

Boom! Lawyered: Next Week, the Nuns Are Coming for Your Birth Control

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 excelling when it comes to social distancing. I'm Imani Gandy-

Jessica Pieklo: And I'm Jess Pieklo. Rewire.News is dedicated to bringing you the best reproductive rights in social justice news, commentary and analysis on the web and the Team Legal Podcast is part of that mission. A big thanks to our subscribers and a welcome to our new listeners!

Imani Gandy: Jess, I'm sick and tired of nuns.

Jessica Pieklo: What?

Imani Gandy: You heard me. I'm sick and tired of nuns.

Jessica Pieklo: Imani, you just can't announce that you're sick and tired of nuns. Like what nuns? Surely, not all the nuns.

Imani Gandy: Well, obviously I'm not sick and tired of all nuns. Some of my best friends are nuns, #NotAllNuns. [laughter] But you're right, there are plenty of Catholics, including nuns who support access to birth control, so I should have been a little bit more clear. I'm sick of a particular group of nuns.

Jessica Pieklo: Why are you trying to start beef with any nuns though? That seems a little blasphemous, Imani.

Imani Gandy: Because these nuns are starting beef with us and I'm tired of it. I'm tired of these nuns. They're coming for our birth control, Jess.

Jessica Pieklo: Which nuns, Imani? Who am I beefing with?

Imani Gandy: The Little Sisters of the Poor.

Jessica Pieklo: Oh, yes, those nuns. I'm pretty sick of those nuns too, but maybe we should explain who the Little Sisters of the Poor are and why we're sick of them.

Imani Gandy: I'm going to go ahead and let you do that.

Jessica Pieklo: Oh, thank you, that's so very gracious of you! Next week, the Supreme Court is going to hear arguments in two consolidated cases that could kill off the birth control benefit for good. Not only that, it could grant employers and colleges and universities the right to defy regulations they have a, get this, "moral objection" to.

Imani Gandy: Oy vey.

- Jessica Pieklo: The cases are Trump vs. Pennsylvania and Little Sisters of the Poor Saints Peter and Paul Home vs. Pennsylvania. And honestly, they kind of sum up everything that's wrong about these times.
- Imani Gandy: What's wrong with these times? What do you mean by that exactly?
- Jessica Pieklo: Well, for starters, they are the perfect example of conservatives gaming the legal system to get to a desired policy outcome. In this case, creating a whole big regulatory loophole for businesses and colleges and universities to ignore laws they don't like.
- Imani Gandy: That seems to be like something they often do, just ignore laws they don't like.
- Jessica Pieklo: Totally, right? But these cases also star the Little Sisters of the Poor, who've become maybe some of the biggest bad faith actors in the fight over the birth control benefit.
- Imani Gandy: And finally, even this case has been affected by the coronavirus. For the first time in the history of the Supreme Court, oral arguments will be live streamed by the justices, so buckle up law nerds because this one is a doozy.
- [music]
- Imani Gandy: Jess, why are we still talking about these cases? We've been talking about the birth control benefit for literally eight years now. How is this still going on?
- Jessica Pieklo: Because conservatives are the worst. Honestly, that's the only answer.
- Imani Gandy: Fair enough. Podcast over! But no, no, no, no, we should remind our listeners of the ancient history of the birth control benefit just in case they've forgotten and haven't read any dusty tomes lately.
- Jessica Pieklo: Dusty tomes?
- Imani Gandy: Yes, dusty tomes, because the birth control benefit fight is ancient and details about it have been written in old-ass books with a quill and pen.
- Jessica Pieklo: Oh boy, I mean, you're not entirely wrong.
- Imani Gandy: I know.
- Jessica Pieklo: All right, so the Obama administration first proposed the birth control benefit way back in 2012, 2012. The lawsuits have been flying around ever since. Now, let's remind the listeners what we're talking about here. The birth control benefit requires most employers to include coverage of FDA-approved contraceptives without copay in their employer-sponsored health insurance plans.

