This transcript is a version of the episode.

Imani: Hello fellow law nerds! Welcome to another episode of Boom! Lawyered, a Rewire News Group podcast..

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Jess: I'm Jess Pieklo, Rewire News Group's Executive Editor.

Rewire News Group is the one and only home for expert repro journalism and the Boom! Lawyered podcast is part of that mission. A big thanks to our subscribers and welcome to our new listeners!

So Imani I was thinking and you know what, we've talked so much about administrative law lately, about regulations and rulemaking. I want to return the favor. I think we should talk about levels of constitutional review and trans rights because I think it's an issue that SCOTUS is gonna weigh in on sooner rather than later.

In November advocates from the ACLU urged the Supreme Court to take up a pair of trans rights cases out of Tennessee and Kentucky. Both cases involve bans on gender affirming care for minors and argue that such bans violate the equal protection clause of the Constitution. Both cases also seek to assert the constitutional rights of the parents of trans kids to direct their childrens' care and upbringing.

And thanks to some recent action by the Biden administration, both cases could be the first major test of trans rights to land before the Supreme Court since the 2019 and the *Bostock* and *Harris* cases.

Imani: That's what we're talking about in this episode. What levels of constitutional scrutiny apply when courts evaluate a gender affirming care ban? Do the parents of trans kids have the same rights as the parents of cis kids wanting to block their access to birth control? These are open questions the Supreme Court could soon answer in a case called *L.W. v. Skrmetti* and it is THE case to watch on trans rights right now.

Imani: Back in November advocates from the ACLU filed a petition with the Supreme Court asking it to take up a case out of the Sixth Circuit Court of Appeals that allowed Tennessee's ban on gender affirming care for trans kids to take effect.

Jess: That decision—led by Bush appointee Judge Jeffrey Sutton—broke what had been consensus by the federal courts that gender affirming care bans are unconstitutional.

Imani: It was the first decision to let any gender-affirming care ban take effect, and it started a domino effect where courts out of Kentucky and later the 11th Circuit and Alabama would later follow.

Jess: it also shifted the legal landscape significantly. Before Sutton's decision, courts were applying a heightened level of scrutiny to gender affirming care bans because they discriminate on the basis of sex or transgender status—because they do!

Sutton's decision was the first to say these kinds of bans should be subject to rational basis review– the most deferential level of review a court can give a law.

Imani: Laws targeting suspect classes are subject to heightened judicial scrutiny in order to protect a tyrannical majority from sticking it to that "discrete and insular minority." The trick for the courts has been determining what level of judicial scrutiny to apply. Sutton couldn't be bothered. He doesn't think trans people constitute a suspect class because the trait isn't immutable, as in trans people aren't trans from birth according to him.

Also, Sutton reframed the debate. It's not whether or not you can deny puberty blockers to some kids (cis kids who need them for whatever reason) and not trans kids (because it's quote-unquote mutilation). Rather it's that you cannot allow *anyone* to transition.

In other words, the law does prohibit children assigned female at birth from receiving testosterone treatments, while permitting children assigned male at birth to receive those very same treatments. But in Sutton's view, this isn't a problem because "a cisgender boy cannot transition through use of testosterone; only estrogen will do that." Right? The law treats everyone equally by not allowing anyone to transition.

It's not a great argument, but it's a colorable one, and colorable is all they need. They need an argument that will pass the smell test from a respected judge like Sutton.

Imani: So Sutton's decision is obviously bad—and had enough sway that other conservative judges have used it as cover. Do we really want SCOTUS to weigh in though?

Jess: I don't know, but Chris Geidner interviewed ACLU attorney Chase Strangio in his Law Dork newsletter—subscribe as he's doing great work her—Chris interviewed Chase who has been litigating many of these cases and Chase makes a compelling case for why, even with this Court, advocates are asking for intervention.

This is what Chase said, that one, this is a crisis, and it's getting worse, not better. And two, this is an issue that is going to reach the court multiple times in the near future, whether they take our case or not.

So, we are going to the Supreme Court because the Sixth Circuit opinion was catastrophically wrong as a doctrinal matter and as a moral matter.

Imani: It's important to have the issue of heightened scrutiny versus rational basis settled

- Appellate courts seem reluctant to engage in any real analysis about levels of judicial scrutiny to transgender people even though they obviously fit the mold.
- Transgender people are a discrete and insular minority, and they lack political power, as evidenced by the avalanche of legislation targeting and dehumanizing them.
- Appellate courts seem squeamish about stepping in and calling a spade a spade.
- They seem loath to view discrimination against trans people as something in and of itself deserving separate equal protection analysis: They'd rather rely on proscriptions against discrimination on the basis of sex.

For example, in striking down Arkansas' gender-affirming care ban, the Eighth Circuit Court of Appeals dropped a footnote saying it didn't disagree with the lower court's designation of trans people as a quasi-suspect class, but then said there was no need to get into a discussion about suspect classes: "We need not rely on it to apply heightened scrutiny because the Act also discriminates on the basis of sex."

But what about the fact that the law discriminates against trans people as trans people? The laws may discriminate against them because of sex for constitutional analysis, but that's not actually what's happening here.

Jess: DOJ filing ups the ante, increasing the chances the Court takes this case and hears arguments maybe as early as this spring: "The question whether the recent wave of bans on gender-affirming care are consistent with the Equal Protection Clause is a question of national importance that urgently requires a definitive resolution," the Justice Department lawyers argued in their cert petition.

Imani: The Department of Justice wants the Court to take *Skrmetti* because it believes the Tennessee ban is both a ban based on sex-based classification AND one that discriminates against transgender individuals on the basis of being trans because it is, and Sutton was wrong to get the other federalist society judges all in a tizzy over rational basis review.

But Jes, I have a question for you. The Biden administration's petition is different from the ACLU's in a really important way—the Biden administration wants the Court to stay the hell out of the parents rights fight. What's that about?

Jess: That could open up a whole different set of issues—also the ACLU represents the families so there's slightly different clients—from an advocacy standpoint that can explain some of the difference. It's all a risk but appreciate what advocates are doing here. You don't fucking concede the fight when the fight has a person's humanity at its core.