Give the Roberts Court the chance to clarify whether the substantial burden test from Whole Woman's Health versus Hellerstedt applies to abortion restrictions passed in the name of protecting fetal health.

Imani Gandy: For Christ's sake. I just can't-

Jessica Pieklo: That's it.

Imani Gandy: Can we just-

Jessica Pieklo: Can we just not respectfully submit it?

Imani Gandy: That's funny. Somebody call the Center for Reproductive Rights. "We've got really great brief writing ideas," just you know. Okay. So the Whole Woman's Health test states that the court must weigh the extent to which the laws in question actually serve the stated government interest against the burden that they impose. Now, when this case in Indiana, the interest is quote, an interest in fetal health. Now the State of Indiana is arguing that the data to support the idea of advancing potential fetal life is impossible to quantify. Unlike data regarding patient's safety.

Jessica Pieklo: I just got to say, Imani, that this is some disingenuous bullshit here. Okay?

Imani Gandy: It really is. Yes, yes.

Jessica Pieklo: I mean, so first of all, you can't just shift from patient health to fetal health to suddenly make an unconstitutional abortion restriction constitutional. And by doing that, say, "No, but there's just no data. It's impossible." Because all of Whole Woman's Health requires data.

Imani Gandy: Right.

Jessica Pieklo: And if you do that shift, then well, Hey, you don't need to hit that burden. It's just... I'm getting mad. Sorry.

Imani Gandy: Well, it's an attempt to create a distinction between types of restrictions as a way to undercut the legislative accountability that the Whole Woman's Health standards amends, right?

Jessica Pieklo: Exactly.

Imani Gandy: If Whole Woman's Health says you've got to have data to support your claim that this law is supposed to advance women, pregnant people's health and safety, then you need to have data to back that claim up. You can't just say it and now they're trying to switch to fetal health. And be like, "Well, we can't quantify. So eh! Tie goes to us." I mean, it doesn't even make any sense. And by the way, clarify this idea that the Roberts Court needs to be clarify something they ruled on a mere three years ago, it's just basically saying, "Hey, conservative majority, here's a chance to undermine precedent."

Jessica Pieklo: And speaking of Whole Woman's Health and the power that that decision has, the second case the court is conferencing on is also a direct attack on Whole Woman's Health. That one's out of Louisiana.

Imani Gandy: Shocking.

Jessica Pieklo: So that's June Medical Services versus Gee, and we've talked about that a little bit. It's a challenge to a Louisiana admitting privileges law that is basically

identical to the one the Roberts Court struck down as unconstitutional.  
Unconstitutional in Whole Woman's Health.

Imani Gandy: Yeah, we've covered this case and this is the one where the Fifth Circuit Court of Appeals basically ignored precedent so hard-

Jessica Pieklo: So hard.

Imani Gandy: That Chief Justice John Roberts had to step in and tell them to basically fuck off.

Jessica Pieklo: Well.

Imani Gandy: I mean, he didn't actually use those words, but like he could have because honestly, the Fifth Circuit Court of Appeals just went rogue and decided to do whatever it wanted to do and just said... basically throwing their middle fingers up at precedent and that's just not the way that the law is supposed to work. So that order, the one where John Roberts basically told the Fifth Circuit to knock it off, it was issued on February 7th of this year. That order paused the fight, right?

Jessica Pieklo: Mm-hmm (affirmative).

Imani Gandy: It just put a stay on everything. And now the court is trying to figure out how to settle the matter for good.

Jessica Pieklo: So I had the chance to talk to T.J. Tu, again, one of the attorneys from the Center for Reproductive Rights, who's challenging the Louisiana law. We had him on the podcast when John Roberts basically was doing all of this, "Hey Fifth Circuit, knock it off." And we had the chance to talk about the case, the upcoming conference and here's what he had to say about the petition.

[Music]

So I am here with T.J. Tu from the Center for Reproductive Rights and so excited to talk about a case that the Supreme Court is considering taking up, June Medical Services. So thank you so much for joining us, T.J.

T.J. Tu: Thank you for having me back.

Jessica Pieklo: Always. So we've talked about this case on the show before and Imani and I have covered it and we've yelled about it on Twitter a whole bunch. And one of the points we make is that in the fight over admitting privileges in Louisiana, the law at issue here, Act 620 is identical to HB 2, which is the law that got struck down by the Supreme Court in Whole Woman's Health V Hellerstedt. But just how identical is it? Are we talking like the same exact law or is it that they're kissing cousins?

