

Imani Gandy: Hello, fellow law nerds. Welcome to another episode of "Boom! Lawyered," a Rewire News Group podcast hosted by the legal journalism team that really wants to know where it is you get the bags of Skittles that have the Fentanyl in them because I haven't been able to find them, but I'm assured by the Heritage Foundation that that's happening. So I got questions. I'm Rewire News Group's editor-at-large, Imani Gandy.

Jess Pieklo: And I'm Jess Pieklo, Rewire News Group's executive editor. Rewire News Group is the one and only home for expert repro journalism that inspires you to start your mornings with a gentle stretch. We're getting older, Imani. And the "Boom! Lawyered" podcast is part of that mission. So a big thanks to our subscribers and a welcome to our new listeners and viewers.

Imani Gandy: So, law nerds, Jess and I come to you with this episode with a very heavy heart because we got something wrong.

Jess Pieklo: We did?

Imani Gandy: Yeah, we did, and it doesn't happen very often. It doesn't happen very often at all, but when it does, we like to be upfront about it. We like to get out in front of it because we think it makes us more trustworthy, right? Like, it makes us, like, the kind of people who would never, I don't know, slide a razor blade into an apple and hand it out to kids on Halloween. We're not those kinds of people.

So today we're gonna have to revisit *Bostock v. Clayton County*. Remember, that's the case that said, "Title VII forbids discrimination on the basis of sexual orientation and gender identity," right? We're gonna talk about how, upon reflection, that opinion is just a big fat goose egg. It's a big fat goose egg and Neil Gorsuch is to blame. Essentially, it wasn't the win for trans people that we needed, and that at the time we thought it was and hoped it would be.

Jess Pieklo: Listeners, viewers, it's true. We got way too excited about *Bostock* in 2020, we did.

Imani Gandy: I mean look, in our defense, it was June 2020, we were in the throes of the Covid pandemic, right? We were in the middle of one of the most brutal presidencies in modern history. And you know, when Jess and I got the news that Neil Gorsuch had written the majority opinion in *Bostock v. Clayton County* saying that Title VII forbids discrimination on the basis of sexual orientation and gender identity, we were over the goddamn moon, like, we were so excited.

We were so excited we even apologized to Neil Gorsuch for calling him Neil "Gorsuck" for the first two terms of his tenure, right? We apologized to the man. In fact, Jess even sort of forgave him so much that she was able to become enamored of the man's pandemic beard. Do you remember you were stanning the man's pandemic beard?

Jess Pieklo: Look, isolation was rough on all of us, Imani. It really was.

Imani Gandy: It was.

Jess Pieklo: I mean look, we wanted that decision to be so much, and we celebrated it, we did, but also.

Imani Gandy: It was all smoke and mirrors, it was smoke and mirrors, and we almost missed it, we almost missed it.

Jess Pieklo: Almost, almost. I love how we're like, "We got things wrong, but not totally, not totally everybody." But you're right, because in that episode, I did raise a red flag about how Neil Gorsuch, while the outcome of the decision sounded really good, managed to write the decision and tailor it so narrowly that it really left open room for future conservative fuckery.

Imani Gandy: Mm-hmm.

Jess Pieklo: All right, so let's talk about those cases, 'cause maybe not everybody remembers them. Bostock was a series of cases that involved employees being fired for either being gay or trans on the job, and at issue was whether or not Title VII of the Civil Rights Act, and that's the federal law that prevents employment discrimination, whether its ban on discrimination, quote unquote, "on the basis of sex," includes discrimination against an employee because they happen to be gay or trans.

Imani Gandy: And it was, at the time, I remember being so jazzed about the opinion, particularly because it was Neil Gorsuch and so it split the conservatives, but also because of the way he sort of clapped back to the other conservatives who were basically claiming that, you know, in 1964, no one would've contemplated that gender identity and sexual orientation were meant by Congress to be included in the prescriptions of Title VII. And Gorsuch came up with one of my favorite Gorsuchy lines. Remember when he talked about the canon of donut holes, like C-A-N-O-N, not like pow-pow-pow.

Jess Pieklo: Shooting donut holes out of a cannon. Delicious, not at issue here.

Imani Gandy: Exactly, but like the canon of donut holes. He said, "There's no such thing as a canon of donut holes in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception." And I just love that language. I love the canon of donut holes.

