

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. I'm Rewire News Group's Editor-and-Large Imani Gandy

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!

Last week the 11th Circuit allowed Alabama's gender affirming care ban to go into effect, and that's terrible not just for Alabama, but also for Georgia and Florida both of which are located in the 11th Circuit and both of which have gender affirming care bans being litigated right now.

Imani: You may be thinking to yourself, y'all just did a huge trans rights episode right before the holidays? What gives.

You're right. On December 1, [we dropped a podcast](#) about the cases out of Tennessee and Kentucky which are basically waiting for the Supreme Court to tap them on the shoulder and push them onto the stage. If you want a deeper dive into those cases and if you want to understand why those cases might spell the end for GAC in this country, go check out that episode.

Jess: The case we're going to talk about today is out of the 11th Circuit which allowed Alabama's gender affirming care ban to take effect last Thursday.

The case is called *Eknes-Tucker v. Ivey*. (It's also been called *Boe v. Marshall*.) It's a legal challenge to SB 184, an Alabama law known as the Vulnerable Child Compassion and Protection Act, which restricts medical care for trans kids.

SB 184 makes it a felony for parents to try to get their transgender children the necessary medical care. Anyone who helps trans kids obtain the care they need could face up to 10 years in prison. That includes parents and doctors.

The lawsuit was filed by a group of Alabama parents alleging that the law strips them of the right to make important decisions about their children's health care as well as a pediatrician, a clinical psychologist, and Reverend Paul Eknes-Tucker, who is a pastor at Pilgrim United Church of Christ in Birmingham.

Rev. Eknes-Tucker has said, “As a minister I counsel parents with transgender children about how best to love and support their children. Under SB 184, those conversations now come with a risk of criminal prosecution.”

Imani: In May 2022, a lower court ruled that (1) parents have a fundamental right to direct the medical care of their children subject to accepted medical standards; and (2) discrimination based on gender-nonconformity equates to sex discrimination. On that basis, the Court found that the gender affirming care ban was likely unconstitutional and issued a preliminary injunction blocking Alabama from enforcing it, pending trial.

It was a solid ruling grounded in fact. The decision came after a two-day evidentiary hearing on May 5 and 6, during which physicians and other medical professionals discussed the harm that occurs to trans kids’ health when they suffer gender dysphoria and are not given care that has been proven safe and necessary.

According to data presented before the court, over 22 major medical organizations recognize the established course of care for trans kids. Plaintiff-parents testified in court about the enormous benefits that their children's health and wellness have received from having access to quality medical care as well as the severe harm that would result from having to discontinue treatment.

Notably, the American Academy of Pediatrics, the Alabama Chapter of the Academy of Pediatrics, the American Medical Association and other state and national medical organizations submitted an amicus brief to the trial court stating that the medical community has reached a consensus when it comes to the standards of care for trans kids and opposing gender affirming care bans like SB 184 which criminalize that care.

But none of that mattered, because the federal judiciary is stacked with outcome determinative Trump judges.

Jess: To be fair to Trump judges, the guy who issued the preliminary injunction in lower court is also a Trump judge.

Imani: We don’t ever have to *hand* it to Trump judges.

Jess: I’m not handing it to Trump judges! Just more surprised that there’s a Trump judge who actually follows the law rather than spewing the right wing talking points fed to them by the Federalist Society. So I’m going to hand it to this guy this one time because Judge Liles Burke’s ruling blocking the law made sense.

He actually read parental rights as they SHOULD be read and not through the narrow lens of the Moms for Liberty.

Imani: Fair enough. I'm not putting down my switchblade yet though.

Jess: OK, calm down. Judge Burke ruled that the ban likely violated the due process rights of parents to direct their kids' medical care—specifically to treat their kids with puberty blockers subject to medically accepted standards. He also said that the law likely violated the equal protection rights of trans kids since the Act “places a special burden on transgender minors because their gender identity does not match their birth sex.”

He also said Alabama hadn't produced any credible evidence to show that transitioning medications are “experimental.”

Imani: So shout out to that guy for bucking the Trump judge trend and actually ruling correctly. He's probably on Leonard Leo's shit list right now.

In August 2023, after the law had been blocked for more than a year, a three judge panel of the 11th Circuit ruled that the Alabama law is likely constitutional and tossed out the injunction. All three of these judges are Trump judges and not the Liles Burke kind. These judges, led by Barbara Lagoa ruled that the district court used the wrong level of scrutiny for reviewing the case.