- Jessica Pieklo: Let's take a break here because this is not free contraception, contrary to popular belief. It's an anti-discrimination provision. You don't get to charge some people more for the same shit. That's it.
- Imani Gandy: Yeah. Yeah. Also, the birth control benefit contains an exemption for religious employers and then accommodation for religiously-affiliated employers. Now we're going to talk about that accommodation in more detail in a bit.
- Jessica Pieklo: It's really totally standard, normal stuff that the conservative saw is an opportunity to wedge for a whole new set of rules just for them.
- Imani Gandy: The first time around, the Little Sisters were fighting the Obama administration. This time around, the Little Sisters are defending the Trump administration against challenges by attorneys general in states like Pennsylvania and California. First, the Little Sisters said that the Religious Freedom Restoration Act covered both nonprofit and for profit businesses like Hobby Lobby, meaning that nonprofit and for profit businesses could exempt themselves from providing birth control to their employees.
- Jessica Pieklo: I just want to pause here because nobody had ever made that argument before. And Imani, we've been covering these cases since the dawn of time and we literally snort laughed when we saw that, this idea of corporate religious rights. I mean come the fuck on, what?
- Imani Gandy: Yeah, we laughed it off, all right. It was downright hysterical until the Supreme Court said, you know what, corporations do have religious rights in a case called Hobby Lobby v. Burwell back in 2014, and then we stopped laughing because we were just like, what the fuck? Seriously, what the fuck?
- Jessica Pieklo: But in Hobby Lobby, the court didn't strike the birth control benefit down. Instead, the court said that the Obama administration had to give for profit businesses the same right to object to the accommodation as nonprofits and that the administration had to find some way to accommodate those objections.
- Imani Gandy: Okay, so we should probably explain what this accommodation was that the Obama administration came up with.
- Jessica Pieklo: Yeah.
- Imani Gandy: It was simple. Certain organizations like churches and houses of worship, places that are super, super Jesus-y and employ and serve equally Jesus-y people, those organizations could exclude contraceptive coverage from their health insurance plans.
- Jessica Pieklo: Other religious organizations like nonprofits, like schools and Catholic charities and such, they would be able to opt out of the birth control benefit by saying to

their insurer, "Hey, we don't like contraceptive coverage and we're not going to offer it." In which case the insurer would be like, "Okay, cool." And they would step in and provide the contraception coverage for them. Now to notify the insurer, all they had to do was fill out a form, one form called Form 700, like Mad Libs style.

Imani Gandy: Right. And this seems like a perfectly good compromise, right? If you don't want to provide birth control, then you just tell your insurer about it and they will provide it for you. But the religious right being the religious right found something to complain about. Here's what they were complaining about. They didn't want to even have to notify their insurer that they objected to providing contraceptive coverage themselves. Because if these religious organizations notified their insurer, then the insurer would step in and provide the contraceptive coverage and the religious folks thought that that was "material cooperation with evil."

Imani Gandy: Basically by notifying their insurer, it was the same as if they were just, I don't know, selling birth control pills in vending machines in the break room. Essentially, they were arguing if they had to fill out this form, Form 700, they would be handing out permission slips for contraception.

Jessica Pieklo: And the Obama administration was like, "Just, can you please fill out the Form 700, one form. It's easy. Just fill out the fucking form."

Imani Gandy: And then these religious nonprofits, we're all, "We don't want to fill out the fucking form." I just had a big panic attack about it.

Jessica Pieklo: That's it. That is. Basically, the legal challenges to the birth control benefit continued. Not because the administration failed to accommodate corporate objections, but because conservative saw yet another way they could attack the benefit.

Imani Gandy: And that was by attacking the accommodation process that the court had upheld in Hobby Lobby. That's the accommodation process that I just explained, filling out the form.

Jessica Pieklo: Fill out the fucking form.

Imani Gandy: Fill out the fucking form, exactly. And so that's what the Little Sisters did. They attacked the accommodation by claiming that the accommodation process itself violated the Religious Freedom Restoration Act, which is a statute that basically says that governments can't pass laws that substantially burdened a person's religious beliefs.