Jess Pieklo: It's good language, it's good language, and Gorsuch was doing a good thing, but in hindsight, all he did was rule that Title VII's ban on discrimination on the basis of sex necessarily includes prohibiting firing someone because they happen to be gay or trans. That's literally all the opinion says, in hindsight.

Imani Gandy: Right.

Jess Pieklo: Now, okay, this is a big deal. It was the first time that Title VII had explicitly recognized that protection. So we shouldn't just say, "Pfft, Bostock is nothing," 'cause that is a big deal, and especially considering the Trump administration had come into these cases defending the actions of the employers here, saying things like, "Hey look, they're not actually firing anyone for being trans, they just happen to be enforcing gender dress codes on the job," right?

Imani Gandy: Right.

Jess Pieklo: Like specifically with regard to one of the cases, that was Aimee Stephens, who was an employee who transitioned while a funeral home employee. She was told she wasn't being fired for being trans, she just was being fired 'cause she couldn't dress how she was supposed to on the job.

Imani Gandy: And you know it's, as always, I think it's really critical to recognize that these issues don't just affect trans people, right?

Jess Pieklo: Right.

Imani Gandy: It bleeds over and affects cis people, which is something I wish the quote unquote "gender critical" folks, the rebranded TERFs, would understand, right? Because what this is dealing with is the ways in which people aren't conforming to gender stereotypes, right?

Jess Pieklo: Yes, exactly.

Imani Gandy: I mean, that's what this is about. Like, you cannot discriminate against someone for being trans without enforcing stereotypical notions of how gender should be expressed, right?

Jess Pieklo: Exactly.

Imani Gandy: About how gender identity and your sexual organs should align.

Jess Pieklo: Right.

Imani Gandy: Like, you can't really do that.

Jess Pieklo: Right, so that was a big deal. Like, the decision itself does stand as a big deal and written very narrowly to allow conservatives to mess around with it, which we'll get to in a second here. So, as what happens when the Supreme Court issues a new decision like this, the administration goes back and says, "Okay, now we're gonna have to let folks know how to implement it." In this case, that's the EEOC, right? They're the federal agency that's been charged with offering guidance for employers to how to comply with federal law. That's exactly what they did in this case: follow-

Imani Gandy: The Equal Opp, the, that's what the EEOC is, is the Equal Employment Opportunity Commission.

Jess Pieklo: Yes, thank you. I'm just gonna whip through all the acronyms today. But in the wake of the decision, the EEOC went back and said, "All right employers, we're gonna issue some guidance and offer you some clarity on how to abide by this decision." So they issued that guidance, and here are the things that they said: Employers, use employees proper pronouns, okay? Employers, don't prevent trans people from using bathrooms, locker rooms, showers that align with their gender identity.

Imani Gandy: Seems simple.

Jess Pieklo: Employers, don't force trans employees to dress according to their assigned sex at birth.

Imani Gandy: Also seems simple.

Jess Pieklo: And employers, in some cases, if you refuse to use pronouns or names that are consistent with that person's identity, you could be subjecting them to employment harassment. That could be creating a hostile work environment for that employee, which means they have action to sue. So that's all really reasonable.

Imani Gandy: So that's like if you were just purposefully misgendering someone and not using their names, even though you've been told what they are, you're just being a jackass about it.

Jess Pieklo: Right, if I insisted on calling Imani "Chad" throughout this podcast for example-

Imani Gandy: Okay, let's do that.

Jess Pieklo: That may rise to the level of a hostile work environment depending on the circumstances.

Imani Gandy: Right.

Jess Pieklo: All right, so all very reasonable. But then Texas gets involved.

Imani Gandy: Mm-hmm.

Jess Pieklo: Because Texas gets involved. They file a lawsuit. And Imani, I'm gonna ask you about this.

Imani Gandy: Yeah.

Jess Pieklo: What happened? We have Texas suing the EEOC.

Imani Gandy: Yeah, yeah.

Jess Pieklo: What is happening? What is happening?

Imani Gandy: Well, essentially Texas is just being Texas. You know how Texas is, Texas is just so Texas about everything, all of the time. Just dial it back a little bit, Texas. But they sued the EEOC, challenging the guidance, right?