T.J. Tu: No, we're talking the same exact law. Word for word. Both laws require doctors to have admitting privileges within 30 miles that they absolutely do not need and they cannot get. So both laws create the exact same catch-22. And what's important for your listeners to understand is this isn't some kind of coincidence. The Louisiana Legislature actually got this idea from Texas. Texas passed its law and 20 clinics closed. And evidence in this case showed that the proponents of the law in the Louisiana Legislature actually said on paper we should pass this law because it was so successful in closing clinics. So no accident here, they passed the exact law so it would have the same effect.

Jessica Pieklo: It's wild to me that lawmakers in Louisiana look to Texas and were like, "Yeah, looks good, let's do that."

T.J. Tu: Texas has a long history of exporting its bad ideas when it comes to abortion access. And so we've seen this pattern before. They pass some terrible law that makes women's access to abortion in Texas that much harder. And other states say, "We might as well try it here."

Jessica Pieklo: Now you folks actually want the Supreme Court to take this case and we talk about the Roberts Court not being friendly to abortion rights at all, so that proposition might be confusing to listeners. Can you explain what it is you're asking the court to do and why?

T.J. Tu: It's incredibly important that the Supreme Court take this case. First and foremost, they have to take the case because the Fifth Circuit upheld this law and if they don't take the case, the law is going into effect and will reduce the number of clinics in Louisiana down to one and leave the state with only one doctor who provides abortion care. That's one doctor for over a million women. So the Supreme Court has to act to prevent that doomsday scenario.

But our petition tells the Supreme Court that they have to take the case for another overriding reason, which is that the courts' credibility is at stake. Only three years ago, the Supreme Court struck down the identical law and if precedent means anything, it means that the same law should be unconstitutional three years later and they have to take the case to make that clear.

Jessica Pieklo: That's a really important point and one that I want to get into in a second, but our listeners are also law nerds and your petition has a really interesting procedural posture to it. So can you explain what you're asking the court to do in the summary reversal of the Fifth Circuit? That sounds like the kind of thing that our listeners are going to go, "Huh?" And, "Ooh, that sounds nerdy."

T.J. Tu: Yeah. Summary reversal is a seldom used procedure by the Supreme Court where they actually take a case but they don't hear it. They don't take oral argument, they just summarily reverse. They send it back with a short decision saying, "We've basically already covered this before and we don't really need to

say anything more." And that's precisely the situation we have here. In *Whole Woman's Health*, the Supreme Court looked at this identical law, had a very thorough assessment of the issues and said, "Yeah, these are a sham." They don't provide any benefit to women's health, but they impose a lots of burdens on abortion access. They're blatantly unconstitutional. So the Supreme Court really doesn't need to say anything more to resolve our case. And that's exactly the situation where some of the reversals should be used.

Jessica Pieklo: I know that our listeners are so confused as to how we got here. What are we doing with the possibility of a case before the Supreme Court on a law that is identical to one that was struck down like honestly, T.J. what the hell is going on?

T.J. Tu: Well, these are not ordinary times. And what the Fifth Circuit did here is really testing the rule of law. The Fifth Circuit should have done what appeals courts do every day, which is they look at what Supreme Court precedent says and they apply it in a fair manner. Even if they disagree. We see that lots of time as lawyers, we see lower courts say, "Yeah, I might not have decided this case the same way, but I can tell from what the Supreme Court said what it is I'm supposed to do in this case." That's not what happened here. The Fifth Circuit engaged in all kinds of logical gymnastics and did all the things that were taught in law school appeals courts aren't supposed to do. They totally ignored the trial court's findings of fact, re-found the facts and they disregarded what the Supreme Court said in *Whole Woman's Health*. They limited that case to the facts of Texas and said, "Meh, we're one state over in Louisiana, so all bets are off." That should not have happened.

Jessica Pieklo: That is just wild to me. Okay, so what's up next for this case? The Supreme Court is going to consider taking it in its October 1st conference. Explain that process and what's next for our listeners.

T.J. Tu: Sure. So our petition is fully briefed and it's all teed up and Louisiana has a counter petition in the case, which is also teed up, which raises the interesting issue of third party standing. Another nerdy but critically important issue. Both petitions are set to be considered at the October 1 conference when the Supreme Court gets back together. Now they may not decide the petitions on that day and if history is any lesson, abortion cases are contentious within the court, it may take them a while to figure out what to do with the case, but it's entirely possible. We may know in early October that we have the next major abortion case at the Supreme Court on our hands.

