

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 is doing things. 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 do things also. And the "Boom! Lawyered" podcast is part of that mission. So a big thanks to our subscribers and welcome to our new listeners and viewers.

Imani Gandy: So Jess today, we are going to talk about a case that fits nicely with our theme for this season of Boom! Lawyered. And that is the conservative effort to send women and girls back to the 1950s essentially, and to make their participation in civic society basically untenable, more difficult, impossible even, by imposing unnecessary restrictions that are patriarchal in nature.

The case is called *Charter Day School v. Peltier*, and the Supreme Court is thinking about taking this case and that is a disaster, and we're going to explain why. But as of right now, they haven't taken it. They've just asked the Biden administration to weigh in on the matter. So the first thing we're gonna talk about is what is *Charter Day School v. Peltier*? What's this case about, Jess?

Jess Pieklo: Everything that's terrible right now, basically. Like your whole intro, I was like, thanks, I hate it. I'm gonna go get a drink, like, no. So, but for real, this case is about Charter Day School Inc., a company that runs multiple charter schools in North Carolina, and get this Imani, they won't let girls wear pants.

Imani Gandy: I mean, what? Like won't let them wear pants, like it's the 1950s. Like we're talking Peggy Sue got married with like poodle skirts and like saddle shoes. That's the vision that they want for women in this country in the year of our Lord 2023?

Jess Pieklo: Like the 1950s, no pants for girls. Give the girls their pants.

Imani Gandy: And pockets in them!

Jess Pieklo: It's just insane. So there's a lawsuit about whether or not girls can wear pants at school. That's what we're talking about.

Imani Gandy: Yeah, it's absurd. It's absurd.

Jess Pieklo: So the plaintiffs in this case are guardians of a group of students and they argue that the policy is bullshit basically.

Imani Gandy: Yeah, you think?

Jess Pieklo: Yeah they actually. They have some good legal claims. They argue that the policy violates Title IX, which is the federal civil rights law that says equal access and opportunity in education regardless of sex or gender, the equal protection clause of the Constitution, which is sexy and we love that on the Boom! Lawyered podcast, as well as a contract with the State Board of Education that requires all public schools in North Carolina to comply with the federal and state constitutions. And I just have to say that I love that we are engaging in contracts with schools to make sure that they're not violating student rights. Like, okay.

Imani Gandy: Yeah, great time we're living in, don't you think?

Jess Pieklo: Love it.

Imani Gandy: But first we gotta give a little bit of background on how the public school system works in North Carolina. So the North Carolina Constitution mandates that the North Carolina Legislature shall provide for a general and uniform system of free public schools to be supervised and administered by the State Board of Education. So basically, the NC Lege provides free public schools and those schools are regulated and run by the State Board of Education.

Jess Pieklo: Yeah, pretty simple, straightforward. And to fulfill this obligation, the legislature created six types of free public schools, and that includes public charter schools. The state board of education requires these schools, like I said, to comply with federal and state constitution. So really, they're just asking the bare minimum of these institutions functionally, like don't overtly break the law. Charter Day School Inc. runs several public charter schools per one of these contracts with the State Board of Education.

Imani Gandy: Right. And remember, these contracts say "Hey, charter Day School, you have to comply with the federal and state constitutions." Right? And so what does Charter Day School in response to that directive, basically acted like a bunch of patriarchal ding dongs, right?

They implemented a code of student conduct, which requires girls to wear skirts in order to "Preserve chivalry based on the belief "Preserve chivalry based on the belief that 'Every girl is a fragile vessel.'" And of course, they also spouted out, the usual nonsense about how, you know, you can't distract the boys and we gotta make the girls conform to this particular behavior, so the boys don't get boners in you know, trigonometry or whatever. I mean, it's like, what are we doing here, people? And it's not like plaintiffs are asking for that much, right?

They just want to change the uniform policy, so that girls can wear pants and shorts like boys do. I mean, that's it. And they have good reasons. I mean, besides like equality and just let fucking girls wear pants. The skirts requirement restricts girls movement. And they say that wearing pants or shorts would allow them to be more active during recess, which makes sense. I mean, you wanna run around in shorts or pants. You don't wanna run around in like a little skirt. It would keep them warmer in winter. Which makes sense, right? One student testified that the squits, I almost said skorts. Do you remember skorts-

Jess Pieklo: Which all those, you brought it up and I just have to say it, skorts are terrible as a runner, I know that this is a strong opinion, and I am definitely gonna get flamed for it, but anti-skort. Okay, go on.

