

[Boom! Lawyered: This School Keeps Fighting to Discriminate Against Trans Kids](#)

Imani Gandy: Hello, fellow law nerds! Welcome to another episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that thinks Black Lives Matter. 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, big thanks to our subscribers and welcome to our new listeners.

Imani Gandy: So, Jess, do you remember the Gavin Grimm case?

Jessica Pieklo: Oh, sure. Yeah. Gavin's the high school student who sued his school district over its policy that required students to use bathrooms that aligned with their biological sex rather than their gender identity. His was one of the first big transgender rights case in this country. God, that case was a while ago. I mean, I think maybe 40 lifetimes ago, if I'm being exact.

Imani Gandy: Well, what if I told you that the case is still happening?

Jessica Pieklo: Get out.

Imani Gandy: I will not get out. I can't get out. There's literally nowhere for me to go, not even if I wanted to, which I don't.

Jessica Pieklo: Okay. Fair. But for real Imani, Gavin's case is still happening, how?

Imani Gandy: Fuck me if I know, sorry. [laughter] But yeah, it's still happening. And in fact that's what we're going to talk about in this week's episode. Gavin's case has been going on for years now. Why and what does that say about the fight for trans rights in the courts?

Jessica Pieklo: Okay. Imani, before we dive in, I have a confession to make.

Imani Gandy: Oh boy, what kind of confession are we talking about here?

Jessica Pieklo: No. I know we've been cooped up for a while. It's not that kind of confession.

Imani Gandy: Okay.

Jessica Pieklo: I kind of lost track of this case. I mean, there's just been so much happening and that's without the 'rona piling on all of it. So honestly, I'm counting on you to get us through this episode.

Imani Gandy: Oh boy, that might be a fool's errand, but I'll do my best.

[music]

So, the case involves Gavin Grimm. He's a trans man, at the time he filed his lawsuit he was a trans boy. He was a student at a high school in Gloucester County. He told his teachers, the administration that he had transitioned, that he was a boy and that he wanted to present as a boy. And that he wanted to use the boys bathrooms.

Well, you can imagine that went over super well in Virginia. Actually, it didn't go over as badly as one might think. The school was actually rather accommodating when it came to using the proper pronouns, which really shouldn't be that lauded, but in this day and age, trying to get people to actually use trans people's pronouns can be a bit difficult. So, they let him use his pronouns. They treated him as a boy, but when it came to going to the bathroom, they did not let him use the boys bathroom. And as a response to his concerns about using bathrooms in school, they created this separate single-stall bathroom, which they claimed anyone in school could use, but in actuality was built for him. And in his view it was stigmatizing and humiliating. And so, he didn't use it.

Jessica Pieklo: Okay. So I have, I guess what I would consider more of a comment than a question to start off.

Imani Gandy: Oh boy, here we go. Are we at a conference? [laughter]

Jessica Pieklo: I mean, look, it's been a while! So, that was helpful to get me back into the facts. But what would you say then that this case is really just kind of all about what's the nugget of it for our listeners?

Imani Gandy: So, the nugget of the case is whether under Title IX, because of sex includes gender identity, Title IX basically says, "If you want government funding, you can't discriminate against people on basis of certain characteristics." One of those characteristics is sex. And the issue in the case is does sex include gender identity? That may sound familiar because that's basically the issue that the Supreme Court is going to decide any day now in the Harris Funeral Homes case.

Jessica Pieklo: Right, we've got these two civil rights statutes, one deals with the workplace, one deals with schools and both say that you can't discriminate on the basis of sex if you want federal funding. And both cases say is discriminating against someone on the basis of their gender identity, discrimination on the basis of sex.

Imani Gandy: Precisely.

Jessica Pieklo: Yeah. So I mean, there's like a parallel there that's helpful for me.

Imani Gandy: Right, and he also brought another claim, an equal protection claim, which is fairly straightforward. Are you discriminating against me because I'm trans and

not permitting me to use the goddamn bathroom that I want to use because I'm trans?

Jessica Pieklo: This lawsuit happened five years ago. It started five years ago. Gavin's graduated from high school. So, on a real basic level, if he's graduated from high school, and this is a case about his high school giving him access to the bathroom that aligns with his gender identity, how can this case still be going on?

