

[Boom! Lawyered: 'Reverse Discrimination' Isn't a Thing, but the Roberts Court Might Disagree](#)

- 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 super excited that the University of Virginia won the NCAA championship. Woo, woo, wahoo, et cetera. 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: Alliance Defending Freedom and conservative women's groups want the Supreme Court to take a case that would give school districts that ability to affirmatively discriminate against transgender students. The case is called Jane Doe versus Boyertown Area School District, and while there's plenty of reasons for the court not to take the case, ADF has it framed in such a way that it may be too tempting for the Roberts Court to pass up.
- Jessica Pieklo: Groan.
- Imani Gandy: Groan.
- Jessica Pieklo: Big groan.
- Imani Gandy: In this episode, we're going to talk about that case. We're going to talk about what's at stake in that case, and we're going to groan. Jessica, where do we begin? Can you just tell us a little bit about what this case is all about?
- Jessica Pieklo: Sure. We begin with the fact that this case is a trap. It's a trap, flat out a trap.
- Imani Gandy: It's a tarp.
- Jessica Pieklo: Insert your Star Wars GIF right there. Unlike a lot of the trans cases that we are used to, that we see a trans student, or an employee, who's suing to have their rights enforced, this case involves cisgender students challenging their school's trans inclusive policy. And they're arguing that by allowing trans students to use bathrooms that correspond with their gender identity, the school districts are violating their, the cisgender students, privacy rights.
- Imani Gandy: The first thing I want to talk about is the fact that there is a black student who is the face of this lawsuit, a black woman.
- Jessica Pieklo: Yeah.
- Imani Gandy: A black female high school student is the face of this lawsuit, and that just strikes me as really disgusting and icky because in my view they're sort of not

particularly subtly drawing a straight line from the civil rights movement to some fantasy that Christians have, the Evangelical Christians have in particular, that they are being persecuted in some way by being forced to acknowledge trans people as human.

Jessica Pieklo: Right. Absolutely. And Alliance Defending Freedom is involved in this lawsuit, so we have every reason to think that strategy is on purpose. And also, because it continues this theme that the right has, that the real discrimination that is happening out there is against Christians and against Christian students. And here, the real harm is that cisgender students can't deal with trans students and that they have this emotional harm as a result of having to exist in a place where trans students have the ability to use restrooms that correspond with their identity. It's not even like somebody has had a moment where that space has existed. There's just the policy itself is on its face just so terrible, and on its existence, they just can't. That's their petition basically. We just can't.

Imani Gandy: And what's really disturbing about it is that, frankly, it's not cisgender students that are at risk when it comes to discrimination, when it comes to bullying in high school. Right? I mean, 40% of homeless youth, for example, are LGBT, and that's according to a UCLA law study that was conducted in 2012. And I can't imagine it's gotten any better in the last seven years. In addition, the Gay Lesbian and Straight Education Network published a 2013 report, which found that 55% of LGBT youth feel unsafe at school because of their sexual orientation, and 37% feel unsafe because of their gender expression. 74% of LGBT youth have been verbally harassed because of their sexual orientation. And 55% have been verbally harassed because of their gender expression.

These sorts of statistics demonstrate that these sorts of lawsuits further demonize trans students when we're already living in a world where it's very difficult to be a trans student and to be in high school, and to be trying to figure out who you are and where you fit in the world, while people are screaming at you that you're some kind of weirdo, or that you're some sort of deviant. I mean, the sort of reverse discrimination against cis students is really disgusting.

Jessica Pieklo: It is. And it's building off real harm the Trump administration has caused trans students. Right? They rolled back those guidance clarifying that trans students have rights in school, like the policy that's being challenged here. And even this week, Betsy DeVos testified before Congress that when they were considering rolling back that guidance, they had that evidence of kids getting bullied in school, of the fact that it is not safe for LGBTQ, and particularly trans students in so many spaces. And she said, "Yeah. We knew about it. We just didn't really care," effectively. And that's why this case has me so riled up because, I mean, the reverse discrimination stuff is just bullshit. But there's real harm to real people on the line here. And the Trump administration has done its part, and we have Alliance Defending Freedom taking up this wing of it. And really SCOTUS could make this all permanent.

Imani Gandy: Why don't we talk about why this case matters? We alluded to it, but we should really dig into it. Essentially, the religious right is again-

Jessica Pieklo: Again.

Imani Gandy: Looking for ways to legally sanction discrimination. And this case is just their latest vehicle to do so. And we obviously know this isn't going to stop with trans students. Right?