Imani Gandy: I like skorts, but I'm not a runner. So you know, I'll let you have that one. But one student testified that the skirts requirement "Sends the message that girls should be less active than boys." And that they are more delicate than boys with the result that boys "Feel empowered" and "In a position of power over girls." And then another student testified that the skirts requirement conveys the school's view that girls just aren't worth as much as boys and that girls are not in fact equal to boys.

Jess Pieklo: I mean, this is some like pretty logical mature thinking for a group of students, I gotta say. I'm pretty impressed and I'm sure that the Charter Day school board took it well, right?

Imani Gandy: [laughs]

Jess Pieklo: What if I told you that their response was, What if I told you that their response was, I don't know, terrible. Like terrible. All right, in an email to plaintiff Bonnie Peltier, one of the CDS parents, the Christian Day School founder, Baker Mitchell explained that girls and boys should be required to dress differently to emphasize chivalry. Let me say that again. Chivalry. Chivalry.

I mean, what the fuck is chivalry? But chivalry is driving educational policy, this code of conduct where women are regarded, like Imani said, as fragile vessels that men are supposed to take care of, in honor. And females are to be treated courteously and more gently than boys. Which first of all, let me just say yikes, but—can I share something here? 'Cause I actually went, I went to school, lo those many years ago in elementary school. I went to to a Catholic school that had a dress code. And girls were not allowed to wear pants. We were required to wear skirts and- We were required to wear skirts and-

Imani Gandy: Wait, but you have to tell the listeners the name of your Catholic school 'cause it's the most Catholic school name I've ever heard of in my life.

Jess Pieklo: Listeners and viewers. The origin of my villain story is that I went to elementary school is that I went to elementary school at a Catholic school called, wait for it, wait for it, Christ the King.

Imani Gandy: I mean, who goes to a school called Christ the King? That's-

Jess Pieklo: This bitch.

Imani Gandy: That strikes me as so bizarre. This bitch right here. Who has two thumbs and went to Christ the King? This bitch.

Jess Pieklo: So first of all, it explains everything like, everything.

Imani Gandy: Like you and I are the same age, right? So we were in elementary school in the mid-'80s. '85, '86.

Jess Pieklo: The Reagan-Bush years.

Imani Gandy: The Reagan-Bush One years. Also about a decade after women were finally allowed to get their own credit cards. Before like, I don't know, like '74 ish. '76 ish, women needed to get permission from their husbands to

Jess Pieklo: Yeah, or open a bank account, have any financial independence, right? Like none whatsoever. So like, everything that the students are saying was true. I was a young girl in elementary school at Christ the King, trying to play dodgeball at recess. You think that was fun in a skirt? What do you think the boys were doing in fifth and sixth grade as we were walking down the hall, they were flipping up the skirt, so they could see our underwear, right? Like it was absolutely, it was just a walking #MeToo violation going to that school. And here we are-

Imani Gandy: Literally Jesus Christ.

Jess Pieklo: Literally. Like all of it was just, it was bad. And so like, to hear the students say these things and to know that like what, we're so many decades past me being in elementary school we're so many decades past me being in elementary school and it's the same bullshit. I just, but like Imani said, you know, in our lifetimes, in Imani and I's lifetimes, it was not possible for women to have credit on their own, to have their own bank accounts.

So the progress, the backlash against the progress is real and amplified.

Imani Gandy: So let's talk about the arguments that plaintiffs are making.

Jess Pieklo: Yeah. Sorry, I just made that all about me. Thank you for the therapy everybody.

Imani Gandy: You know what Jess, I'm here for you, you know. and the Boom! Lawyered community is here for you as well.

Jess Pieklo: Those Christ the King days were dark, man. That's all I'll say.

Imani Gandy: I mean, knowing how rebellious you are now, I just shutter to think what the hell was going on with you when you were like 11. I wish I had known you then. I really do. So plaintiffs are making two arguments. This case is kind of convoluted, and we're just gonna give you the bare bones because otherwise we're gonna be here forever. And last week we did that to you. We're not doing that to you this week. We're keeping that light and airy, as much as we can. So plaintiffs are making two arguments. One is that Charter Day Schools' actions violate Title IX, right?