Imani Gandy: Well, that's one of the issues that the Gloucester County School Board actually brought up. They want the case dismissed on the grounds of mootness, basically, meaning there's no case here. Gavin doesn't even go to this high school anymore, why are we here? And the answer to that question is: because Gavin wants a declaratory judgment, right? He wants the court to say, "This is not right. This policy is wrong it needs to be changed, on the one hand. On the other hand, he's now an alumni alumnus alumni. I can't... I don't do Latin, but he's alumae....alumni? He's alumni, I don't know. [laughter] But he's now a graduate of this high school.

And so, he's going to be going back to this high school for reunion events and other kinds of events. And he wants to be able to use the boy's bathroom, the men's bathroom when he goes to those events. And then on a really smaller level, he's really concerned about what his transcript and his school records will say with respect to his pronouns and his gender identity. So, that's why we're still here.

And if I'm being honest, the Fourth Circuit, which heard oral arguments in this case, didn't really seem that interested in talking about mootness. They were like, that was just not a big concern of theirs, because like I said, this is still an issue. It's going to be an issue for the next trans kid that comes out of this high school. So, you might as well just fucking decide it now. You know what I mean?

Jessica Pieklo: It reminds me so much of the mootness conversation that we had when we were recording We'll Hear Arguments -- that was the podcast that we did about Roe v. Wade. And one of the defenses that the state of Texas made in that case was that, well, look, "Jane Roe is no longer pregnant. So, her case is moot." And so, that idea that these pieces of litigation take a long time and deal with these big issues that can sometimes outlast them with something that I was like, "Oh, that sounds a little familiar."

Imani Gandy: Right? Exactly. I mean, Gavin's not going to be the first trans kid to come out of Virginia or to come out of that school board. And so, this is an issue that needs to be decided. It was an issue that was already decided, but here we are again for the second round of oral arguments.

Jessica Pieklo: Well, I think what other reasons why this case completely slipped my mind is that it already went up to the Supreme Court, right? Didn't it?

Imani Gandy: Yeah. It went up to the Supreme Court, and the Supreme Court kicked the case back down after the dingdong in the White House got elected. Because he decided despite his campaign trail promises that he was going to be like, the most wonderful person who was doing beautiful things for lesbian, gay and trans people because I'm wonderful and I'm tremendous, blah, blah, blah.

Jessica Pieklo: That's actually not a terrible Trump impression. [laughter]

Imani Gandy: So, of course he went entirely back on that and immediately began to attack trans people and withdrew this guidance that Obama had issued back in the Obama era that said, "Hey, assholes, let these people use the goddamn bathroom that they want to use." He didn't actually use those words precisely, but that was the jest.

So, by the time the case got to the Supreme Court, the school board appealed the Fourth Circuit decision saying, but sided... the Fourth Circuit initially sided with Gavin Grimm and the school board was like, screw that. We're going to the Supreme Court. The Supreme Court said, "Ah, sorry, we got this new white guy in White House now. We're going to kick the case back down to the lower courts."

Jessica Pieklo: So, in theory it could go back up there?

Imani Gandy: Yeah. Yeah. I imagine it will no matter which way the court rules. I mean, if the Fourth Circuit rules for Gavin Grimm, you can bet your sweet... your sweet ass cheeks is what I was about to say for some reason. [laughter]

Jessica Pieklo: Look, I'm 46, they're pretty sweet for 46!

Imani Gandy: You can bet your sweet cakes that the school board will appeal again and will ask the Supreme Court to weigh in and Gavin Grimm will do the same.

So, it's very, very likely that this will end up before the Supreme Court and the Supreme Court's ruling in Harris Funeral is basically going to be dispositive. It's going to decide whether or not Gavin Grimm should win or Gloucester County school board should win, because it's essentially the same issue. One's Title VII, one's Title IX, it's the same analysis. So, we're all kind of waiting to see what the Supreme Court is going to do.

But generally I think what's really interesting and what struck me from the Fourth Circuit arguments is James Wynn.

Jessica Pieklo: Okay. Who's that?

Imani Gandy: Okay. So, he's the one of the judges on the Fourth Circuit. He's a black man and he really, really honed in on this idea that the single stall bathroom that the school board basically created in response to Gavin Grimm's concerns was

stigmatizing, was humiliating and was separate but unequal. And so, it's a little bit wild to be hearing that separate but unequal language, right? Because, hey, slavery's over. Why are we even talking about separate but equal railway cars and whatnot?