Jessica Pieklo: Right.

Imani Gandy: How long until they try to get conversion therapy methods brought into counseling spaces, for example?

Jessica Pieklo: Oh, I think they're probably working on it, honestly.

Imani Gandy: Exactly. Mike Pence loves him some conversion therapy.

Jessica Pieklo: Mm-hmm (affirmative). We have this trap of a lawsuit. But let's really get into the facts of it, Imani. Let's get into the facts of Boyertown. What's going on in this case?

Imani Gandy: This case was filed on behalf of cisgender students at Boyertown Area High School. These students oppose the trans inclusive policy and argue that it's a violation of their own privacy rights. Now current policy allows transgender students to use facilities that match their gender identity. And in this case, the Third Circuit ruled in favor of the school. Right? Here's what the petition filed by the Alliance Defending Freedom argues. "When the school policy opens all school locker rooms and restrooms to members of the opposite sex," sidebar, they're referencing transgender people here when they say that, "A student that reasonably feels embarrassed and harassed and can no longer use the facility has been denied access to that facility on the basis of sex.

Jessica Pieklo: Oh good grief. Okay. Let's break this down because there's a lot happening in that one sentence of bullshit, Imani.

Imani Gandy: There is.

Jessica Pieklo: In other words, the argument is like we've said, that the real sex discrimination is the discrimination against cisgender students who are so stressed out by the presence of transgender students at their school that they can't use the same bathroom as them. Right? It's this reverse discrimination against cis students. That's what they're arguing, that trans students are the real bigots, and because trans students are the real bigots, cisgender students can't just go to the bathroom in peace.

Imani Gandy: And this is in line with the arguments that the Trump administration has been making attacking trans rights.

Jessica Pieklo: Exactly. These attacks have been going on for two years now, so we should probably recap them quick for the listeners.

Imani Gandy: All righty. Here we go. Back in February 2017, the Trump administration rescinded an Obama era Dear Colleague letter, and that Dear Colleague letter instructed schools to consider trans students as protected under Title IX. Title IX says, "You can't discriminate on the basis of sex and still get public funding." You just can't do it. Now ever since the Trump administration rescinded that letter, that letter that protected trans students under Title IX, it has been up to local districts, local districts like Boyertown, to decide whether or not to adopt transgender inclusive policies.

Jessica Pieklo: Right. And meanwhile, ADF and other conservative litigation groups have been around the country snooping around for test cases like Boyertown, places where school districts have already adopted trans inclusive policies. And they've gone to look for those so that they could build off this theme they developed in the Masterpiece Cake Shop case. Remember that case, Imani?

Imani Gandy: Oh, God. I wish I could forget it.

Jessica Pieklo: Right. Right. The Colorado baker who didn't want to bake a cake for the gay couple, and the Supreme Court kind of split the difference and said, "Well, gay people, LGBTQ people, you are protected under the law. But also, Colorado, you were really mean to this Evangelical."

Imani Gandy: So mean.

Jessica Pieklo: Evangelicals have picked up on that theme that they are in a constant state of possible government persecution should the state enforce nondiscrimination laws and policies. Right? They've taken that theme, and here they argue that these policies violate the privacy rights of cis students, that just the policy existing, this perpetual state of possible persecution for these students. And so this is the environment that the Roberts Court is going to decide what kind of rights trans students have at school, and that's concerning because siding with ADF here would reverse years, I mean years, of progress in school districts to recognize and affirm the rights of trans students. And like you alluded to, I think it'll set the stage for even more discrimination.

Imani Gandy: Absolutely. Let's transition and talk about what exactly ADF is claiming here specifically. They're saying that this case is about protecting the privacy rights of students who have some sort of objection to trans students just existing.

Jessica Pieklo: We have a clip of ADF attorney, Kellie Fiedorek, trying to articulate what this case is about. So how about we just let her do the talking for us.

Kellie Fiedorek: It's common sense that boys and girls shouldn't be forced to shower or to take their clothes off in front of a member of the opposite sex in an intimate facility.

Newscaster: She says the boy and his family have met with school officials about respecting students privacy, but says they've gotten nowhere.

Kellie Fiedorek: Instead, they told our client that he needed to tolerate the situation and act as natural as possible when a girl entered and took her clothes off in this locker room with boys everywhere.

Imani Gandy: Jess, what the fuck, man?

Jessica Pieklo: Oh my God.