Title IX says you can't discriminate on the, you can't discriminate if you get public funds, essentially. Gender equality for everyone, if you get public funds. The other argument they're making is that Charter Day Schools' actions violate the Equal Protection Clause. Now, on the equal protection clause, the main issue is whether or not Chartered Day School is a state actor and whether or not they are standing in the shoes of North Carolina when they are providing public education. If they are a state actor, then Charter Day School has to stop violating the federal and state constitutions by requiring girls to wear pants, right? Now, of course Charter Day School is saying that they are not a state actor because they don't wanna have to abide by the Constitution.

They're claiming that they're a private entity, they have a private board, they're privately run. And just because they have a contract to provide public education that doesn't make Charter Day School a state actor. That is what they're arguing. North Carolina, on the other hand, is arguing that they are, not North Carolina, sorry, the plaintiffs in this case are arguing that they are a state actor, right? They are standing in the shoes of North Carolina when they are providing this public education.

Now this is a fact intensive inquiry. I just rattled off a bunch of stuff. Jess told you a bunch of stuff about what these people are complaining about. It's all very fact intensive.

But do you know what the Supreme Court is not? The Supreme Court is not a fact finding body. is not a fact finding body. They are not a fact finding court. Even though they've been acting like it as of late. Charter Day School wants the conservatives on the court, right? These Federalist Society stooges on the court to legislate from the bench and dig around in the factual weeds of this case and then come up with a solution that says, "Sure Charter Day School, you can force girls to wear pants." That's what Charter Day School wants. They want this really, just nasty, gnarly, complicated morass of a lawsuit.

Jess Pieklo: I have a question.

Imani Gandy: I may have an answer.

Jess Pieklo: The fuck are we doing here? Like what about Title IX? Like this is a pretty straightforward Title IX case, isn't it? And that's not fact specific at all. Title IX says no discrimination on the basis of gender, if you get public funds. Charter Day School gets public funds. You can't discriminate on the basis of gender. You don't even need to get to a state actor question here in the Constitution, we have a statute, so I ask again, so I ask again, the fuck are we doing here?

Imani Gandy: The fuck are we doing here? Well, I'll tell you, Charter Day School argued, and the district court agreed that Title IX doesn't cover dress codes. So the district court ruled in Charter Day School's favor on the claim that the dress code violated Title IX.

Jess Pieklo: Oh.

Imani Gandy: Exactly. Like what?

Jess Pieklo: What? Okay. So, true. Okay. So, true. Fine. They did, they got it wrong, but fine. I'll give it to 'em. The Fourth Circuit kicked the case back to the district court for more findings on that Title IX claim. So we should be getting some more facts, right? Like, so SCOTUS, I mean, I don't know Imani, shouldn't they just wait for the Fourth Circuit to rule on the Title IX issue then? Because if plaintiffs win on that Title IX claim, I mean, I don't know, it's been a little while since I was in a courtroom, but I feel like that gets us to the end of the line here. We don't even have to get into the equal protection weeds. We don't have to talk about who's a state actor, who's not. We can just say, "Hey, the statue says knock it off, Charter Day School, knock it off."

Imani Gandy: I mean.

Jess Pieklo: I'm gonna answer my own question 'cause I'm like all hopped up about it. Yes. If you can't tell, yes. Like this should be just really clear Title IX stuff. But, as Imani has alluded to, this is another case of conservatives looking to the Supreme Court to act as a fact finding body, which it is not. Sam Alito is not a fact detective. He does not get to decide what is going on. So there's no reason for the Supreme Court to take this case. There's no reason for them to be thinking about this case right now. They shouldn't be asking the Biden administration to weigh in on shit. But here we are.

Imani Gandy: So, the second thing we're gonna talk about today is what the shit, man? Like-

Jess Pieklo: Functionally? Yes.

Imani Gandy: Functionally, what the shit? Why is the court thinking about taking this case? There's no circuit split. The Supreme Court has not weighed in on the matter of whether or not dress codes violate the equal protection clause or violate Title IX. No other circuit court has said yes, while the District Court in North Carolina is saying no.