Jess Pieklo: Okay.

Imani Gandy: So the crux of the issue in Bostock is whether or not the holding applies only to homosexuality and transgender status or does it extend to correlated conduct, right? Correlated conduct, specifically sex-specific conduct, like dress in uniforms, bathroom use, pronouns, health-care policies, right? Matt Kacsmaryk, that's the judge in the Texas v. EEOC case, he's a Trump judge.

Jess Pieklo: That's why my face is doing this.

Imani Gandy: I know, and that's why Jess's face, if you're watching, her face is scrunching up. But he ruled that Bostock was limited to status and did not cover correlated conduct. So he threw out the EEOC'S guidance and said, "You know, the guidance went too far."

So in other words, he said, he ruled that employers can't discriminate you for being trans, but they might have the ability to discriminate against you for acting trans and for expecting your employer to accommodate your trans identity by doing such very difficult things as calling you by your name, using your pronouns, and letting you use the frickin' bathroom, right? They can't fire you under Bostock, but they can make your life a living hell.

Jess Pieklo: Sure, sure. So you can, like, be gay on the job, you just can't be gay on the job.

Imani Gandy: Exactly, just like, just dial it back a bit. Do you gotta be so gay when you're working? That's ridiculous.

Jess Pieklo: I mean, I can't help it.

Imani Gandy: That's ridiculous. So, you know, like I said, Kacsmaryk is a Trump judge, but I have to say, and I don't like to say this, but I agree with his ruling. I know Jess, I'm not happy about it, but I agree with his ruling because Gorsuch left this giant loophole in his opinion, and he left it there on purpose, right? Bostock protects LGBTQ workers as status, right? Transgender, they're homosexual, whatever, their status, but it doesn't protect the correlated conduct? Like, how they dress or which bathroom they wanna use. Like, ah? Kacsmaryk says this ran afoul of the APA, of the Administrative Procedures Act, right? Because when the EEOC

implemented these guidelines, this guidance, these simple things, don't mess up someone's pronouns, let 'em dress the way they want, let 'em use the bathroom, apparently they didn't implement the guidance through the proper regulatory process, eh, right? Notice and comment where you're supposed to post the stuff and let people comment and take it into consideration and repost the stuff, they didn't do all of that. And so we just throw out all the guidelines, Jess? Like, is that right?

Jess Pieklo: I'm employing all of my deep breathing techniques right now because I refuse, Imani, to let you get sucked into this distinction without a difference.

Imani Gandy: Help me, help me please.

Jess Pieklo: These Trump judges are going to make a mockery of the APA. They are gonna tell you that up is down, that a guidance is something substantive as opposed to, you know, guidance.

Imani Gandy: Okay, all right, because I clearly got sucked in, can you just, can you explain what the APA is? 'Cause I know you love the APA so I'm just gonna lean back. I'm just gonna, you're gonna fan yourself with your papers and just lay it on me, lay it on me.

Jess Pieklo: I need to bring it down a minute and I literally need to pull myself together here, because truly, in the show notes right here, Imani has it saying, "Jess, yada yada, APA so sexy, yada yada."

Imani Gandy: I knew you would just take that note and just go with it.

Jess Pieklo: This is my explanation of how the APA is so sexy, everyone. So look, our federal government relies on federal agencies to do its job, right? Congress can't do everything, it can barely do anything. Can you imagine if Congress was in charge of trying to implement, oh I don't know, clean air regulations? Good luck with that.

So the Constitution suggests that Congress can pass off some of its duties, and the Administrative Procedure Act is the federal statute that does that. And it says how these agencies have to operate because there's no democratic check on them aside from our ability to elect folks to Congress and appoint those agency heads and hire the employees. So without getting too much into the weeds, the APA really drives how the federal government does its job. And when those federal agencies have to do things in big, meaty ways, the public gets to weigh in on it, and that's in a process called notice and comment. And that's like if the administration were to do a brand new rule, let's say tell all automobile industry makers that every car has to be electric in the next 10 years. That's a big change. The public, you know, other interests get the opportunity to weigh in on it. That's notice and comment.