But it's the same kind of premise, right? As Wynn pointed out, he grew up in an era where schools were becoming integrated and he pointed out, yeah, there were black schools and black kids went to the separate black schools. Black kids went to the separate stall bathroom, but no white kids were going to those schools just as no cis-gender students were going to the separate stall bathrooms. So, just because you have a separate and purportedly equal facility doesn't mean that forcing someone to use that facility is instill inherently stigmatizing and humiliating.

So, the attorney for the school board really tried to keep saying, "Well, you know, these bathrooms are open to everyone and it doesn't matter if you're trans or not," but it does because no one else was using them. Gavin Grimm was the only person really who was supposed to use them and he didn't want to use them because it's fucking humiliating, and I agree. I understand why.

Jessica Pieklo: Yeah. What else stood out from the argument? That is fascinating to me though. I love it when judges get idea and just sort of go off to the races with it. And I mean, hearing the attorney's kind of flounder around with it, but what else really jumped out for you?

Imani Gandy: People need to stop being so goddamn concerned about other people's genitalia. Just the number of times, the number of times the lawyer for the school board use the word genitalia. The number of the times, Paul Niemeyer, who was another judge on the Fourth Circuit, who was appointed by Reagan. Which -- Reagan, like in the 80s Reagan -- he just can't and he was so laser focused on genitalia talking about, well, this policy of bathroom usage depends on what genitalia you have. He kept... The lawyer for the school board kept saying, "Well, we think of it as binary. You're either female or you're male and the bathroom usage is tied to your physiological characteristics." Meaning if you have a penis, you got to use the boy's bathroom. If you have a vagina, you got to use the girl's bathroom, irrespective of what the rest of your body looks like.

And I think what really struck me is just the absolute inability to think beyond this little genitalia box, and to realize that what this is about is what trans people look like, right? It sets up almost a discriminatory framework among trans people. Because if you're a trans man or a trans boy that looks like a trans boy, you can walk into a bathroom, walk into the boy's bathroom and no one's going to say anything, because you look like a boy. But if you're a trans man that doesn't quite pass, then maybe some people are going to give you some static.

And ultimately the thing that continually boggles my mind when it comes to these bathroom cases, is that do you really want someone who looks like a straight up man, like looks like stereotypical, if you want to be patriarchal and

stereotypical about it, stereotypical butch dude, who hasn't had his genitalia, "genitalia" changed yet. Do you want that person in a woman's bathroom?

I think you're going to find, even if you ask the most bigoted people, the people who are most concerned about trans people's genitalia, that no, you don't want someone who looks like a man in a woman's bathroom, but that's what the school board expects to happen. So, they really haven't thought it through. And that really that... just that issue right there really, really bothers me because it just lays bare how asinine this whole bathroom panic is.

Jessica Pieklo: So, that totally brought me all the way back to the oral arguments in Harris Funeral Homes, because in that case, and in the companion case on sexual identity discrimination, the only thing that justices wanted to talk about in any of the cases was where people peeing. I have never spent so much time in the Supreme Court contemplating urine. It was like, it's the weirdest thing in the world. And it is just an obsession in these cases, and I really think to get to your first point with judge Wynn and stigma and shame really drives home that point... that what's at the heart of all of this is fear and stigma and an attempt to shame people who fall outside of these heteronormative binaries. And it's just wild.

Imani Gandy: Yeah. That's exactly what it is. And it's a real shame because Gavin Grimm, he had won in the Fourth Circuit, he won. The reason he won is actually kind of interesting, and I can't remember the lower court judges name who initially cited against him, but he was also a Reagan appointee, conservative Reagan appointee. But then the case was reassigned to judge, Wright Allen, and she is an Obama appointee. She is liberal and she sided with Grimm.

So, it just really demonstrates or illustrates or highlights that who the judges really matters. Who's appointing these judges really matters. And with this panel, we have a Reagan appointee and two Obama appointees. So, that might bode well for Grimm. But generally what we have now are a lot of Trump judges who are just bigots, who are incompetent, who have no business being on the bench and who will always side against trans people.

So, it's just depressing how much support Gavin Grimm had from the White House when Obama was in the White House. And then as soon as Obama was gone and Dipshit McGee got in, then it was, we don't support trans people. We now side with the school boards. And by the way, trans people, you can eat my shorts and that's really... we're in the trans people eat my shorts era and I don't like it. I think it's absurd. Stop focusing on people's junk, man. I don't understand.

Jessica Pieklo: There are bigger fish to fry.

Imani Gandy: Bigger fish to fry, really.

Jessica Pieklo: Okay. So, the Fourth Circuit panel heard arguments this week, what happens next for this case? What can our listeners expect?