This case is a fact specific inquiry on the issue of whether or not CDS is a state actor or whether or not the case violates Title IX, right? Like, what are we doing here? There's no reason for the Supreme Court to be dipping its toes in these waters, so.

Jess Pieklo: Yeah, and I'm just gonna say it again because I'm so mad about it. This is a straightforward case of stay the fuck out of it, Supreme Court. The plaintiffs could still win on their Title IX claims in lower court. If they do, then the charter school would have to end the dress code and the Supreme Court wouldn't need to step in at all. Let me say that again. You wouldn't need to step in at all, guys. Literally, like you could just leave it alone,

Imani Gandy: Stand down.

Jess Pieklo: Go find something else. Stand down is right. So, you know, I mean, So, you know, I mean, it used to be, when norms and principles mattered, it used to be, when norms and principles mattered, that the Supreme Court wouldn't review or weigh in on, on legal questions, on policy matters until a case had gotten to the end of the line, until the parties had exhausted all of their appeals, and we had a final, like a final issue, right? And we had a final, like a final issue, right? Like a final settled dispute. We're like in the middle of it. We're in like season two of a four season arc on this case, and the Supreme Court is possibly going to step in.

Imani Gandy: Yeah. The Supreme Court is like, "We're switching showrunners. We don't like how this is going, we're gonna come in and we're gonna kill off all of the main characters. We're gonna do a red wedding situation and just"-

Jess Pieklo: No!

Imani Gandy: But you know, like I feel like we are repeating ourselves, but it bears repeating. How much the Supreme Court appears on the cusp of ignoring procedures and norms again, to take a case that it doesn't need to. So it can insert itself into an issue that it doesn't need to insert itself into right now. Like that's just, there's no reason for it.

Jess Pieklo: Right. And all signs point to that is what is going on here. As I said, if norms mattered at all, the Supreme Court would be completely ignoring this petition. I mean, how many petitions get filed at the court every year? Hundreds, Hundreds and hundreds. They could ignore this one as well, but it suggests that they are interested. It suggests that the justices are curious about dress codes, to say the least. And if they're curious, to say the least. And if they're curious, then there's every indication that they'd be willing to ignore custom and policy, and just muck about, don't you think?

Imani Gandy: Yeah. I mean, they've done it before, right? The case that ended Roe, the Dobbs case, remember? Remember lo those many years ago, the Dobbs case. But no, but some of our listeners, well our listeners probably all know, but I'm gonna repeat, if you recall, Mississippi's original ask was to the Supreme Court, is our 15-week ban kosher, under current law. Current law at the time was Roe and Casey, right? Undue burden, fetal viability. We kept saying it, fetal viability, what was it? ♪ Pre-abortion bans are right ♪ ♪ Pre-viability abortion bans are unconstitutional ♪

Jess Pieklo: Jazz hands!

Imani Gandy: I mean, that's the issue. But then, what happened? Ruth Bader Ginsburg died. Amy Coney Barrett ascended to the bench, and Mississippi basically filed its merits brief and said, "I know in our petition for cert, we asked for, you know, a ruling under current law, but JK, just go ahead and overrule Roe and Casey, we don't need it."

Jess Pieklo: False. False.

Imani Gandy: Like that seems like we're, it seems like we are on that similar track right now.

Jess Pieklo: I mean we've talked about it even with cases before the court this term, right? 303 Creative, the case out in Colorado that involves the lady who doesn't even make wedding websites, but is really mad that she might have to, possibly one day, for a same sex couple, so she's gonna sue about it now.

Imani Gandy: Yeah, yeah, yeah. Or *Students for Fair Admissions v. Harvard*, right?

Jess Pieklo: Oh, totally.

Imani Gandy: The court took that case and essentially substituted its own factual findings for the factual findings of the lower court. I mean, it's remarkable I mean, it's remarkable the extent to which they were like, Yeah, I know you already did all of this and I know you did, you know, fact finder, that's your role, but what we don't like affirmative action.

And we are going to end it. And the only way we can do that is to just make up our own facts. Ignore what you found, and just make up our own shit. That's not the Supreme Court's job. The Supreme Court is not a trial court. They're basically treating the Supreme Court like it's a small claims court for conservatives.