Suggesting how a Supreme Court decision works in real life is not substantive. If the administration were to, say, dictate to all automobile industry manufacturers that every car they

make has to be electric in the next 10 years, that's a substantive rule. Folks get to weigh in on that through notice and comment. That's literally like, type into the federal government, "I don't like this" or "This is the best thing you've ever done," right? Like, that's the process. There's a timeline involved, it's really long. But implementing a Supreme Court decision, how to abide by a law that's been handed down, that's procedural, right? That's the process, the procedure, of implementing the Supreme Court decision. So Kacsmaryk's wrong. He gets that, I'm sorry.

Imani Gandy: Yeah, got it, okay, I feel a little bit better. I feel a little bit better.

Jess Pieklo: I'm not gonna let you go to the dark side, Imani.

Imani Gandy: Don't let me go, I'm glad you pulled me back. I'm glad you pulled me back. So the question then becomes-

Jess Pieklo: I mean, he gave himself cover, right? He wrote an opinion that sounds good, that's what these guys do.

Imani Gandy: Okay, so then the question becomes did the EEOC skirt the APA, right? Like, that's the question. And I'm gonna answer that question because I know the answer now. So, one of the reasons Judge Kacsmaryk ruled in favor of Texas is because he said that that the guidance was a substantive rule. And you've just explained how it's not a substantive rule, it's a procedural rule.

Nevertheless, that was his claim, that's what he ruled. He said it ran afoul of the APA since it was issued without a notice and comment period. So how is this gonna play out in Texas and the federal courts in Texas? Well, we kind of have an answer to that because we have some precedent there, and we have the kind of precedent that courts are gonna abide by, not the kind of precedent that gives people rights and you know, that the courts are gonna just ignore.

Jess Pieklo: Yeah, they're like precedent-shmecedent, rights-shmights.

Imani Gandy: But only when we like it. So the precedent in the Fifth Circuit, where Texas sits, indicates that Kacsmaryk's ruling is going to be upheld, and here's why. In 2019, the EEOC published guidance regarding criminal applicant screening policies, right? So when people who have criminal records are going to apply for jobs, the EEOC said that employers have to do an individualized review of each candidate rather than having a blanket policy that they're not gonna hire people who have criminal records. Texas sued, arguing that this guidance was a substantive rule that needed a notice and comment period before it could be implemented. Now, given what you just said, I know now that this was not a substantive rule either. It's procedural.

I'm really glad you brought me back, 'cause I was stressed out about that. I was like, I don't wanna be agreeing with Trump judges, I need Jess's help, right? So the district court agreed that it was substantive, and then the Fifth Circuit agreed that it was substantive, saying, quote, "Although the scope of the guidance is purportedly broad, the EEOC has limited rule-making

and enforcement power with respect to Title VII. It may issue only procedural regulations implementing Title VII and may not promulgate substantive rules." So here we seem to have just a "difference of opinion," quote unquote, about what substantive and what's procedural. And given how the Fifth Circuit has already ruled, it doesn't bode well for the EEOC in this particular case involving Title VII and sexual orientation and gender identity.

Jess Pieklo: No, it doesn't.

Imani Gandy: Yeah.

Jess Pieklo: And it's all garbage, and it's driving me crazy, and I need conservatives to leave the APA alone. Okay? Leave the APA alone.

Imani Gandy: Leave the APA alone. Also leave Britney alone.

Jess Pieklo: I know that you hate the administrative state and that you will do anything you can to burden it to the point and break it so that everybody's like, "Ah, screw government forever." But we need government to work, and y'all have been messing with the APA and

Imani Gandy: She's gonna arm wrestle somebody in the street over it.

Jess Pieklo: I really am.

Imani Gandy: Let's talk about how Gorsuch's opinion paved the way for this, right? Gorsuch's opinion expressly leaves open the question of bathroom access, right? Pronoun usage.

Jess Pieklo: Yep.

Imani Gandy: And if you remember, I mean, if you remember, Gorsuch's opinion was 30 pages. It was tight, it was neat, it was buttoned up. The dissent? 140 pages of just whinging and complaining and discussions, bad faith discussions. And it's just, it's too much, Jess, it's too much. What is going on here with this 140 pages of nonsense? And how did we get to the point where Gorsuch is just letting people run roughshod over this Title VII ruling?

Jess Pieklo: I had completely forgotten about the length of the dissent until we started preparing for the show. That's just, like, go touch some grass, right?