Jessica Pieklo: This ridiculous argument found its way to the Supreme Court as well. And honestly, the only reason the Supreme Court didn't buy it is because at the time, Scalia was dead, and that meant that the court was divided with an equal

number of justices on equal side. That case was Zubik vs. Burwell. They basically just tossed it.

Imani Gandy: Right. After Zubik vs. Burwell happened, the 2016 presidential election happened. And, ugh, Trump being the Trump that he is decided to write a sweeping exemption to the benefit, far more sweeping than what Obama had done. Basically, he's allowing any company, any company at all, to claim a religious or a moral objection to providing copay free birth control to their employees. And I just want to point out that there's nothing in the Religious Freedom Restoration Act that accounts for moral objections. They have to be religious objections.

Jessica Pieklo: It's not the Religious and Moral [crosstalk 00:10:01] Freedom Restoration Act. Just as a point of order.

Imani Gandy: Right.

Jessica Pieklo: Now, but that's important. Because instead of arguing that the Religious Freedom Restoration Act grants employers a right to deny their employees insurance coverage for birth control, Trump vs. Pennsylvania is about whether or not the administration acted properly when it wrote this sweeping exemption to the benefit. And Imani, you know what that means...

Imani Gandy: Oh lordy, here we go.

Jessica Pieklo: It's an Administrative Procedure Act fight!!

Imani Gandy: Oh Jesus Christ.

Jessica Pieklo: I can barely contain myself!

Imani Gandy: Oh, Jess, calm down for the love of God. [laughter]

Jessica Pieklo: I refuse. I will not. I love the APA. I stand in and it's at the court next week.

Imani Gandy: All right, so talk about this a little bit more while you collect yourself.

Jessica Pieklo: Hold on. I got a fan. Hot flash or the APA, I don't know.

Jessica Pieklo: The Trump administration sidestepped the rulemaking process and released this giant black hole of a regulation that allows employers to refuse to comply with the birth control benefit in the ACA if, as we've said, they have a religious or moral objection to providing contraceptive coverage.

Imani Gandy: The administration is trying to create this freestanding moral objection to laws they don't like and that objection would apply to employers, schools and universities. That's the danger in this case. It's just a free for all essentially.

- Jessica Pieklo: And our listeners might even remember this fight, our first podcast of 2019 featured these cases. Go back and listen to it because we really dive into the hot and sexy APA. But I mean for real, we really dive into the issues and you all get to be better for spending the time with the APA.
- Imani Gandy: I'm pretty sure you're the only person in history that think that people's lives would be better if they spent more time with the APA. [laughter]
- Jessica Pieklo: I stand by it. This is a hill I'll die on.
- Imani Gandy: Fair enough. But the long and short of the APA is that you can't impose new rules without allowing the public a chance to comment. Also, you can't impose new rules that are "arbitrary and capricious."
- Jessica Pieklo: Right. In May 2017, Trump issued an executive order called, get this, Promoting Free Speech and Religious Liberty. That purported to end any legal obligations the Little Sisters or any other religiously-affiliated employers had in complying with the benefit. That's it. He was just like, "Nah, you get a pass."
- Imani Gandy: Then in October 2017, the administration announced new rules that granted secular employers the ability to opt out of the birth control benefit if they had religious and moral objections to providing contraceptive coverage. Trump basically ignored the APA and ultimately published these new rules saying that they would be effective immediately.
- Jessica Pieklo: That prompted attorneys general in states like Pennsylvania to sue and say, "Nope, that would create regulatory chaos." Oh, and also administration, follow the damn APA if you intend to issue rules like that.
- Imani Gandy: During the course of that litigation, the Little Sisters of the Poor decided to rush to the new rules defense becoming the face of the litigation moving forward.
- Jessica Pieklo: Now that's an important strategic posture for conservatives here and I'm kind of obsessed with it honestly, the optics of all of it. I'm going to talk about this for a second because I'm mad.
- Imani Gandy: Do it.
- Jessica Pieklo: During the Obama administration, conservatives had this refrain that the big, bad federal government was running around and forcing nuns to hand out birth control like, I don't know, breath mints, right?
- Imani Gandy: Mm-hmm (affirmative).
- Jessica Pieklo: Of course, nothing of the sort happened. In fact, one of the most maddening aspects of the whole first round of the Little Sisters litigation is that the nuns were never at risk of having to comply with the benefit, at all. They didn't have