Imani Gandy: Honestly, what, and I cannot stress, the fuck is going on?

Jessica Pieklo: I mean, that's my legal analysis of their theory right there, is a bunch of stammering and arm waving around because, I mean. Where do we begin? How about with the idea that biology and basic anatomy and functions of the body and gender identity are a thing that ADF refuses to wrap its arms and head around? I mean, the willful denial of science and the way it translates into the willful denial of people's existence is, ugh.

Imani Gandy: I think that's what's most alarming to me, is the idea that you can oppose the existence of people.

Jessica Pieklo: Right.

Imani Gandy: Just their very existence, that boggles my mind. But what this case is really about, let's talk about what really is going on here. It's really about controlling the ways in which public schools direct students at large. Teaching tolerance, diversity of opinion and identities, these are all antithetical to this white, Christian, heterosexual patriarchy, which is what the Alliance Defending Freedom wants to enshrine into The Constitution, into law. And so the fact that they have this black woman, this black female student, as the face of the case, just makes it so much more gross because really: What was the Civil Rights Movement except for a pushback against white Christian patriarchy? Right? And so now they're using a black woman to sort of go back to a time where that was ... It makes my head hurt and it makes my heart hurt. And it really makes me feel badly for this black woman, who I hope when she grows up, realizes that she's being used to strip the rights away from other people in the same way that rights were stripped away from her ancestors.

Jessica Pieklo: It's so upsetting. And it's so cynical too, what ADF is doing here in their choice of plaintiffs, but then also in the way that they are manipulating how the law has developed here. Right? When the Third Circuit upheld the trans inclusive policy, it did so in a very plain reading of Title IX in terms of interpreting what sex

means and gender, and because of sex. And it relied on a long line of cases that's developed that sexual identity discrimination is covered. The idea that sex and gender operate in the law, not just based on biological sex. Well, ADF says, "That's all horse shit." What the Third Circuit is doing here is taking sex to a "mere social construct." And from there, chaos takes over. Right? Words lose meaning. Nothing matters. It is all nihilism. And it's just frankly not true in terms of how the laws developed.

Imani Gandy: Right. I mean, they're arguing that women and girls, for example, are going to lose preferences that have been used to address historical and systemic discrimination under Title IX.

Jessica Pieklo: Right.

Imani Gandy: And frankly, I think out of all of the arguments that are being put forth against being trans as a person, which you can't do, you can't be against people. But I feel like this one has the most teeth, especially in terms of popular culture because when you start talking about sports and whether or not it's "fair" to allow "men." I don't even like to start talking in this way because it's gross, but that's the way that these people are talking. They are saying that it is unfair to let men, to let boys, compete with girls.

For example, Martina Navratilova got into hot water last month, or maybe it was the month before, for making utterly trans phobic comments. She said something to the effect of letting men compete as women is unfair. And she said that trans inclusion in sports is "insane, and it's cheating." But when you look at, for example, the Olympics, which I would say as an organization probably has more knowledge when it comes to how to make it fair in terms of athletes competing against one another, they've come up with a system by which they permit trans athletes to participate in the Olympics. But they just had qualifications, they had conditions. For example, female to male athletes can compete without restriction, but male to female athletes must undergo hormone therapy. And so this idea that it's just straight up men who are just, I don't know, putting on women's athletic gear and then going out and competing as women, that's a trans phobic trope, and it's unfair. And it doesn't recognize what's actually happening.

Jessica Pieklo: Right. And again, I'm just going to beat my drum that ADF, they're just the most cynical bastards out there because really, what they're doing is taking a true benefit of Title IX, and I say this with a lot of resentment as a woman who's participated in sports her entire life, this makes me livid when they do this. They don't give a shit about women's athletics. They don't give a shit about any of this stuff.

Imani Gandy: Nope.

Jessica Pieklo: This is an opportunity for them to take on the trappings of a civil rights law and manipulate the hell out of it for their own good. And they're doing the thing that they always do, which is playing on stereotypes and fear and misinformation. And they are relying on the fact that people haven't had conversations about this. They don't have a lot of knowledge unless this is an area that you're really passionate about and invested in. And they're just terrible. It drives me crazy. So don't believe them when they say that they are concerned about the status of Title IX and access to opportunity for girls and women in education because we all know that they don't truly care about that.

Imani Gandy: Yeah. They don't truly care. I just want to reiterate. If you're really that concerned about it, ADF, then just adopt the Olympics policies. Right?