Imani Gandy: Seriously.

Jess Pieklo: Pull yourselves together, man. I don't know. But I will say now, after having the opportunity to observe Justice Gorsuch in some additional oral arguments and have this sit a little bit, now the bad faith from that decision just oozes through it. And he knew it at the time. Yeah, that man's a snake.

Imani Gandy: And here's what bothers me.

Jess Pieklo: What?

Imani Gandy: None of this would've happened if trans people had more protection under the law.

Jess Pieklo: Oh, yeah, okay, I see what you're doing here.

Imani Gandy: Mm-hmm.

Jess Pieklo: So I guess we have to talk about suspect classes, right? That's what you're doing.

Imani Gandy: Yeah.

Jess Pieklo: That's what this is all about, Imani. I'm pickin' up what you're puttin' down, right?

Imani Gandy: Yes.

Jess Pieklo: Okay, so we're gonna talk about suspect classes and if gay, lesbian, and trans folks are a suspect class. So, Imani, are they?

Imani Gandy: Yes! Yes. Do you remember when Anthony Kennedy retired and we were so pissed? We were so pissed that [we co-wrote a piece](#) about it, right? We wrote about how he had essentially destroyed his legacy of LGBTQ allyship by dissembling in just about every case related to LGBTQ issues that came before him in, say, the last decade of his tenure. We're talking about Obergefell, which said that, you know, laws forbidding same-sex marriage were unconstitutional. We're talking about Masterpiece Cake Shop, where he said, "I don't know you guys, you're being really mean to this Christian baker and I feel like you're attacking religion," right?

Jess Pieklo: Right.

Imani Gandy: He has talked incessantly about the dignity of LGBTQ people and how it's so undignified to deny them, for example, the right to marry and the right to get divorced, right? But he didn't do what he should have done when he was on the bench, which was advocate for deeming trans people a suspect class, either a suspect class or at least a quasi-suspect class.

Jess Pieklo: Right.

Imani Gandy: If trans people were a suspect class, then strict scrutiny would be triggered, right?

Jess Pieklo: Right.

Imani Gandy: And trans people could then start to make equal protection claims under the Constitution as opposed to statutory claims when they are complaining about employment discrimination in the courts. When I say complaining, I mean filing complaints, not like complaining.

Jess Pieklo: Yeah, not like whining about it, right.

Imani Gandy: Right? So I ask you this question, Jess: what is a suspect class? What is a quasi-suspect class?

Jess Pieklo: I love this. We're gonna do some constitutional law nerdery.

Imani Gandy: Whoo-hoo!

Jess Pieklo: Because truly, what we're talking about here is the difference between, as Imani said, the statutory remedy, right, Title VII, when Congress can change statutes, make them broader, make them narrower, the Constitution is a living, breathing document that lives forever though, folks, and says that suspect class and deals with how to deal with discrimination. So that's how we get to this idea of the suspect class.

And a suspect class is a class of people who have historically been subject to discrimination. They comprise a discrete minority. That means there's not a lot of them percentage-wise, right? And they have some immutable characteristics, meaning characteristics that can't be changed, right? You're born that way.

Imani Gandy: Right, ooh, I like that. Absolutely.

Jess Pieklo: Suspect classifications include things like race and national origin, along with religion. We'll just put that aside.

Imani Gandy: I'm sorry, that never made sense to me 'cause you can change your religion, but we can move on.

Jess Pieklo: All right, but what's important to know is that laws targeting suspect classes, they're subject to a heightened scrutiny, that's the level that courts use to apply whether or not they're good or not, in order to protect a tyrannical majority from screwing over that discreet and insular minority, right?

Imani Gandy: Right, right.

Jess Pieklo: So let me say that again. The purpose of this is to create a way for courts to judge when the majority is looking to screw over that discrete and insular minority. So like Imani said, had trans people been deemed a suspect class, then laws that potentially discriminate against

them are subject to a much higher level of scrutiny. That means they really gotta pass a high bar than, say, another law that applies to everybody, right?

Imani Gandy: Right, right. And so, you know, I'm not gonna go into grave detail about the levels of judicial scrutiny, although I'm literally dying to because I love talking about the levels of judicial scrutiny. But let's just say strict scrutiny means that the government has to have a really, really, really good reason to pass a law that otherwise restricts your rights. Like, if it's not a really, really good reason, then the law's going to fail.

