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Music. Hello, fellow law nerds, welcome to a very special summer session of boom lawyered, a rewire News Group podcast hosted by the legal journalism team that is fully enjoying the Olympics, just really, just getting I've never been more patriotic than I have been this past week. I'm rewire news group's editor at large, Imani Gandy, and I'm just tea clove. Rewire news group's Executive Editor. Rewire News Group is the one and only home for expert repro journalism that inspires you to thank Beyonce for making us all feel so patriotic, and the boom lawyer podcast is part of that mission so big thanks to our subscribers and a welcome to our new listeners. So it is such a treat to have the ultimate law dork, Chris Geithner join us today. Finally, the law nerds and law dorks unite.

Welcome to boom, lawyer Chris, it's so good to have you here. Thank you so much. So over at your sub stack law dork, which truly we love and everybody should subscribe to and support as they can. If you listen to this podcast, truly you are doing the Lord's work over there, you have covered in depth the Biden administration's effort to update the rules around Title Nine to better protect LGBTQ students from discrimination in school. This is a monumental task, given everything that's going on in the landscape right now. So I wanted to just open up the conversation by asking you to summarize kind of neatly what the administration has done and what the status of that rule making is today. Yeah. So I mean this title nine rule like, let's understand first of all, this is something that basically is like eight years in the making. This is something that really started back in the Obama administration, and came out of when the EEOC, back during the Obama administration, was issuing a series of rulings that we're finding that Title Seven when it references sex discrimination, that sex discrimination includes gender identity discrimination and sexual orientation discrimination. Now, at the time when that happened, even then, it wasn't that big of a deal. It was a huge deal for protections, but it wasn't that controversial. When the EEOC made the decision as to transgender protections, it was a five zero vote, the Republican members of the EEOC supported this. This wasn't a controversial idea. Earlier rulings out of both the sixth and 11th circuits, including a ruling out of the 11th Circuit that prior had joined this decision under a case brought by van de Beth Glen, who had sued the Georgia legislative Service Commission for anti transgender discrimination under the equal protection clause. Basically, you had this whole line of cases, rulings finding that when we talk about sex discrimination, that includes discrimination against LGBTQ people, because you could not have discrimination against them unless it's discrimination based on sex. And the Obama administration started adding that into its protections in the form of like guidance, letters and things like that, dear colleague, letters that went out to schools, but basically the Obama administration ended before any final rule happened. The Trump administration pulled back those guidance letters, but they didn't issue a rule. They issued basically contradictory guidance letters. In the meantime, big liberal Neil Gorsuch issued Supreme Court decision in 2020 Bostock that agreed with those EEOC decisions and said in a six, three vote that both the Chief Justice and Gorsuch wrote, said, Yeah, Title Seven, sex discrimination ban includes sexual orientation and gender identity. It was in unbelievably whiny descent, even for his normal standards from Justice Alito, he issued an appendix to the I forgot about the appendix? Yes, that talked about

everywhere in the law where we talk about sex and how horrible this decision was. He cited the dictionary.

Yeah, but you know, you've lost, hiding the goddamn dictionary well. And the thing that I always go back to here on these cases is Justice Scalia's unanimous decision for the court in on call a where he said, Look, Title Seven was a broad law, anti discriminate. This is, this is Antonin Scalia, right, saying, Look, non discrimination. Laws were passed to be broad laws. They often cover things that the people who passed them might not have imagined they would have covered, but that was their point, that they are broad laws seeking to end discrimination, and in that case, what he was saying is that sex discrimination, sexual harassment ban included same sex sexual harassment. That was obviously not what the people who passed sex discrimination bans were trying to end. But he said it's covered by the law. The text says sex discrimination. We've said that includes sexual harassment. There's no reason why that wouldn't cover same sex sexual harassment. That logic just applies to all of these cases, and that's why justice Gorsuch was like, this isn't a tough case. Yeah, Title Seven says sex discrimination. You can't discriminate against somebody based on sexual orientation or gender identity without making that discriminatory action being based on sex, because but for the person's biological sex at birth, you wouldn't be treating them the way you're treating them now. So traditionally, Title Seven and Title Nine have been read together, right, like this, the standard of analysis are that are very similar, but there are 26 states now that are arguing. Oh well, no, no, no, no, Bostock needs to be corralled to Title Seven. There's no way that Bostock has any bearing on Title Nine. Can you talk about what some of those arguments are in the Bostock decision? Gorsuch does what any any court does at any time. It says, we are deciding the case in front of us. He says in the decision, this is not deciding these other questions. It's not deciding other laws. It's not deciding restrooms and changing rooms, because those weren't at issue. The cases that were before the court in there were two cases that were combined. They had to do with people who were fired because they transitioned and and so. So Gorsuch said what was just a normal statement of law, like, I'm not deciding what's not before us. And offensively, like, there there's no other word for it. Just just judges have done things that judges should not do, and just are writing opinions that say, well, because they said that, that means we're supposed to take that as a sign that the court was not going to treat them the same. That's the first thing they do. The second thing they which is just absurd, yeah, there's no basis for that. There's no that's not a legal principle. The rest of what they do is stupid cherry picking that you could have done with Title Seven. They use like quotes from people in passing Title Nine, saying, This was intended to protect women, and you're subverting Title Nine by providing transgender protections. Which obviously, if you looked at anybody who supported adding sex into Title Seven, like, you could say, like, obviously that. But then I mean, if you actually go into it, we all know that Title Seven added sex almost as a poison pill, and it backfired on them and the civil rights groups like, Yeah, sounds good. Sign us up.

