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 at 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 that inspires, and the Boom! Lawyered podcast is part of that mission. A big thanks to our subscribers and welcome to our new listeners.

Jess: If there's one thing that conservatives like to do, it's find the perfect plaintiff to be the face of a court challenge to a policy that will strip rights from people.

Imani: Enter the Becket Fund for Religious Liberty, a conservative law firm that fights for the rights of its clients to refuse to comply with laws related to repro rights or LGBTQ anti-discrimination because to comply with these laws—laws that form a social contract that we all have to live by—would infringe on their religious rights.

You may remember the Becket Fund from the contraception mandate fight a decade ago. They represented Hobby Lobby in Burwell v. Hobby Lobby, the case that held that closely held for-profit corporations could claim a religious exemption from the birth control coverage requirements of the Affordable Care Act under the Religious Freedom Restoration Act.

They also represented Little Sisters of the Poor, the cute little group of nuns who crashed out over the contraception mandate, alleging that the big bad Obama administration was forcing these poor nuns to dole out free birth control pills to everyone they came in contact with.

Jess: This was obviously not true. Nothing in Obama's policy would have ever required the little sisters to provide birth control pills. But cute nuns make for great plaintiffs.

Cut to 2024 and the Becket fund have recently filed several petitions for cert with the supreme court that squarely raise religious freedom claims and given their overwhelming success in the past, we thought it might be a good idea to talk about their strategy when it comes to one of these cases: Diocese of Albany v. Harris.

Imani: In Harris, a group of plaintiffs including a group of goat herding Anglican nuns have challenged a NY regulation that requires health insurance policies offered to employees to include coverage for medically necessary abortions.

Jess: Did you say goat herding nuns?

Imani: The goat herders are challenging the regulation exemption for religious employers. They're claiming that the exemption is too narrow and that the first amendment rights of certain kinds of religiously affiliated employers are violated because they do not meet the terms of the exemption. The regulation narrowly exempts certain religious orgs: tax exempt entities that have the purpose of inculcating religious values and primarily employ and serve those of the same religious persuasion. Plaintiffs are complaining that religious orgs with broader religious missions like serving the poor must cover abortions. The case is called Diocese of Albany v. Harris.

Jess: I'm having flashbacks to the contraception mandate cases and how mad I was at the Obama administration for acting as if the people opposed to the mandate were acting in good faith. He provided a workable exemption process that would have required religious organizations to inform HHS that they refused to provide contraception in their insurance plan so that HHS could step in and provide it for them. This of course caused a lot of consternation from those very religious employers because in their view even telling HHS that they weren't going to provide the contraception would lead to a third party providing the contraception and that would constitute a participation in sin.

Imani: The New York Court of Appeals, which is the highest appeals court in the state, ruled that the insurance mandate and the accompanying religious employer definition and exemption were neutral and generally applicable pursuant to a case that is still good law despite the fact that conservatives hate it—and that case is called employment division versus Smith. And in their cert petition, the Diocese explicitly asks the Court whether Smith should be overturned.

Jess: Oh lord, do we have to talk about Smith again?

Imani: We do. We do. But it's been a while since we've had to do that, and we've got a bunch of new engaged listeners so let's go through the Smith case. Take it away Jess.

Jess: Wait, why do I have to do it?

Imani: Because you're so goooooood at explaining stuff.

Jess: I see what you're doing and I don't like it. But I'll explain. Smith. It's a 1990 decision that held "the right of free exercise does not relieve an individual of the

obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduction that his religion prescribes (or proscribes).” In other words, a person’s first amendment right to exercise their religion does not excuse them from being held accountable for laws that apply to everyone equally.

Smith involved two members of the Native American Church who were fired for ingesting peyote for sacramental purposes. They applied for unemployment benefits, but the state of Oregon rejected their claims on the ground that consumption of peyote was a crime. The Oregon Supreme Court agreed that the denial of benefits violated the Free Exercise Clause. But the U.S. Supreme Court, with Justice Antonin Scalia writing for the majority, reversed the Oregon Supreme Court. It held that if the Oregon Supreme Court decision were allowed to stand, it would allow a person to object on religious grounds to the enforcement of a generally applicable law.

Imani: According to Scalia in Smith, these kinds of claims “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.” And that’s basically what the goat herders are trying to do—exempt themselves from a civic obligation imposed on them by these New York regs even though the regs are neutral and generally applicable.

Conservatives were hoping that the Court would overturn Smith in Fulton County v. Philadelphia back in 2021, but the Court didn’t bite. Instead the Court narrowed the application of Smith and said hey man, you can’t say a law is generally applicable and neutral if you start handing out individualized exemptions which is what the City of Philadelphia did in Fulton.

Jess: We should remind people what Fulton County was about. Take it away, Imani! See what I did there?

Imani: My how the turns have tabled.

- A Catholic foster agency made a stink about an anti-discrim ordinance that prohibited basing the placement of children on the foster parents’ sexual orientation.
- The Court found that Philadelphia's anti-discrimination ordinance failed the test of "general applicability" because it allowed for case-by-case exceptions by city officials.
- Due to this lack of general applicability, the Court applied strict scrutiny to the city's actions, which the city failed to satisfy.

- The Court determined that Philadelphia's foster care contract contained a mechanism for individualized exemptions, which meant the policy was not generally applicable or neutral.
- The Court ruled that if the city allows any exemptions from its non-discrimination provisions, it must allow the catholic foster care agency an exemption based on religious beliefs. The Court said that a law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."

Jess: Look at us explaining stuff!

Imani: Ok, so I have a question then—if permitting religious accommodations or exemptions so that the Archdiocese will stop complaining about having to provide insurance coverage for medically necessary abortions, then doesn't that automatically mean that the law isn't generally applicable or neutral? If any exemption destroys a law's general applicability, as plaintiffs are claiming, then shouldn't we just stop providing religious accommodations at all?

They can't have their cake and eat it too. They can't demand an exemption, obtain one, and then complain that the exemption destroys the laws general applicability such that strict scrutiny applies rather than the fuck it we don't care rational basis review. And if strict scrutiny applies, that means the New York regs must be narrowly tailored to serve a compelling state interest. That's a hard standard to meet. Am I losing it?

Jess: [riffs]

Imani: But really though, this is a case we are watching closely. Because earlier this month the Becket Fund, along with attorneys from Jones Day, filed their cert petition and asked SCOTUS to weigh in specifically to overrule Smith.

And you'll never guess who is representing these jamokes over at Jones Day
Jess who?

Imani: None other than Noel Francisco.

Jess: Francisco, Trump's Solicitor General so represented the admin at SCOTUS on everything terrible—ALSO HE'S A SCALIA CLERK SO TRYING TO SHANK HIS BOSS' LEGACY BY OVERTURNING SMITH THE CALL IS COMING FROM INSIDE THE HOUSE.