

Boom! Lawyered: Bathroom Panic at the Supreme Court

- Imani Gandy: Hello, fellow law nerds. Welcome to another episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that really just wants to get this man out of office. It's getting ridiculous. I'm tired. I'm irritated. I'm slightly aggro, and I want it to stop. I'm Imani Gandy.
- Jessica Pieklo: And I'm Jess Pieklo. Rewire.News is dedicated to bringing you the best reproductive rights and social justice news, commentary, and analysis on the web. And the Team Legal podcast is part of that mission. So a big thanks to our subscribers and a welcome to our new listeners.
- Imani Gandy: Jess. So you know how much I love calling people out, right?
- Jessica Pieklo: Sure.
- Imani Gandy: If you're a bad person with bad opinions that are harming marginalized people, I have no problem calling you out about it. That's the truth. And if my calling out includes calling a bad person with bad opinions a brainless numpty, perhaps, then that person probably deserves it and should stop being a brainless numpty.
- Jessica Pieklo: It's true. You do really have a thing about brainless numpties.
- Imani Gandy: I do. But when someone I love says or does something that harms marginalized people, I don't like to call them out. I like to call them in.
- Jessica Pieklo: Wait, what are you talking about? What's the difference here?
- Imani Gandy: Well, it's a difference in tone primarily.
- Jessica Pieklo: Okay.
- Imani Gandy: A call out basically tries to expose the brainless numpty for the brainless numpty that they are, but a call in is an attempt to get someone who was doing or saying something harmful to change their behavior or their viewpoints through patience and compassion.
- Jessica Pieklo: You? Patience and compassion?
- Imani Gandy: Hey man, I'm capable of patience and compassion. I'm a goddamn delight, Jessica.
- Jessica Pieklo: Oh, I know. I'm just giving you a hard time. It's true. You really are. But okay, hold on. Why are we talking about calling out versus calling in, Imani?
- Imani Gandy: Because today the task falls upon us to call in Justice Sonia Sotomayor.

- Jessica Pieklo: Oh, we love her. No. What did she do?
- Imani Gandy: Well, you heard her during the oral arguments during the title seven cases, right?
- Jessica Pieklo: Yeah. I did. It made me sad. I mean, she said some pretty cringe-worthy things during those oral arguments. So you know what, it would be marvelous if we could get her to be better on trans rights because trans people really need her to get better. But don't we need all the Supreme Court justices to get better on trans rights?
- Imani Gandy: Well, yeah, we do. But when it comes to some of the more numpty-oriented justices.
- Jessica Pieklo: Numpty-oriented justice. We're going to put that on a judicial questionnaire moving forward.
- Imani Gandy: Who are the numpty-oriented justices? But when it comes to the numpty-oriented justices, we can just call them out for their terrible opinions and viewpoints about trans people. And then we can just move on because they don't have the capacity to get better.
- Jessica Pieklo: Yeah. Okay. I see where you're going with this. You're saying that when it comes to Justice Sotomayor, she does have the capacity to get better.
- Imani Gandy: Right.
- Jessica Pieklo: That's why we need to talk to her about trans rights in a compassionate and patient way so we can lead her to the trans promise land-
- Imani Gandy: Hallelujah.
- Jessica Pieklo: Where no trans person is discriminated against because of who they are, where everyone believes that trans rights are human rights, and no one gives a shit about who is going into what bathroom.
- Imani Gandy: Precisely. We need to call her in. And I think it's just a matter of an explanation. Right? I feel like if we were to take her out for drinks, maybe have a nice bottle of rosé on a patio somewhere, we could talk to her about trans people and the law. And in about I'd say an hour, we could make her understand, and then we can all hug and go on a bike ride.
- Jessica Pieklo: Wait, hold on. I was tracking until that bike ride part. Why are we going on a bike ride?
- Imani Gandy: Because that's what friends do, Jess. They go on bike rides together.

