

Imani Gandy: Hello Fellow Law nerds. Welcome to another episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that has a head cold, at least I do. 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 thank you to our subscribers and a welcome to our new listeners.

Imani Gandy: So the Trump administration is looking to let evangelical adoption and foster care agencies refuse to place children in LGBTQ or non-Christian families. Non-Christian meaning they won't place children with Jewish families, with Muslim families, and with any other host of religions that people celebrate or practice. In this episode, we're going to tell you about these efforts and who is behind them, we're going to talk about which states are chomping at the bit in order to let this discrimination against LGBTQ people and non-Christian families happen, and how the Notorious RBG herself predicted this entire mess way back in the Hobby Lobby days. Like back in the day when Jess and I we're cutting our teeth on all this nonsense.

Jessica Pieklo: Okay. So let's give you folks some background on what's going on here. The Washington Post reported recently that the Trump administration has approved a waiver for a federally funded South Carolina Child Placement Agency that would allow it to refuse to place kids with LGBTQ families and families that were not Christian. So this is about Miracle Hills Ministry, a Christian foster care agency that turned away a Jewish woman from fostering a child because, as a Jew, she did not share the ministry's beliefs.

Imani Gandy: Wait, what?

Jessica Pieklo: Yep.

Imani Gandy: You can't do that. As a Jew, I'm personally offended. But seriously, you can't do that. You can't just turn away people because they don't fit the box that you want parents to fit into. This can't be constitutional. And that's exactly what the South Carolina social services said. They said, Yo, whoa, hold up a second, that's discriminatory, and that's the kind of action that could get your license yanked.

Jessica Pieklo: Yeah. Reasonable so far up until the point then when South Carolina Governor, Henry McMaster, decides to butt in and he goes and issues this executive order that grants this adoption and foster care agencies generally in the state, so not just Miracle Hills, but adoption and foster care agencies in the state this right to discriminate on the basis of their religion. I mean, this happened.

Imani Gandy: But you can't. But Jess, you can't do that.

Jessica Pieklo: I know. We know that. Let's maybe explain why you just can't do that.

Imani Gandy: All right. So the reason you can't do that, and the reason why governor Henry McMaster is going to have a pretty big problem is that there's a federal rule that specifically prohibits agencies that get federal funding from engaging in discrimination on the basis of religion or sexual orientation, right?

Jessica Pieklo: (affirmative)

Imani Gandy: So while Governor McMaster issues this executive order, he also petitions the Trump administration. Specifically, he petitions the Department of Health and Human Services to grant Miracle Hills an exemption, and do you know what happened, Jess?

Jessica Pieklo: I'm going to guess that they went ahead and granted that exemption, right?

Imani Gandy: Yeah. The Trump administration sure did.

Jessica Pieklo: Yep, they sure did. Back in January, they issued this four page letter that granted Miracle Hills, a quote unquote faith based initiatives program exemption. And what this did, Imani, was essentially rewrite federal civil rights laws in the process. The impact of this letter, and this waiver is huge.

Imani Gandy: It's astonishing. It's really astonishing and actually rather deplorable. So, let's talk about who the hell is actually responsible for all of this.

Jessica Pieklo: Yes. Who is responsible for this? So one of the guys is, Roger Severino, and that name may ring a bell for some of our listeners because we've mentioned him before. We did an entire episode about him. He's so terrible. He's one of the folks in charge at HHS, the agency who issued the waiver, and he is, let's see, let's remind some of our listeners. His office has a Supreme Court justice, Clarence Thomas Bobblehead, and a crucifix.

Imani Gandy: Why does anyone need a Thomas Bobblehead?

Jessica Pieklo: I mean, it pairs well with the crucifix, I guess. I don't know.

Imani Gandy: I guess that's true.

Jessica Pieklo: I don't know but he's in charge of the office of civil rights at HHS and is one of the masterminds of this whole faith based initiatives policy, and this waiver falls right in line with what they're trying to do, and Imani, we told folks this is what was going to happen when they put Severino in charge.

We said this kind of stuff was going to happen, and here it is. So, we've got South Carolina but it's not just a one off here. This is a teaser of what the administration is hoping to tee off. So, in a leaked 2020 draft budget request, it hasn't been made public yet, HHS is looking for broad budgetary authority to include faith-based foster care and adoption groups, those groups that we're

talking about like Miracle Hills here who reject LGBTQ parents and apparently non-Christians too. They want them in the nation 7 billion with a B, \$7 billion federally funded child welfare programs. They want them in on the money.

Imani Gandy: But how? I'm just wondering, isn't there this whole thing about separation of church and state and how federal funding can't be used to prop up religious groups? Am I mistaken about that?