Unknown Speaker 9:50

Like, like, all of the logic behind this is essentially like, we're going to backfill Title Nine to do exactly what Antonin Scalia said we should not do in these civil rights statutes, to say that these people, back in the day in 1972 would not have wanted to protect trans People. That's that's

literally what they're writing, and like you cannot put it side by side with either on calling or even with the the purposive portions of justice. Gorsuch boss thought decision, where he talks about the broad purposes of our anti discrimination statutes. He really does double down on some of that, on Cauley stuff that it's almost to me, more offensive that they take and that includes people like judge Sutton. It includes some of these appellate judges that that they're taking that section of Gorsuch opinion in Bostock without just just eliminating the broad purposive parts of his decision that talk about like this was a big line. Tended to do big things, like we might find the major questions doctrine for many things, but this is the one type of law that the major questions doctrine can never apply to. So I there's so much there, I think to unpack, and I'd like to get your thoughts on a couple things. But just to close the loop for our listeners, so August, 1, this title nine rule that the Biden administration passed to sort of finish the job, as you described, took effect, except in what 26 states where it's currently blocked in litigation, which is wild. So it's been blocked in litigation from like, I think there are, there are like, well, there are two one state decisions in Oklahoma and Texas, but the rest of them are sort of like multi state sections where there there are four or five states that are in in lawsuits. And those are, there are injunctions, preliminary injunctions issued that say that the states are likely to succeed in their challenge to the rule, saying that it mostly that they violate the Administrative Procedure Act because the title nine rule is either contrary to law or is arbitrary and capricious, which are the two ways? Yeah, toss out rules. And then there's one other piece that is sort of the wild card, which is moms for liberty, plaintiff in one of the lawsuits, along with two other right wing organizations and John brooms, the Trump appointee in Kansas, included them in the injunction. Now there are organizations in a bunch of the injunctions. All of the other judges said, Okay, your members within these states are protected because they are part of multi state litigation. But brooms went further and said, No, no, I'm not just going to limit it to the states in my circuit. I'm not going to limit it to Kansas. I'm not even going to limit it to the states even outside of my circuit where we have plaintiffs. He said, nationwide, any school where a member of the organization, or in the case of moms for liberty, the student of a member of the organization attends, I'm going to enjoin enforcement there. And this has been a bit of a moving target, but it ended up being that technically, as of today, the title nine rule is blocked in something like more than 700 nearly 700 colleges across the country, including, like the 10 largest colleges, and I think it it's the five largest colleges and the five highest ranked colleges in the country, and also in 2000 school districts across the country, including some of the largest school districts across the country. That's wild. So listeners, we're recording this on Monday, August 5. We're waiting for the Supreme Court to do something in this case, and in two of the cases, the Fifth Circuit and Sixth Circuit just declined, denied requests to issue partial stays of the injunctions, and so DOJ went to the Supreme Court to do that, and what they're asking is actually sort of wild. They're noting that the plaintiffs in a lot of these lawsuits, as I said, are only challenging those three trans provisions. They're challenging the definition, they're challenging the the hospital environment role, and they're challenging the sex separated facilities provision. Now we've got these, these injunctions in which I think it's a 423 page rule, is being completely enjoined based on challenges to basically one two words in the definition of sex, gender, identity, and these two provisions in this 423 page rule. It's, it's just wild. They don't grant the partial stay. And it's doubly wild. On top of that that they have not responded that this is, this is a federal rule that went through, like we always hear these cases about, like people should have gone through the