[Music]

Jessica Pieklo: So Imani, one of the amazing things about this case is that it's not just attorneys from the Center for Reproductive Rights that want the Roberts Court to take it. So too do from Louisiana, right? They asked the court to take the case and determine whether or not providers have standing to challenge abortion restrictions on behalf of their current and future patients.

Imani Gandy: This is infuriating. I just need to say that this is infuriating. For 45 years, it has been understood that abortion providers have standing to sue on behalf of themselves, obviously, but also on behalf of their patients, the patients that they serve. And so now this idea that Louisiana is going to just jump ahead, decide to bring up an issue that it didn't raise in the lower court because the appellate process normally works. You have to bring an issue before the lower court and then you appeal it to the Fifth Circuit Court of Appeals. Then you appeal that issue to the Supreme Court and at every level you have to have actually raised the issue that you want the Supreme Court to hear.

In this case, Louisiana, they seated standing. They conceded it. They said, "Yes. Okay, fine. These providers have standing." Went through the lower court process, through the Fifth Circuit Court of Appeals process, and then when they hit the Supreme Court, they're like, "You know what? Actually, they don't have standing. We want to litigate the whole standing issue, but not in the lower court where we're supposed to, but in the Supreme Court for the first time." That's not how it works. It's frustrating. It's almost like they're taking cues from Trump who likes to just jump ahead in line and just complain to the Supreme Court and ask the Supreme Court to basically, "Do me a solid and just hear this issue even though I haven't raised it before." No. No. No.

Jessica Pieklo: Yeah. No, I think that's a real good point about them taking cues from the administration in terms of just breaking procedure. But also I got to say I appreciated the response from the Center for Reproductive Rights. That was 30 pages of basically like, "Are you kidding me?"

Imani Gandy: Yeah.

Jessica Pieklo: Really?

Imani Gandy: Exactly. Jess, I tweeted the other day and I think I said to you in Slack, like I'm reading this and it's essentially 30 pages of fucking seriously.

Jessica Pieklo: Yeah.

Imani Gandy: Because the idea... Just even though what they call this petition, right?

Jessica Pieklo: Uh-huh (affirmative).

Imani Gandy: Across conditional petition, what the fuck is a cross conditional petition? You know what I mean? This is not normal. This is not what states are supposed to do. And the fact that they're just asking the Supreme Court to append decades of precedent about standing and who has the right to sue on behalf of these patients, it's absurd. And just to think about what would happen if the court were to say, "You're right, abortion providers don't have standing." That means that we need to find patients like, people seeking abortion to sue based on

these laws. But these lawsuits take years and years and years, right? Three to four years. You're not pregnant for four years.

Jessica Pieklo: Yeah.

Imani Gandy: So I mean, I don't want to get into all of the legal talkidy-talk, you know-

Jessica Pieklo: We may have to, depending on what the court does, we'll do that later.

Imani Gandy: Right, we'll do that later. But the bottom line is courts usually say if there's like a limited period of time in which you can sue like, say nine to 10 months, and you can't litigate an entire case in nine to 10 months, then you have standing because that issue can't happen again and again and again and you're never going to find a person who has standing to sue throughout the entire four year lawsuit because again, people aren't pregnant for four years straight. But I digress. I'm going to see the floor back to you.

Jessica Pieklo: Well, the thing is conservatives had been coming for a third party standing and abortion rights cases for a while and at least the Roberts Court has turned away those kinds of attacks so far. So we can hope that they do so with Louisiana's as well. I mean, it's pretty far out there. But man, everything looks stormy. We'll say that.

Imani Gandy: Stormy is putting it kindly.

Jessica Pieklo: Okay. Last but not least of the abortion rights petitions that the court is considering-

Imani Gandy: We talked about that-

Jessica Pieklo: Is the case of Price versus Chicago.

Imani Gandy: And we talked about this case two episodes ago. It's the case about bubble zone. The little areas around clinics where people shouldn't be able to just go into your face and scream that you're a baby killer and you're participating in black genocide or whatever is the fuck that these people like tho yell at people as they're trying to go get reproductive healthcare. That's the case that involves the Scheidlers, right?