- Jessica Pieklo: All right. I guess that's true. I'm not going to argue with that point. So that's what we're going to do in this episode. We're going to go bike riding with Justice Sotomayor and call her in on trans rights.
- Imani Gandy: Yes.
- Jessica Pieklo: Is this a tandem? I'm picturing us on one of those long... What's a bicycle with three people called? Anyway, one of those.
- Imani Gandy: Either that or a bike with a sidecar. I can put my dog in it and put them with some goggles.
- Jessica Pieklo: Yes, we are in a tandem bike, and Justice Sotomayor is riding in the sidecar. That's the image.
- Imani Gandy: But that's what we're going to do. We are going to supplement our "Sonia Sotomayor is a boss" episode that we did back in April of 2018. We're going to supplement that episode with a "We still think Sonia Sotomayor is a boss, but we need to talk about how she can be better when it comes to trans rights, and then we can go bike riding." That's what we're going to do.
- Jessica Pieklo: That's a long episode title, Imani.
- Imani Gandy: Okay, fine. We can workshop it. We can workshop it.
- So in this episode we're going to call in Justice Sonia Sotomayor in the hopes that we can urge her to evolve on trans rights quickly. It is absolutely critical that Justice Sotomayor grasp the issues and rights at stake when it comes to trans people. The bottom line is that it is imperative that Justice Sotomayor specifically understands and be 100% sure that trans rights are human rights.
- Also, we need her to understand that people who are anti-trans, as if a person can be opposed to the existence of people, we need to make her understand that those people cannot dictate what rights trans people are afforded.
- Jessica Pieklo: Agreed. Okay, so let's catch the listeners up here, Imani. What happened? Why are we calling her in?
- Imani Gandy: So during oral arguments in the title seven cases, which you attended, it became clear that the court's most progressive justice doesn't really understand trans rights in the way that she should and in the way that we and trans people specifically need her to.
- Jessica Pieklo: Yeah. It appeared that she was subscribing to this whole idea of bathroom panic.
- Imani Gandy: Right. So why don't you explain to the listeners what the bathroom panic is?

Jessica Pieklo: Sure. So bathroom panic began in earnest several years ago in North Carolina, and it was happening around the time the legislature passed a bathroom discrimination bill. And it was that bill that really lit the bathroom fire. But we should probably give a brief history to demonstrate that really people have been panicking about who's going into what bathrooms and why since the 1970s.

Imani Gandy: Oy vey. All right, so in March 2016, the North Carolina legislature passed a bathroom discrimination bill as a response to a public accommodations law that the city of Charlotte passed in February 2016, right? So in February 2016, Charlotte passes this public accommodations law that says you can't discriminate against trans people and let them go to the goddamn bathroom wherever they want to. In response to that, the North Carolina legislature introduced and passed on the same day a bill that basically said, you know what, trans people have to go to the bathroom that corresponds with their "biological sex." Moving back a bit further, that legislation was in response to a bunch of states and municipalities passing trans-friendly bathroom bills in 2015.

Jessica Pieklo: Right. And in July of that year also, we had the Obama Department of Justice taking some really important steps in this area, right? They first sided with Gavin Grimm in his case against the Gloucester County school board, and that was really the first high profile case of a trans student seeking access to facilities that correspond with their gender identity. Then in April of that same year, President Obama opened the first gender-neutral bathroom in the white house.

Imani Gandy: Woo!

Jessica Pieklo: That's a big deal.

Imani Gandy: Huge deal.

Jessica Pieklo: Right? So this wave of trans-friendly bills were in response to what we call trans surveillance bills that states like Texas and others were passed. And those were bills that required bathroom's choice to correspond with the sex assigned at birth.

Imani Gandy: So I have to wonder, what is the plan to police this bathroom surveillance nonsense, right? I mean, are we expected to have genital inspections at bathroom door entrances? Are we going to force people to carry their birth certificates with them to the bathroom so people can determine whether or not the genitals they have correspond with the genitals that are "supposed to have" based on their birth certificate? What's the deal? What is the deal?

Jessica Pieklo: Excellent questions. Because people have been freaking out about this idea like unisex bathrooms, along with abortion, I don't know. These are ideas that killed the equal rights amendment in the 1970s. Phyllis Schlafly was worried about this

stuff, so you'd think they'd have some time to cook up at least a plan to enforce it.

Imani Gandy: You would think, but unfortunately these people aren't the brightest bulbs in the box.

Jessica Pieklo: And it's not real.

Imani Gandy: And it's also not real. But the point is people have been freaking out about bathrooms for decades, and that freak out has become a full on meltdown in recent years.

Jessica Pieklo: It really has. And it was sad then to see Justice Sotomayor pick up on this, and really especially her case of bathroom fever became most visible in the Harris Funeral Homes case. And that's the case involving transgender employee Aimee Stephens. Now at the beginning of his oral argument on behalf of Aimee Stephens, David Cole, who is arguing the case for the American Civil Liberties Union, made three key arguments. One, just like the plaintiff in the 1989 Price Waterhouse case, which we've talked about a lot on this podcast, Stephen's had been punished for not conforming to sex stereotypes. Two, Stephens was fired for identifying as a woman only because she was assigned a male sex at birth. And that, Cole argued, is a clear cut case of discrimination with the basis in sex. And third, Stephens was fired for changing sex, which is comparable to being fired for changing religion.