Jess Pieklo: Judge Judy for evangelicals.

Imani Gandy: Judge Judy for ADF.

Jess Pieklo: I mean it is, but you bring up ADF, and so that's a good transition to our third point, which is, you know, why does this case matter and how does it tie into this theme of looming Christian theocracy that the Supreme Court has this careening towards right now? Okay, so it's actually pretty straightforward. Charter Day School touts itself as a school based on traditional values, Imani. Hmm. I like already hear the robins in the background.

Imani Gandy: Right, I love a traditional value.

Jess Pieklo: Nothing like a good traditional value, right? Those traditional values are patriarchal in nature. And you know, And you know, white Christians would truly love to, nothing more than to return to a time when literally only men wore the pants. And I think it's important to tie this argument and this case and this sideways attack on Title IX with the ongoing trans panic that we have.

Imani Gandy: Yes.

Jess Pieklo: Sweeping the country right now because it is absolutely part and parcel of the same fever. We can expect to see a return to dress codes in order to differentiate between men and women to ensure that trans or nonbinary people are forced to dress in a manner that does

not align with their gender identity. That's what this is really about, is about getting folks back into the closet, about un-queering public spaces.

Imani Gandy: Yeah, and it's also about being able to police those public spaces, right? I mean, there was a time where you would be harassed if you weren't wearing the clothes that you were supposed to be wearing, wearing the clothes that matched the identity that you look like, that people thought you look like, there's over-policing when it comes to trans people and gender non-conforming people. And there's over-policing when it comes to black and brown girls, right?

I mean, when it comes to the sexuality of Black and brown girls, there's this term, you know, in the Black community about girls being fast, right? You get these fast girls, these 12, 13 years old year old girls who are just fast and therefore, they're not, they shouldn't be treated as if they're young children. They should be treated as if they're women, as if they know what they're doing, as if they have the capacity to be, not only the capacity to be sexual, but they're doing it on purpose, right. That's where the Jezebel myth comes from when it comes to Black women.

Jess Pieklo: Exactly.

Imani Gandy: Like oversexed, Black women, Black girls. Bo, there was a national women law center report that examined the effect of dress codes on black girls. And would it surprise you that Black girls and brown girls face the brunt of these sort of, this sort of targeting.

Jess Pieklo: Nope.

Imani Gandy: From the report, "Black girls also face adults stereotyped perceptions that they are more sexually provocative because of their race and thus more deserving of punishment for a low cut shirt or a short skirt," right? More deserving of punishment. The report also found that this was a report conducted in DC schools. The report found that DC dress codes promoted race and sex discrimination, and pulled students out of classrooms for no good reason, often through illegal suspensions. Right?

So as a result, Black girls tend to fall behind in school. That threatens their ability to get into good colleges. That threatens their long-term earning potential and then also just continues to exacerbate the existing racial and gender inequalities.

Jess Pieklo: Mm-hm. And I mean, this report is wild. Like some of the anecdotes in this report are absolutely bonkers. At one school, they were prohibiting outerwear in winter, right? Because you would walk into the school doors and they would have metal detectors and because people were wearing like big parkas, they just wanted, they wanted to be able to see what people were doing, and walk through these metal detectors and just, I mean, they almost wanted X-ray vision, right? So they're making people go through school, people go through school, walk to school with no outerwear, which makes no sense. Especially given how cold these schools are. I mean, these school districts

Jess Pieklo: Yeah!

Imani Gandy: don't have any way to make these schools warm. And apparently walking through a metal detector with a big parka on, earned a person a suspension because it was presumed to be a security risk, because you might have weapons. First of all, if you're walking through a metal detector, can't metal detectors read through down, like goose down? I feel like that's the thing.

Why are you forcing kids to shed their outerwear to be cold? So you can check them for what? There's gotta be a better way. And if that gets you suspended, And if that gets you suspended, particularly if you're Black or brown, that's gonna get you suspended. If you're white and your name is like Kayleigh with an E-I-G-H, then maybe you might be okay. And I apologize to anyone who's listening, whose name is Kayleigh, or Ashley, or Becky with the E-I-G-H. I'm sorry, I have no prejudices against you. I'm just saying. So.