Jessica Pieklo: Mm-hmm (affirmative).

Imani Gandy: The Scheidlers are basically professional anti-choice clinic harassers and they want the court to take their challenge to a Chicago bubble zone law that protects abortion providers and patients from the worst kind of harassment as they try and access care. They want the court to say, "No, this bubble zone law is unconstitutional. It's a violation of the First Amendment," and go away.

Jessica Pieklo: And let me just say this is another one of those cases that the court has absolutely no business taking. I mean, I understand the formality of having to put something on the calendar and take a look at it, but there is no reason why the court should take this case. What conservatives want to do is overturn precedent Hill vs Colorado that says these kinds of clinic protest zones generally are constitutional. They see an opening with the conservative majority in particular with Kavanaugh on the court and they're going for it. And really if this is one of those cases where it's completely under the radar because so much is happening, right? I mean, we're just talking about the abortion petitions. There's like a whole bunch of other cases that we're going to be talking about in other episodes that are absolutely threatening our rights.

But this is one of those that in terms of day to day impact, should the court take the case and rule for conservatives, that would have a very terrifying ripple effect. And so, it's one that I'm trying to amplify because I just want folks to know exactly where the attacks are coming from and what they're trying to do.

Imani Gandy: So Jess, just tell me what's going to happen on October 1st? I got to know.

Jessica Pieklo: Okay, so let's talk about the process a little bit. The justices will take a vote on whether or not they're going to take these cases. And sometimes like with the Indiana ultrasound delay, this happened several times. Right? So they could think about it. So it takes four votes to hear a case. If conservatives really want to go ham this term and take a bunch of cases they think they can use to roll back rights, they've got four votes.

Imani Gandy: So when are we going to know what cases the court is taking?

Jessica Pieklo: Oh well, the court doesn't announce when it will issue a particular decision. God, if they did, can you imagine the chaos?

Imani Gandy: Wouldn't that be nice. I think it would be nice.

Jessica Pieklo: It would be nice, but it would also be like AAAAH!

Imani Gandy: That's true.

Jessica Pieklo: Like literally the Elmo gif with everything on fire in the background. Generally speaking though, they usually issue orders on Fridays and Mondays so we could know real soon, Imani, if they're taking these cases. If they decide to take the case, they'll just note it as cert granted so they'll issue one long order list with all the cases and the case numbers listed in it, says petitions granted, and you got to look to see if it's there.

Sometimes if they decide not to take a case, they won't announce that decision right away if a justice is writing an opinion to go along with the refusal. Right? So let's say they decided not to take Price versus the city of Chicago on the 1st,

they may not announce that decision in the order list that gets released because Justice Thomas is writing some bonkers opinion related to it.

Imani Gandy: It's so funny because I literally was going to say yeah because they got to give Thomas a chance to write some bullshit.

Jessica Pieklo: I just got a new book on Thomas so I'm warning everybody right now. I'll probably be talking a lot about him coming up.

Imani Gandy: I just finished book one of Outlander and I feel like I made the better choice.

Jessica Pieklo: You definitely did. You have better hobbies than I do.

Imani Gandy: I do. I do. So that's going to wrap it up for us today. Our little Supreme Court preview. I swear to God this term is going to be a disaster for abortion rights and LGBTQ rights, which we will talk about in a later episode, but definitely keep your eye on that ball as well. If you would like to discuss any of these shenanigans with us, you can follow me on Twitter @AngryBlackLady. You can follow Jess on Twitter @Hegemommy. H-E-G-E-M-O-M-M-Y. You can follow @Rewire\_News and you can and you should join our Boom! Lawyered Facebook group. I need you all to answer the question.

Jessica Pieklo: Justice BeerFace!

Imani Gandy: I mean, they're all kinds of... just answers to the questions that we're providing for you right now. So we're just trying to keep the space safe. That's it. We're not trying to be exclusive, or have like a velvet rope, like a VIP club in LA. That's for later, right? That's for later when we start our foundation, which will be part club, part abortion clinic and part dog sanctuary.

Jessica Pieklo: Part dog sanctuary. We have plans.

Imani Gandy: We do have plans.

Jessica Pieklo: All right.

Imani Gandy: But thanks for joining us and we're going to... What are we going to do, Jess?

Jessica Pieklo: We'll see y'all on the tubes.

Imani Gandy: See y'all on the doggone tubes.

Jessica Pieklo: 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.