Jessica Pieklo: You're not mistaken about it and neither are some of the House Democrats, thank God.

Imani Gandy: So the same day that the Trump administration leaked that they intended to include broad authority for discrimination in foster care and adoption in their budget, the Chairwoman of the House Committee, which oversees HHS funding, her name is representative Rosa DeLauro, she pushed back. She said, "Discrimination has no place in our child welfare services, whether it's antisemitism, Islamophobia or anti LGBTQ discrimination." She wasn't having any of the bullshit.

Jessica Pieklo: None of it. And most recently, 95 members of the House joined with her to say, nope, we are not having it, this is not what we do. So this is a very live fight, not only as the Trump administration suggesting that they want this budgetary authority, and we're already starting to get pushed back from the house, which is great. This is what we said, post mid-term elections. This was exactly the stuff we wanted to see. But naturally, it doesn't end there, does it? The Trump administration has hinted that they might rewrite that rule that we mentioned, that Miracle Hills had to get the waiver from.

The Trump administration has hinted that they are going to go through the rulemaking process to rewrite the rule and allow some broad exemption or faith based process into it. And we've talked about rulemaking, right? And we know in previous episodes and this administration doesn't do it so well.

Imani Gandy: We did a whole episode on rule making and then you sang about how much you loved admin law and thought it was sexy. It was fantastic.

Jessica Pieklo: It is. I'm bringing sexy back for agency law. I am. It's my 2019 mission. But this is why it matters people, agency law is sexy because they're trying to do this shit. Anyway, so that's really bad. They've suggested that they're trying to rewrite this rule. And, I mean, we hinted at it at the start of the episode, but this was totally predictable, wasn't it? I mean, RBG mentioned this and here we are.

Imani Gandy: Yeah. I mean, she really did. She literally called this. I mean, she had that great analogy about my fist ends where the other person's nose meets, right? Like you can be religious, you can hold religious values, you can even express them, you can use your first amendment rights to scream from the top of the mountain tops that you think homosexuality is a sin and that LGBTQ people, or

Jews, or Muslims, or whomever else shouldn't be allowed to adopt children, shouldn't be allowed to foster children, that's your first amendment right.

But what you cannot do is discriminate against people using religion as a weapon. That's just not what you can do. And that's what Ruth Bader Ginsburg said in her dissent from the Hobby Lobby decision, right? She said, "This is where we're going to go. This is a danger." And then here we are, what, six years later, that danger is imminent.

Jessica Pieklo: Not only did RBG predict it, but this feels still esoteric. In a sense. We're talking about, in a way, one agency in South Carolina and a fight that the Trump administration is itching to pick but thankfully we have a wall of push back in the house Democrats and an ability to hopefully stem some of that at bay, but why does it matter though, for folks beyond that? Let's broaden this out because the reality is, it's not just the Trump administration and it's not just South Carolina, is it?

Imani Gandy: No, it really isn't. And not to go back to my home girl Ruth, but she basically said, that there's no limiting principle when it comes to letting people discriminate in the name of religion, right. So, in Hobby Lobby we were talking about birth control and whether or not closely held corporations could discriminate against its employees who want to take or obtain birth control. And then we started talking about cakes, right? The Masterpiece Cakeshop of America, where now people, Evangelical Christians don't want to bake cakes for gay couples.

And now I just wrote a piece last week about how there's more nonsense going on in Arizona with wedding invitations, and these super Christian women who say that their wedding invitations or expression of their love for God and blah blah blah, and that's why they don't want to serve same sex couples. And now we're going to, we're just refusing to place children and perfectly healthy homes in the name of the lord.

I mean, do you know how many kids there are that need foster care? How many kids there are that need to be adopted? And we're looking at perfectly great people, people who would make wonderful parents and saying, you can't adopt these children because you're Jewish. You can't adopt these children because you're gay. That is wrong.

Jessica Pieklo: It's extra gross in the context of the family separation that's happening and we know children are coming up through Christian agencies. And so, all of it feels very specifically missionized.

Imani Gandy: It does. It really does feel like, it harkens back to the days when the government was stripping native American people of their children and just passing them out to white people. It's horrifying. It's horrifying. They've lost thousands and thousands of kids. Thousands of kids may be living in these evangelical homes

that are potentially not safe, but have been deemed safe simply by virtue of the fact that they are evangelical Christians. And that, that's not right.

If anyone of you have seen abducted in plain sight on it, Netflix, you know, I mean, that was about LDS and Mormons, but you know what can happen when religion is so entangled in child rearing to the point where children are left neglected. This is a real problem and it's not just happening in South Carolina, right? Texas, for example, has asked for a similar waiver allowing them to discriminate against non-Christian people and against LGBTQ people. Tennessee, Kentucky, they both have legislation pending this session. Kansas and Oklahoma have also passed similar bills. So, this is a widespread problem and it's only going to get worse.