Jess Pieklo: Strict scrutiny applies to race.

Imani Gandy: Yep. That's like the main thing that strict scrutiny applies to, race-based classifications. Intermediate scrutiny requires just a pretty good reason.

Jess Pieklo: Yeah.

Imani Gandy: Otherwise, the law restricting your rights is gonna fail, as long as the state has like a decent reason. And what falls under intermediate scrutiny are gender-based classifications, right? It doesn't reach the level of race-based classifications. But you know, women are a quasi-suspect class, so we get just like a little bit lower level of scrutiny than race-based applications.

Jess Pieklo: Yeah, and that's mostly because there's just more women than there are, say, you know, Black folks. So it's that percentage-wise of a population.

Imani Gandy: Absolutely. And then there's rational basis review, which I refer to as the "eh, fuck it" level of review. The court's gonna look at a law and is gonna say, "I mean, they had a reason. They had a reason, it's fine. Fuck it, we're not dealing with it." Basically it's what it is, right? So again, laws discriminating on the basis of race gets strict scrutiny, laws discriminating on the basis of sex are subject to intermediate scrutiny, and then right now, trans people are just sort of left twisting in the breeze, right?

The laws affecting them tend to be reviewed under rational basis review, which is just the "eh, fuck it" review. But how can we have "eh, fuck it" when it comes to laws discriminating against trans people who are, I would say, right now the most vulnerable population in this country.

Jess Pieklo: Yeah.

Imani Gandy: Particularly when you're talking about trans women of color, the absolute most vulnerable population. They are a discrete minority. They don't have a lot of political power. They need protection, they need constitutional protection.

Jess Pieklo: Yeah, yeah.

Imani Gandy: I have a question for you.

Jess Pieklo: Okay.

Imani Gandy: Let's move on to my next question. What is so scary about this case? Why did we feel like we had to do an episode going back to a case we talked about a year and a half ago to explain how we got it wrong?

Jess Pieklo: Yeah, no, that's an excellent question. But I think you kind of proved the point in this podcast because you were like, "I don't know, I kind of see what this judge is doing here." But the reality is Texas v. EEOC is the first high-profile case to really weaponize Bostock and try and put queer folks back in the closet at work. And we have to talk about this, okay?

Historically, it has not really been safe for folks to be out at their places of employment, and conservatives are looking to take us back to that place. They spent a summer whipping up rage against teachers as quote unquote "groomers." We've had these attacks on drag queen story hour that are just bad faith nonsense. The "Don't Say Gay" bills at Florida, and now at the federal level, these are all attempts at erasing folks from public spaces and making it dangerous to be out. Sure you can be gay, just don't be gay, right? I mean, Imani, we're not that young anymore. Do you remember "don't ask, don't tell," right?

Imani Gandy: Mm, yeah.

Jess Pieklo: That historically terrible experiment that liberals tried to run in the military that said essentially, "Look, you can be out in the military, you just can't be out in the military." It's disastrous. And the idea that we won't allow folks to be themselves in their workplace won't stay, won't be limited, to their jobs.

Imani Gandy: Right.

Jess Pieklo: That will be in all public spheres. And so this is one of those like five alarm fire decisions. And you know, we joke a lot on this podcast because we gotta laugh to get through it, but this is a really dangerous decision and there's no other way to talk about it.

Imani Gandy: You know, we've talked a lot this season on the podcast about how this term is about erasing marginalized people from public spaces, and this is just another example of that.

Jess Pieklo: Completely.

Imani Gandy So, that's fun. And if you would like to talk to us about any of this stuff, if you wanna talk to us about our mea culpa when it comes to Bostock, or if you wanna congratulate Jess for having that red flag, 'cause that red red flag turned out to be very prescient, very, very prescient, you can find me on Twitter @AngryBlackLady, you can find Jess on Twitter @Hegemommy H-E-G-E-M-O-M-M-Y. Why? Because she's really, really great. I'm sorry.

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Jess Pieklo: We're gonna see you on the Tubes, folks.

Imani Gandy: We're gonna see you on the Tubes and maybe at Nordstrom Rack.