to do anything. They literally had nothing to lose in the fight. But the Obama administration didn't press the issue. He was a good guy, right, instead of going for the juggler. Instead of looking for some kind of compromise, it just never manifested.

Imani Gandy: I have to say, at the time, I was super annoyed that Obama kept compromising with these people when it was obvious that nothing he did was ever going to satisfy them, right? I really just wanted him to just throw up middle fingers at all the nuns and all the religious organizations and tell them to just fill out the fucking form and stop complaining.

Jessica Pieklo: I have this image now of President Obama doing the big suck it.

Imani Gandy: Exactly.

Jessica Pieklo: If only... Because then Trump gets elected, and well, the whole conservative talking point about Obama shoving birth control down the nun's throat, that blows up for them, right?

Imani Gandy: Right, so the nuns pivoted. Trump issued this executive order. And instead of the Little Sisters being the victims, they're now the heroes rushing to Trump's defense. He's their savior, and Trump is the savior for all of Corporate America, which has toiled under the burden of illegal duty not to discriminate against their employees.

Jessica Pieklo: And that's really the fight in a nutshell, and that's what the court's going to hear next Wednesday.

Imani Gandy: What's at stake here, Jess? Talk to me about what's going to happen here. What are we looking into here?

Jessica Pieklo: Well, for starters, the scope is huge. Just how many employees, students, and dependents would be affected by a decision that said basically anybody who wanted to could opt out of this coverage because of a moral objection. I mean, we don't know what that number is. It's difficult to predict, but it's safe to say it's a lot.

Imani Gandy: And if the court lets the Trump exemption stand, it paves the way for businesses to make moral objections to other laws they don't like, for instance, minimum wage laws, anti-discrimination laws, right, laws that prevent landlords from refusing to rent to Black people or gay people or trans people. This is really a Pandora's box situation that we have going here.

Jessica Pieklo: It really is. And even on a more granular level, these cases will have a big impact. For example, almost all women use birth control at some point in their lives, right? The latest statistic I saw was 86% of us have used three or more methods by their early forties.

Imani Gandy: And birth control can be expensive. I know there's this sort of theory or talking point going around that just go to Walmart and buy some pills or some condoms, but that's not how it works. There are many contraceptive choices that have upfront and long-term costs for the drug or the device itself, and that's because not all women can use just one kind of birth control, right? Our bodies are different, oh shocking. And so these costs can place effective birth control out of reach for a lot of people who want it and drives them to less expensive but less effective methods of contraception.

Jessica Pieklo: And the birth control benefits been around for a while and I mean we've been talking about these fights for a while, so we actually have data now. The coverage guarantee in the ACA has had a positive impact. Numerous studies confirm that the federal contraceptive coverage guarantee has dramatically reduced out-of-pocket healthcare spending.

Jessica Pieklo: Most women surveyed who had such coverage agreed that it has helped them use the birth control method of their choice and to use it effectively. This is a net positive. Several other studies also suggest that the guarantee has had a positive impact on the use of prescription methods generally and consistent contraceptive use. These are all good broad public health goals that are being served with the birth control benefit.

Imani Gandy: And this isn't the only attack on birth control, right?

Jessica Pieklo: Right.

Imani Gandy: The administration and its allies are simultaneously working to undermine these same programs through attacks like the Title X or these incessant lawsuits to overturn the Affordable Care Act, among other healthcare-related things.