Jessica Pieklo: You're right Imani and it's not just South Carolina, it's all these places and we should probably give some of the procedural recap because this isn't necessarily brand new fight either. This is a fight that goes back all the way to 2015, the Obergefell decision that said, marriage equality is the law of the land and this is one of the front lines on the conservative response to Obergefell. Almost immediately after that decision, we saw states like Michigan and Mississippi who passed these far reaching laws. Remember this First Amendment defense laws. remember those?

Imani Gandy: FADA.

Jessica Pieklo: The FADAs.

Imani Gandy: I am your FADA.

Jessica Pieklo: I mean, it just happens when you spend so much time in this place, you come up with jokes like Luke, I am your FADA.

Imani Gandy: I'm not proud. Actually, I am kind of proud of that one.

Jessica Pieklo: You should be. That is like an amazing lawyer dad joke of all time right there. But states like Michigan and Mississippi, right after the decision started passing this nonsense that said, agencies that receive state funds, could discriminate based on their religious beliefs. And those laws fizzled out mostly because it became immediately politically unpopular to be so anti-gay in the wake of such a decision that made many, many people feel good. Even if John Roberts felt sad inside, which he said from the bench when he was reading his descent, it makes me feel sad inside.

Imani Gandy: Did he really say that?

Jessica Pieklo: No, he didn't. I'm paraphrasing. I'm paraphrasing. But it fizzled out a little bit. But then as tides do, they shifted a little bit and evangelicals, also bless their hearts, won't quit. They are the energizer bunnies who just won't quit. And they

started sensing that they may be regaining some political ground again, and so they started pressing their luck in places like Philadelphia, for example, where Catholic Social Services recently lost a city contract for pulling this nonsense.

And Catholic Social Services in Philadelphia tried to get the Supreme Court even to step into the fight and this was right before the cabinet confirmation and we covered it a little bit on the site. It didn't work. The Supreme Court turned the case away over strong objections of both Alito and Gorsuch, so that also gives us a little indication of where at least four of the Conservatives would be leaning on this. And, I'm guessing, you know Justice Kagan is probably in line with... (laughter)

Imani Gandy: (laughter) Oh my God. Okay.

Jessica Pieklo: So that's the TLDR of where we are.

Imani Gandy: Justice Kagan, oh my God. All right. Well on that note, maybe we ought to talk about what the case is supposed to be about as opposed to what the case-

Jessica Pieklo: No this is supposed to be about Jesus. Imani, it doesn't get any deeper than Jesus.

Imani Gandy: All about Jesus. Everybody loves Jesus. I mean, so evangelicals are claiming that this is about their religious freedom and their constitutional right to practice their religion as they see fit without the government getting all up in their business. Like I mentioned before, Masterpiece Cake shop, the Arizona invitations case, brush and NIB studio. But what the case is actually about, let's talk about what the case is actually about.

Jessica Pieklo: Their motive.

Imani Gandy: Their motive. And would it surprise you, Jessica, to know that their motive is money.

Jessica Pieklo: Get the fuck out of money.

Imani Gandy: I know. I am shocked. This is my shocked face, you can't see it, but it's brown. So evangelicals are trying to find a way to get both state and federal funding and discriminate. And these agencies are free to limit placements, they're free to discriminate against whomever they want. They're free to say, we're only going to send children to families who have a person named Amanda in them. If you have a wife name Amanda, then come on down, we're going to give you this kid. They can do whatever the fuck they want. But they can't do that and except government funding, that's separation of church and state. That's basic stuff here. You cannot take federal funding \$7 billions worth, which is available. Take some of that money and then exclude people based on who they are.

Jessica Pieklo: Absolutely. That bears repeating one more time. This isn't about religious liberty. This is about wanting government money to conduct business however you damn well please. And you just can't do that. So, go on with your bad self in have your religious, the affiliated agency, it's all good, right? But you don't get to have my dollars to do that. It's that simple.

And this is really important and something that I want to stress is we close the loop on this argument is that we have to pay attention to the funding argument and these streams because conservatives have had a lot of luck convincing this court that religious groups should get in line for funding for secular services. We covered a case way back when called Trinity Lutheran and this was one of Gorsuch's first big appearances as a newly anointed justice.

I mean, my God, Imani, remember those days? Remember when all it was was just Gorsuck.

Imani Gandy: God, now, you got Kegstand dude.