Jessica Pieklo: Right.

Imani Gandy: Male to female trans athletes must prove that their testosterone is below a certain level. And that takes care of it. So really, cut the bullshit. You know what I mean? You're trying to discriminate. You're trying to sanction discrimination. And you're using concerns that people actually have when it comes to women in sports to push this further hateful agenda.

Jessica Pieklo: And again, this pushing into public schools of religious ideology in creating this very porous border because another one of the arguments they have here is that there's this First Amendment right of consciousness and expression that will be lost if school districts adopts these trans inclusive policies, that Evangelical students, folks who, again, that we have been ranting about, have a religious objection to a person, not to a thing or an idea, but to a person. That they somehow have a First Amendment right to have that bigotry in school, and that is at risk if students adopt trans inclusive policies. That just makes my blood boil.

Imani Gandy: And it should make your blood boil. And what else should make your blood boil is that ADF is legitimately a hate group. According to the Southern Poverty Law Center, the Alliance Defending Freedom supports the re-criminalization of homosexuality both in this country and abroad. And they've defended the state sanctioned sterilization of trans people abroad. These are not people who are taking to heart the interests of students.

Jessica Pieklo: No.

Imani Gandy: They are proposing and pushing a hateful agenda.

Jessica Pieklo: Absolutely. And they're doing it in a way that they've seen success at the court in before by dressing it up in claims of religious discrimination against Evangelical Christians by the state and by the government. And there's a chance maybe that the Roberts Court will bite on it again.

Imani Gandy: Yeah. When you think about it, this is really one of the most screwed up claims of reverse discrimination. And somehow we've got Trinity Lutheran, and that's the case that really screwed up the separation of church and state. That's the case that said if a church has a preschool, and the state has funds for preschools, that church should be able to get some. I mean, that's screwed up. And then we have the Masterpiece Cake Shop to thank for the other portion of this screwed up situation that we find ourselves in. Aside from these cases, Trinity Lutheran and Masterpiece Cake Shop, who else can we blame? What else can we blame for this?

Jessica Pieklo: I mean, absolutely Alliance Defending Freedom. They are on a mission here. We've done over 50 episodes of this podcast right now, Imani. Right? Woo.

Imani Gandy: Woo.

Jessica Pieklo: And we have covered Trinity Lutheran. We've covered Masterpiece Cake Shop. We've covered Alliance Defending Freedom because they are on this mission. And they are building doctrine. And this is how that happens. We are seeing this evolution. And yeah, I mean, they were able to get the court to bite on the idea that it's reverse discrimination in Trinity Lutheran to keep religious organizations out of certain pockets of money. They were able to get the court to bite on the idea that it was reverse discrimination in Masterpiece Cake Shop to try and enforce anti discrimination laws. And it looks like they're going to try and get the court to bite on it again here.

Imani Gandy: ADF is trying to make this and a lot of things about discrimination against Christians. They're trying to make it also about the privacy rights of these vulnerable teens undergoing a sexual awakening.

Jessica Pieklo: Can we talk about that for a minute though?

Imani Gandy: Can we talk about the fact that there are lesbian students, and there are gay students. If you're talking about being concerned about people of the "opposite sex" seeing your nether regions. What about people of the same sex who are attracted to other people of the same sex? Is that going to be the next step? Are we going to start saying, "Okay. We have straight cisgendered locker rooms for you. And then we have lesbian locker rooms for you. And we have gay locker rooms for you. And then we've got trans"? How far down this road are we going to go?

Jessica Pieklo: I mean, honestly, I think ADF would be totally cool with separate facilities for queer kids. I can absolutely see them making some kind of privacy dignity argument that straight kids are hurt by having to exist in the same space as queer kids. Or I'm surprised that they haven't yet tested the waters of kids that come from same sex couple families because that is the basis of their religious objections in the courts, that this is ... They're trying to dress it up as, we don't

really hate gay people. But we just object to their lifestyle. And there's just no separating that. Right?

Imani Gandy: There is no separating that. I just want to make sure that we note that this is all nonsense.

Jessica Pieklo: It is.

Imani Gandy: And the Seventh Circuit Court of Appeals has ruled in a case out of Wisconsin that it's nonsense. And here's what that court said about ... This is what that court said about, I think it was Kenosha School district in Wisconsin that was basically litigating a similar case. And in that case, the Seventh Circuit said, "This policy does nothing to protect the privacy rights of each individual student, vis a vis, students who share similar anatomy. And it ignores the practical reality of how Ash ... " Ash was the plaintiff in the Kenosha case in Wisconsin, "It ignores that practical reality of how Ash, a transgender boy, uses the bathroom, by entering a stall and closing the door."