Jessica Pieklo: These cases are a big deal, and like we said, the court will hear arguments next week and because it's the court, issue a decision likely at the end of June.

Imani Gandy: That's that, right? But let's talk about what we said we were going to talk about in the upfront about how this is this historic moment about the Supreme Court live streaming arguments. Talk to me about that, Jess. You've been in the courtroom before so this must be like mind-blowing for you in some way.

Jessica Pieklo: It is. I mean what a time to be alive. First of all, for the first time ever, seriously, you all Boom! Lawyered family can join the oral arguments with us.

Imani Gandy: Woo.

Jessica Pieklo: CSPAN is going to be carrying audio of the arguments and we are going to be live tweeting them, so buckle up as Imani said. I'm taking over the Rewire.News Twitter account as of 10:00 AM Eastern on Wednesday, May 6th for the

arguments. Now, arguments are kind of boring, but live tweeting, we're going to spice it up.

Imani Gandy: Yeah, we are certainly going to spice it up. I'm going to be throwing just tomatoes and eggs just from the peanut gallery. But let's talk about the fact that the nine justices and the attorneys representing the parties are going to be on one big conference call. How in the hell is that supposed to work?

Jessica Pieklo: Yeah, this is going to be bonkers. Chief Justice John Roberts tried to set some rules up. The justices will ask questions in order of their seniority. Unlike a regular oral argument where it's kind of a free for all, except for Justice Thomas, who knows, there's going to be sort of an order to it. I don't know, I guess it's probably going to feel more like a thesis defense or a parole board hearing depending on how the arguments go.

Imani Gandy: Parole board hearing. Basically, what you're saying is that the usual back and forth between the attorneys and the justices isn't going to happen.

Jessica Pieklo: Yeah.

Imani Gandy: And I bet Clarence Thomas doesn't even care because he never says anything anyway, so eh.

Jessica Pieklo: Eh, is right. Plus, I mean, we've got technology. We've got an aged bench and technology so the possibilities for chaos are kind of endless here.

Imani Gandy: Jess?

Jessica Pieklo: Yeah.

Imani Gandy: Are they going to be using Zoom? Because honestly, I wouldn't mind seeing like, I don't know, RBG with bunny ears or maybe justice keg stand wearing one of those beer hats with the funnels. Please tell me they're going to be using Zoom.

Jessica Pieklo: No. Oh my God, but like the justices and the Zoom Brady Bunch, it's be amazing.

Imani Gandy: Amazing.

Jessica Pieklo: No, they're not using Zoom. But this really could set the stage for more live streams in real life, if in real life ever happens again.

Imani Gandy: Jesus. That's dark.

Jessica Pieklo: Sorry.

Imani Gandy: That's going to wrap it up for us this week. But before we go, we want to thank all of you who have been donating to help keep Boom! Lawyered up and

running. We seriously did not expect to see this level of support right away, especially during these trying times and we are so very grateful to each and every one of you.

Jessica Pieklo: Oh, so much so. And if and only if you have the disposable income, please throw us a couple bucks so we can keep our eyes and your ears on the Roberts Court. It'll only take a second and every dollar really does count.

Imani Gandy: The link is Rewire.News/boomgive, that's Rewire.News/boomgive.

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

Imani Gandy: And you should follow us on Twitter. I'm @angryblacklady. Jess is @Hegemommy. I would also like to wish her a belated birthday because she turned a certain number of years old two days ago.

Jessica Pieklo: Thank you.

Imani Gandy: And if you want to just hang out with us, you should join our Facebook group. We've got 1.3000 members and people are talking and sharing and it's really quite wonderful in a lovely, safe space.

Jessica Pieklo: It's lovely.

Imani Gandy: Go to the Boom! Lawyered. Join the Facebook group. Answer the question. Just say something that lets us know that you're not some anti-choice numpty, we'll let you right in. And aside from that, what are we going to do, Jess? Your favorite part.

Jessica Pieklo: We'll see on the tubes, folks.

Imani Gandy: We'll see you on the tubes, folks.

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