Jessica Pieklo: But one of his first real big imprints on the court was in the Trinity Lutheran case and to help open this pipeline of government funding when religious groups are operating in, what they call "secular spaces" and in the Trinity Lutheran case, that was a church. They're giving money directly to a church because they have a daycare on service. So this is very much also an extension of Trinity Lutheran and we're seeing it bubble up in the federal courts. We've got cases dealing with funding religious schools that discriminate, and funding social service agencies that promote conversion therapy, another topic that we've talked about on this podcast.

Imani Gandy: Can I just say real quick, Mike Pence is the fricking worst.

Jessica Pieklo: Yeah. No, seriously, we'll have an episode called Mike Pence is the worst and all we do is primal scream.

Imani Gandy: Exactly. So let's talk about who is to blame, right? What's the final judgment in all of this? Who is to blame? Who do you think is to blame?

Jessica Pieklo: Let's see. Well, we've identified Roger Severino and the Trump administration. Obviously, but that doesn't feel quite enough.

Imani Gandy: I'm going to go ahead and say, we used to like this guy but then he up and just peaced out of the court before he had a chance to actually cement his legacy on LGBTQ rights. Who is that man?

Jessica Pieklo: I'm still mad, Tony!

Imani Gandy: God dammit Tony! Yes, we're talking about Anthony Kennedy, of course. Hobby Lobby is a disaster that opened these flood gates, that opened these gates that

say, it's okay to discriminate as long as you base that discrimination on some "sincerely held religious belief". But the problem with Kennedy is that, he spent a lot of his career promoting the rights and dignity of LGBTQ people in his Obergefell decision. He talks so much about the dignity of gay people and how marriage is part of this institution and that gay people should have just as many rights to engage in the solemnified act as much as heterosexual couples do, but then he just dropped the ball. He didn't go that extra mile and that extra mile would have required him to say, you know what, LGBTQ people are a protected class under the equal protection clause, they deserve some sort of standard of review, right? We've talked about standard of review, rational basis, intermediate, strict scrutiny.

They deserve a higher standard of review than the states just feel like it because they are marginalized people, they are oppressed people just as black and Brown people are, just as immigrants are, just as these civil rights laws protect religion, they ought to protect LGBTQ people. And he could have stuck around and made that clear. There are cases coming up in the pipeline that really could have used Anthony Kennedy's word, but he decided, you know what, I'm fucking out. I don't need this shit anymore. I got to go.

Jessica Pieklo:

And I mean this dignity harm is something I want to talk about just real quick because he could've seen this coming. And, I mean, what is a greater dignity harm than being in a committed partnership and look to foster a child and be turned away by the state based on who you are as an LGBTQ person, as an atheist, as a Jew, as a Muslim. Whatever your status as a non-Christian to have the state say, you are not worthy, based on your status, to take care of this child, to contribute in this way.

That's a citizenship harm. That's a dignity harm. And that is a direct line from Obergefell and I'm mad.

Imani Gandy:

And let me just add, just a little bit of a sidebar, as we've been seeing through the news this week, all of the people who are attacking representative Omar as being anti-Semitic, and there's a lot of people on the right, I mean, Mike Pence, for example, tossed out a tweet about how antisemitism is inappropriate and is not American and yada yada, but you can bet your bottom dollar or your left boob that Mike Pence is all on board for allowing these agencies to turn away Jewish people as parents.

So even let's put aside LGBTQ people because we know that people like Mike Pence and a lot of evangelical Christians don't like gay people because they're gay. How is it, on the one hand, they are arguing that antisemitism has no place in America, but on the other hand, you know good and God damn well that they're going to support this nonsense. Someone's square that circle, I can't. I can't figure it out.

Jessica Pieklo:

Nope. I mean, it's hypocrisy.

Imani Gandy: Yeah, it's hypocrisy, exactly. Jinx, buy me a coke.

Jessica Pieklo: With a heavy pour.

Imani Gandy: With a heavy pour. A heavy pour of Jack Daniels, you mean, I think. So, yeah, that's going to wrap it up for us today. It's a depressing situation we're in. LGBTQ people are under siege, non-Evangelical Christian people are under siege, and this is something that you should be aware of, something you should be fighting about, and if you want to talk to us about it more, you can feel free to tweet us. I'm @angryblacklady. Jess is @hegemommy, H-E-G-E M-O-M-M-Y. You can join our Facebook group, Boom Lawyered!. For all the people who've tried to join over the past several months, I have declined all of your invitations because you didn't answer the question. So that gives you a chance to apply again and just answer the question, it's a super simple question and we will let you right in.

Jessica Pieklo: We will, we promise.

Imani Gandy: And until that, see it on das tubes.

Jessica Pieklo: See 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.