Jess Pieklo: That's bad. I can't believe. No coats.

Imani Gandy: Let the kids wear coats and let the girls wear pants. Like, people get pneumonia, here man. Basic rallying cries. So Cassandra of the Courts, our court whisperer. What's going to happen with this case?

Jess Pieklo: Oh, well it gives me a stomach ache. Let me just start there. And like we've said so far, all that's happened is that the court has asked the Biden administration to weigh in. The justices are conferencing on the case, which means they're thinking about it. They're giving it a good hard think. All of that is not sitting great with me, If I am being honest. The fact that they're even considering taking it up is, as we've suggested over and over again in this episode, kind of alarming and Imani. Look, we know what happens when the Supreme Court ends up taking cases that they don't need to.

Imani Gandy: Yeah, it shits the bed.

Jess Pieklo: I mean, it shits the bed. It really does. Okay, so like, where are we in the law? Remember when that mattered? Where are we?

Imani Gandy: Oh God, the law. A cute and quaint thing that was.

Jess Pieklo: The Supreme Court hasn't really weighed in on dress codes per se. The closest they've come is a decision permitting students to wear armbands protesting the Vietnam War. But a couple flags here, it's a court captured by conservatives and their spousal of traditional values. And I almost did the jerk-off motion, which they break all the time, by the way. But you know, what better way to permit localities to impose their own puritanical values than by green lighting something like dress codes in schools. And I have a little like tingly Jess Spidey sense going on here.

I don't think this is really about what conservatives are saying. It's about-

Imani Gandy: What do you think it's about?

Jess Pieklo: Okay, so do you remember the Bostock case?

Imani Gandy: Boy do I ever.

Jess Pieklo: Listeners and viewers, the Bostock case was the one good decision from Justice Gorsuch that I then developed a crush on the man over, and I apologize profusely for that. But what he said in that decision was that Title VII, which is the federal statutory law that prohibits discrimination in the workplace, that Title VII prevents employers from firing you if you are gay or trans, and that's a very basic decision. It was applauded and like everybody, including us, were like, "Hey, this is great. The court did something right, didn't really screw this up." Well, at issue in Bostock, Imani, you might remember, was a dress code.

There was, in Harris Funeral Homes, one of the companion cases that was argued, an employee Aimee Stevens, transitioned while an employee, and was fired for it. And ostensibly, the reason that her employer gave was that Aimee could no longer abide by the employer's gendered dress code. And so, it was an entire fight over how employee's dress at work and signal their gender identity and queerness. And the reason I bring that up is because federal courts, all the time interpret statutes, the civil rights statutes in parallel with each other. So if Title VII says that you can't discriminate based on somebody's gender identity, for how they dress, then Title IX should say the same thing as well. Those statutes should be read, so that they are the same across the board. Feels like this is an attack on Bostock without saying it's an attack on Bostock.

Imani Gandy: Yeah, I mean it's an attack on Bostock and we also, you know, we were, we loved that opinion and then remember about a year later, we went and revisited and we were like, yeah, it wasn't as great of an opinion as we thought because there's just like a huge hole that you could drive a Mack Truck through, and that's religion, right? Religious freedom.

Jess Pieklo: Exactly.

Imani Gandy: So you know, it's a good case for now, but who knows how long it's gonna last. And that's distressing, and also let girls wear pants!

Jess Pieklo: Let the girls wear pants.

Imani Gandy: If you would like to talk to us about whether or not girls should be able to wear pants and whether or not those pants should have pockets, you can find me on Twitter @AngryBlackLady. You can find Jess on Twitter @Hegemommy, H-E-G-E-M-O-M-M-Y. You can and should follow Rewire News Groups on all of the platforms, on Twitter, on Instagram, on

YouTube, youtube.com/RewireNewsGroup. If you sign up for notifications, you will get, well our podcast notifications.

And if you're not into YouTube, you can get the podcast wherever you normally get your podcast. Yeah. Charter Day School.

Jess Pieklo: Let girls wear pants.

Imani Gandy: Just fucking let girls wear pants, honestly. And what are we gonna do, Jess, while we're wearing pants.

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

Imani Gandy: I'm gonna see you on the tubes in some goddamn pants.

Jess Pieklo: With my pants!