Jessica Pieklo: God. Thank you.

Imani Gandy: Right? Ding, ding, ding, ding, ding. Ding, ding, ding, ding, ding. It's absurd. But the court went on to say, "A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex, who decides to sneak glances at his or her classmates performing their bodily functions."

Jessica Pieklo: Yep.

Imani Gandy: And so this goes back to what I was just saying. Do they want separate bathrooms for homosexual kids? Do they want separate bathrooms just for heterosexual Christians? Do they want Christians to have their own bathroom so that they can go in, and I guess feel safe that there are no Christians in the world that are homosexual, or lesbian, or trans, or gender non binary? It's a very narrow view, not only of sexuality, but of Christianity.

Jessica Pieklo: It really is. And again, entirely erases the actual harm trans and LGBTQ students face every day in school, the actual harm that they are faced, versus a pearl clutch. It drives me bonkers.

Imani Gandy: What do you think is going to happen next? What are we looking at in terms of timelines on this case?

Jessica Pieklo: This case is real interesting. The court has scheduled it to talk about it, and then has rescheduled it a bunch of times. It is on their radar, and I don't know why they keep rescheduling it. They never have to give a reason. Right? But they're going to think about it. And if we continue the Masterpiece Cake Shop analogy, the court conferenced on that case over a dozen times, damn near 15, 16 times,

before the justices decided to take it up. I would expect to see them think about this case several times before acting on it. And I think ADF knows that to be the case. We've already seen another lawsuit filed in Pennsylvania also, challenging a different school district trans inclusive policy, making the same exact arguments that we see here. So while the court sits on it, we know that these conservative litigation groups are out there looking for more cases to try and run up the circuits to create a split and force the court to take it, if they don't want to take Boyertown now, to take it later.

I guess the good news is, I would say, is that it's not likely, I don't think, that the court would take it, say, this month hopefully. But I do think that between this and the Title VII cases involving gender identity and sexual orientation discrimination, that it is very likely we are going to see the court act on this as next term. I just don't know how they could sit on those cases much longer.

Imani Gandy: Next term is going to be bananas.

Jessica Pieklo: It's going to be bananas. And so I mean, really, we could have these cases all starting to tee up going into the next presidential election, so fun times. Buy canned goods. Stock up.

Imani Gandy: But seriously, buy canned goods, and strength train. I told Jess I figured out it's going to take me 75 days to walk from Oakland to Boulder when the shit goes down.

Jessica Pieklo: We got it.

Imani Gandy: So I'm getting ready. I'm getting ready. I'm doing my cardio. That's going to wrap it up for us today. If you would like to continue the conversation with us, you can follow me on Twitter at Angry Black Lady. You can follow Jess on Twitter at Hegemommy. H-E-G-E-M-O-M-M-Y. And you can follow Rewire.News at Rewire_News. And you can join our Facebook group. We have almost 1000 members, and it's super exciting. So please join us. Please answer the question. A lot of you people are ... Of you people. A lot of you people.

Jessica Pieklo: You people.

Imani Gandy: You fellow law nerds, you people. But a lot of y'all are inviting your friends to join the group, which is awesome. But if you could just let them know that there is a question that they need to answer, because we'd love to invite everybody in.

Jessica Pieklo: Absolutely. And I've just got to say we just did our second AMA, AUA, whatever we're calling it in the Facebook group. And y'all have some really tough and really smart questions. Oh my God.

Imani Gandy: Really good questions. Super impressive.

Jessica Pieklo: Thank you so much.

Imani Gandy: So thank you very much.

Jessica Pieklo: Here I was thinking it was like: What's your favorite Game of Thrones character?

Imani Gandy: People were like, "Well, how do you feel about the definition of forcible rape in the FBI with respect to the definition?" I'm like, "Jesus Christ." Can I tell you that I like to drink beer?

Jessica Pieklo: We love you all so much. We love you all so much.

Imani Gandy: But we do, we love it.

Jessica Pieklo: Our listeners are so brilliant. It's amazing.

Imani Gandy: We do. We love it.

Jessica Pieklo: Thank you all for making that a wonderful, fun space, and a smart space too. And I don't know, Imani. We'll see you on the tubes.

Imani Gandy: See you on the 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.