We talked about the level of review or judicial scrutiny that should apply to cases involving trans rights. We talked about how there's rational basis review which is basically the government can do whatever it wants. And then there's heightened scrutiny which requires a state to come up with either a compelling interest or exceedingly persuasive justification for the state doing what it did—here, banning gender affirming care.

Well these clowns said that rational basis review applies, so tough shit trans kids.

Jess: She didn't say that.

Imani: She might as well have. The notion that only rational basis review should apply is preposterous.

- They're a discrete and insular minority; they lack political power; they're under siege; what the actual fuck?

Jess: Now that you're done yelling, I'd like to yell a little bit.

Imani: Please do.

Jess: Can conservatives on the bench around the country stop relying on *Dobbs* for ludicrous propositions? One of the reasons Lagoa gave for discriminating against trans kids when it comes to health care is that courts have to look at whether the right is deeply rooted in this country's history and tradition when determining the constitutionality of rights. And since using puberty blockers for kids is not deeply rooted in our nation's history, tough shit trans kids.

Here's what she said: "the plaintiffs have not presented any authority that supports the existence of a constitutional right to "treat [one's] children with transitioning medications subject to medically accepted standards."

This is originalism on steroids, and not the good Ketanji Brown Jackson kind of originalism.

Imani: The authority is in the due process clause. The authority is in the equal protection clause. What is not sinking in for these people.

The arguments aren't complicated.

Parents have a substantive due process right to direct their kids' medical care. If you want it in originalism terms, the Supreme Court has found that parents' authority to care for their children is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." That's from a 1934 case called *Snyder v. Massachusetts*. In 1979 in a case called *Parham v. JR*, the Supreme Court said that this principle of justice includes the right "to seek and follow medical advice." Case after case has affirmed this right.

So the 11th Circuit's ruling to the contrary is just wrong.

Jess: And under the equal protection clause, this is discrimination is on the basis of sex.

Alabama could bar the use of puberty blockers to all kids. But instead Alabama is banning them on the basis of sex. Alabama is banning puberty blockers only when they're being used to transition. In fact, I love this line in one of plaintiffs' briefs: "Before

passage of the Act the only information a doctor needed to prescribe hormones or puberty blockers was the patient's medical need. After passage, a doctor must also know the person's sex."

That's a clear case of sex-based discrimination.

Imani: Let alone discrimination against trans people qua trans people

Jess: Did you just say qua.

Imani: Look I love a qua in the wild. But for those not latin law terminology nerdy, it means discrimination against trans people because they're trans—as trans people—and not because of some other reason like sex.

Jess: Also, SCOTUS has already said in *Bostock* that it's impossible to discriminate against a person for being trans without discriminating against the individual based on sex." And even though Alabama tries to distinguish *Bostock* on the basis that it's a title vii case and not an equal protection case, SCOTUS has already said that difference doesn't matter. The Court relies on equal protection analysis in Title VII cases and vice versa all the time.

Imani: What's interesting about this case is that there's a parallel case on contraception that's making its way to the Supreme Court.

- *Deanda v. Becerra* is about whether or not a parent can direct medical care when it comes to contraception. And people will yell hypocrisy, but the difference is, in *Deanda* the parents' interest is adverse to the kids. Here, both the trans kid and the trans kids' parents want the same thing. So that should be an interesting discussion once we get a ruling from the 5th in that case.

Jess: The 11th circuit dropped the order tossing out the preliminary injunction sort of out of nowhere. Plaintiffs have asked the 11th Circuit for a rehearing en banc, i.e., in front of the full panel but there's been no response yet. The only response was to lift the preliminary injunction. So we're waiting for a response.

Imani: Meanwhile, we're also waiting for a response from the Supreme Court about whether it will take up the Tennessee and Kentucky cases involving those gender affirming care bans.

Jess: The fact that the Court decided not to take up the trans bathroom discrimination case out of Indiana earlier this week is also interesting. I talk about that case a little in

The Fallout but basically that was a very limited decision based on an individual student—and there the ACLU of Indiana argued that SCOTUS didn't really have jurisdiction to review the case, and it seems like maybe they agreed.

But the issue is gonna hit the Court probably next term. Right now the 4th Circuit which covers Maryland, North Carolina, South Carolina, Virginia, and West Virginia — has held that such bans can violate Title IX and equal protection guarantees. The 11th Circuit covering Alabama, Florida, and Georgia, has held otherwise. So you know what that means Imani.

Imani: Circuit split!