Imani Gandy: They can expect a few months long wait, and then the Fourth Circuit is going to rule one way or the other and whichever way the court rules, if they side with Grimm or if they side with the school board, someone's appealing to the Supreme Court. And then it's going to end up before this 5-4 conservative court. And depending on what happens with Harris Funeral Homes, and I don't have a good feeling about what's going to happen with Harris Funeral Homes, then transgender rights are going to be set back. Not even set back that many years, but certainly set back to before Obama was like, "Hey, trans people, we got your back." And I think that's depressing.

I think the attacks by this administration on trans people are depressing. I think this administration is depressing just generally, but trans people are some of the most vulnerable people in our population. And I think that they deserve protection. They deserve human rights. They deserve to be seen as human and they deserve to use whatever bathroom aligns with the gender identity that they express. Call me crazy if you must but that's what I believe.

Jessica Pieklo: I must not. I will not.

Imani Gandy: You must not call me crazy.

Jessica Pieklo: So, we'll... So, any day now, literally we could get some guidance from the Supreme Court on what could happen in Gavin's case, just by way of deciding Harris Funeral Home. So, it is looking like it could be a very eventful summer for folks who care about these issues.

Imani Gandy: Yeah. It's going to be eventful and I'm just girding my loins and battening down hatches and all other sorts of metaphors and euphemisms, because I'm really worried about what's going to happen and what kind of message that's going to send to people who are on the attack when it comes to trans rights.

Jessica Pieklo: Yeah, me too.

Imani Gandy: Yeah. So, that's fun.

Jessica Pieklo: I don't have any good news

Imani Gandy: I don't either, but protect trans people! I just, I don't know what else to say, add pronouns to your social media profiles. A lot of trans people have told me that that helps normalize pronouns and respecting people's pronouns. I finally did it just because I have ADD, and it takes me forever to do shit, but I finally did that. So, that's just these small things that you can do and just uplift trans people's voices. That's the positive thing that I'll end on.

Jessica Pieklo: When you introduce yourself in group settings, and when you're... when I'm speaking on panels and things like that too, I include my pronouns too. I'm in something that, for me as a cis-gender white woman, took a second to get my head used to doing, but now it's second nature. So, if it's second nature for me, it can easily become second nature for you too. I do have good news though.

Imani Gandy: Yes.

Jessica Pieklo: We have more Boom! Lawyered supporters!

Imani Gandy: Wow. That's amazing, our listeners are the best.

Jessica Pieklo: Can you believe it? Our audience is the best Imani, best law nerds in all the land. West and East to the Mississippi.

Imani Gandy: As long as you're covering all your ground. [laughter]

Jessica Pieklo: That's like a joke for the OG listeners right here. But seriously, thank you for everyone who has been supporting Boom! Lawyered. It's your support that makes this whole project possible.

Imani Gandy: And here are some of our new donors. We're not going to shout out your last names because we know that you guys are probably secret assassins and don't need that information posted on social media and elsewhere. But we'd like to thank Craig. We'd like to thank Dani with an i, we'd like to thank Keith. They're our new donors and our new monthly donors. We'd like to give an extra thanks to Clarissa and to Shannon. So thank you, thank you very much.

Jessica Pieklo: Thank you. Thank you, spirit fingers, jazz hands all around. We also, this is so exciting or like my kids love this kind of stuff. We have texts to give. You can text boomgive that's one word. B-O-O-M-G-I-V-E to 44-321.

Imani Gandy: We're so high tech now, it's exciting. You can also go to rewire.news/boomgive, that's rewire.news/B-O-O-M-G-I-V-E. Give whatever you can. We know times are tough, but we got to keep this Boom! Lawyered law nerds ship afloat. And if you want to help us do that, we would be eternally grateful. Aside from that, oh, Facebook group, you should join our Facebook group, boom! Lawyered. Some of you are getting real creative with the answers to the questions, which I love.

Jessica Pieklo: We appreciate that.

Imani Gandy: I really, really do appreciate it. And if you want to just commiserate with either of us on Twitter, you can find me at @AngryBlackLady. You can find Jess at @Hegemommy, H-E-G-E-M-O-M-M-Y. And you can follow @Rewire_News, that's Rewire_News. I don't need to spell that. There's no reason to spell that.

Jessica Pieklo: You guys all know how to spell that.

Imani Gandy: You guys know how to spell @Rewire_News. And aside from that, Jess, what are we going to do?

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

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

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