APA. It's inappropriate that somebody implemented a rule without going through the APA. That's their normal line. Here was a case where they did go through the APA. They went through the notice and comment provision. They took the year to do it, and now when basically half of the country the rule on hold the supreme court is saying, Yeah, we're going to take our time. We're not even going to rule on DOJ is request to answer whether these are appropriate injunctions before the rule is blocked when it goes into effect in 26 states as the school year starting, we should add, like, I've got a college student living in the house right now. It's chaos like I can't even imagine how administrators and Title Nine officials that are doing their jobs various college campuses trying to do it. There was a wild half hour, hour, two hours on the 31st when there's a case that the first judge, Judge Emory action, a Trump appointee, issued like 122 page ruling that refused to block the rule. She was the only federal judge to refuse to block it. It's an incredible decision. I know I'm I know that I think that these challenges are bunk, but I also think it's just, it's an incredible ruling that really destroys all of the arguments. And then the 11th Circuit not telling us what judges did, it just issued a one paragraph order that issued an administrative injunction against the rule the next night. But there was weird language in the administrative injunction, and they just said that the Department of Education could not enforce the rule. And I was sort of like on Twitter, being like, there's no state limitation. Like, even though the states had only asked for a state limitation, the sentence in an order from a federal appeals court just said the whole rule was blocked. DOJ, like, 90 minutes after the order said, filed a notice of compliance that said, like, our understanding is that this only applies to the state, so that's how we're going to enforce it. But like, like, there was I had a response when I was talking about this on threads where somebody who said, like, I work in a title nine office, and we're trying to figure in a state that is not subject to any of those 26 state injunctions, and we're trying to figure out what the hell the 11th Circuit just did. Like it is wild to me with how much time we have spent talking about how important it is that that there are be rules set in place and everybody knows their conduct, and that's honestly been the whole point of a lot of these litigation is like, oh, it's unfair that these schools don't have notices rule that they knew was coming off and on for the past eight years, and then you get these courts just doing unclear things in the 24 hours before the rule is going to go into effect, And the Supreme Court just refusing to rule on a request from the Justice Department about a federal rule. It's truly an astounding lack of regard for the federal government doing the its work. I mean, I feel like that's sort of what the Supreme Court is about, though, right? I mean, one of the questions I wanted to ask you was about whether or not the judiciary is ever going to let the government make a decision about anything it's decided to do. Right with the Chevron deference, with this idea that it's no longer going to be the actual agency that interpret the regulations that implement those agencies, but rather the judiciary, basically these nine elected people on the Supreme Court, they're the ones who are going to have the final say ultimately as to what Title Nine means in the first place. So do we even care? What does it even matter? What the Department of Education has said about straight nihilism here? No. But seriously, no. For real education has said this is what sex discrimination is, and the federal judiciary is going to say, Yeah, we hear you, but we don't have to follow you anymore, thanks to Loper bright enterprises. So we're going to go ahead and say a title nine means you need to misgender your students, and no one can ever use a pronoun ever again. That's what Alito was, that that is definitely one Alito once. The interesting thing here is you would actually have to turn not that we couldn't do this, or not that

they couldn't do this, but you would have to turn law on its head here. Because the funny thing is, we don't get into Loper bright on this case, because there is no nobody's arguing that title nine is ambiguous. This is all about how sex is defined. Nobody's arguing that it's it's ambiguous. But they could, well, they, I mean, right, like, I think now, given that that the federal judiciary has just arrogated all of its power to itself. I can see a world where they start signaling to lawyers, Hey, man, you need to start arguing that because of sex ambiguous so we can interpret it to exclude gender identity. Multiple lower court judges have raised local rights, and some have also the the other thing that some have raised is, I mean, some have raised major questions, which is, which I had said earlier, is, like, this is the one type of law that that major question seems to be exempt from. And yet there are, there are lower court judges who have said that this would be a major questions doctrine case. So this is, I had wanted to ask you this earlier, and then the conversation just was happening organically, so I'm going to get back to it. You know what I hear you describing? And you know, these will these are my words. They don't have to be your words. Is a lot of bad faith jurisprudence by the lower courts that likely feel empowered to take the landscape and shape it as they would like. And I feel like Justice Alito has led the charge on this before Dobbs. I mean, I think of the Union cases he was doing that sort of breadcrumbing in in terms of, like, how do we knock down first public sector or private sector unions and public sector unions? And literally queued up each cases. And then I think he really started drinking his own Kool Aid around Dobbs and the courts and the judges who follow Alito, who see him as a leader within the conservative legal movement kind of see that, you know, let me mix all the metaphors left that barn like they can basically do what they want to do now, because we're governing as much on vibes as we are on law. And the title nine cases in particular seem the most obvious to me for that, and because it's trans students, and I don't know your thoughts, yeah, I mean, I think that that's a great question and great thought. I I think that I do think that we should never forget about the boss talk descent, because I think that that was a perfect example of him being incredulous that he had lost a vote, yeah, that he didn't understand how it was possible that that the they could have that Gorsuch and the chief could have have betrayed him like that, and and yet I think you're right both on sort of the big picture. And I've like written a lot about this idea of the fact that that like starting from the beginning of the last term, that that it's sort of like both a feature of the Roberts Court, that you have these out of control lower courts, because they're able to knock down the Fifth Circuit a few times. And get that story out of some critis reporters who are going to be like, Oh, the Fifth Circuit is being taken in hand by the Supreme Court that will correct them when they're out of out of line. But as I looked at

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at the end of the term, I think that the the in the Quick Aftermath After the term, we saw that the far right, the lawyers, the judges, both at the district court and appellate level, got the exact opposite message, because if you look at the major merits Fifth Circuit cases, it was actually six to three for the Fifth Circuit. And it's important to note that while we might think of six or three six that yeah, the Fifth Circuit was reversed or vacated six times, but they were affirmed three times in wild rulings that darkness, see, dark Is he was a wild case that that could have easily been reversed, and yet it wasn't. They. They. They basically the the these far right lawyers, far right judges, have taken the message, go ahead, bring us what you want. Ignore precedent when

you think we would, because, you know what, it's fine if we reverse you every once in a while, because we're going to let some of your stuff through, and that's going to alter a lot, dramatically. And I think that the trans cases are a perfect example of that, and we saw it with the gender affirming care cases that when they were before District Court. Judges, no matter who it was, far right judges, the judge down in Alabama who's leading? The Judge shopping investigation, Lyles Burke ruled in favor of a preliminary injunction against Alabama's ban a Trump appointee in Indiana issued a an injunction, a It was only when they got up to the appellate level that you started getting to these more ideological judges who were like, Yeah, we're not doing that. We don't need to do that anymore. We can do what we want. Led off by Judge Sutton, who, if you don't know me, you don't know that I have a personal beef with Jeff side because he was my professor. I had him for two classes at Ohio State. He gave me A's both times. So not only do I have personal beef with him, but I feel justified in going after him, because he has said, I am good at this awesome

Unknown Speaker 27:45

I want to ask about sparetu also. I'm gonna just, I have to confess to both of you, since I had memory hold the Alito appendix, one of the first thoughts I had was, what flag did Mary Ann fly after the Bostock decision? Oh, my God, it must have been bad. I'm sure it must have been bad. The court is taking up a trans right case, or has a trans rights case on its docket next term ready. And Imani and I have talked about it a lot on this podcast. Your thoughts on the court taking it up? I mean, I don't know if I've actually written them much. I was actually down in Alabama, in Montgomery, at the judge shopping investigation, first hearings, the show cause hearings, the day that the court granted cert. But I would like strongly urge people, if they haven't read my stuff about the judge shopping investigation. It's really horrible. All of the federal judges in Alabama have okayed a two year now on more than two year investigation into LGBTQ lawyers who were fighting Alabama's ban on gender affirming care because they accuse them of Judge shopping for doing things that are specifically allowed under the Federal Rules of Civil Procedure, for dismissing cases. And it's just it's a really wild situation that particularly in light of how much we talk about Judge shopping in the Northern District of Texas by conservatives is, is just an offensive thing happening, but dramatic. The wild thing is they only granted the DOJ certification, which raises equal protection claims. It does not raise the parental rights claims. Now I think there are a lot of reasons for the court not to want to take the parental rights claims, because conservatives like the parental rights claims when it comes to, I don't know, say, vaccines, birth control, yeah, Looking at you, Deanda, anything, or even these, these. I

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