Imani Gandy: And can I just jump in for a minute and just tell you that I literally had to convert my Twitter account on the day of oral arguments to a David Cole stan account because, my God, was he masterful in those oral arguments. If you were to take a masterclass on how to do well arguing before a court, especially the Supreme Court, David Cole would be able to teach that masterclass. He was so clear and concise. He was so just on point. There was not a lot of extra fluff in what he was saying. He just got right to the point.

And what was frustrating is that even though he was so clear cut in the points that he was making, the Justices kept wanting to talk about goddamn bathrooms when Harris funeral homes is not a bathroom case. And Cole just kept trying to keep the Justices on point and kept trying to avoid wading off into the bathroom panic weeds. But Sonia Sotomayor would not let him and then made this really unfortunate comment.

Sonia Sotomayor: Mr. Cole, let's not avoid the difficult issue. Okay? You have a transgendered person who rightly is identifying as a woman and wants to use the woman's bathroom. Rightly, wrongly, not a moral choice, but this is what they identify with. Their need is genuine. I'm accepting all of that, and they want to use the woman's bathroom. But there are other women who are made uncomfortable and not merely uncomfortable, but who would feel intruded upon if someone

who still had male characteristics walked into their bathroom. That's why we have different bathrooms.

So the hard question is how do we deal with that. And what in the law will guide judges in balancing those things. That's really what I think the question is about.

David Cole: Well, that is a question, Justice Sotomayor. It is not the question in this case because-

Sonia Sotomayor: Mr. Cole, that's yes-

David Cole: And-

Sonia Sotomayor: Because once we decide the case in your favor, then that question is inevitable.

Jessica Pieklo: Oh, yikes, Imani.

Imani Gandy: Right? Double yikes. Triple yikes. I award Sonia Sotomayor one yikes. A certificate of yike.

Jessica Pieklo: I mean, I will tell you that sitting in the courtroom and hearing this happen real time, there was a visible sucking of air through the teeth among many journalists as this was happening, that "Really? Oooh." But you know what was also weird about that? She also asked attorney Pam Carlin about bathrooms in the first case that the court heard that day: Bostock versus Clayton County. And that's the case involving a man who claims he was fired for being gay.

Imani Gandy: It's not even a trans case. It has nothing to do with all of this bathroom locker room shenanigans. So what the hell, man? And also Sonia Sotomayor asked the very first bathroom question of any of the Justices.

Jessica Pieklo: The very first! The first!

Imani Gandy: The very first! And the fact that she did so early on in a case not even involving trans employees suggest that she's wrestling with this issue.

Jessica Pieklo: It really does. And if the court's most progressive Justice is wrestling with bathroom panic, it's likely that other folks are as well. So here's an idea. Why don't we go ahead and debunk some of these bathroom myths?

Imani Gandy: I am on board for that. So first let's talk about privacy concerns.

Jessica Pieklo: Yes, let's.

Imani Gandy: There are folks who support these bathroom discrimination bills who frequently prattle on about how people have an "expectation of privacy" in the bathroom and that permitting people who may not have the same genitals as that bald

lady with the triangle skirt, the one who's on the bathroom door for women — assuming that the bald lady with the triangle skirt is cisgender, of course, but we're going to go ahead and assume that — but people are saying that-

Jessica Pieklo: It's all fraught!

Imani Gandy: Right? But apparently if you don't have the same genitals as this triangle skirt lady, that's going to lead to cisgender women feeling uncomfortable or unsafe somehow, peeing in a stall next to a trans woman.

So now this unspoken presumption is that trans women are infiltrating women's bathrooms because they have some sort of perverted agenda.

Jessica Pieklo: An agenda in the bathroom.

Imani Gandy: Right. Your bathroom agenda, besides going to take a whiz, right? And this argument just collapses with even a modicum of rational thought. So first of all, when it comes to the invasion of privacy, one has to question what that privacy is, right?

Jessica Pieklo: Definitely.

Imani Gandy: Is it using the same bathroom as someone with different genitals? And if so, how is a person supposed to determine who has what genitals? Certainly a concrete determination of a person's genitals would require some sort of inspection. And that seems like a far worse invasion of privacy than some nebulous concern that someone in the bathroom may have different genitals than you.

Jessica Pieklo: So that makes a lot of sense. Like-

Imani Gandy: Yeah, right.

Jessica Pieklo: You know? I have a privacy concern in not having my sex and gender being inspected broadly by the public. What about arguments around safety? I hear these are dangerous places, Imani. What are these safety concerns all about?

Imani Gandy: First of all, there is not a single reported case of a trans woman infiltrating a woman's bathroom to commit a crime, whether a sex crime or otherwise. Now I did some research on this, and there hasn't been a lot of data published since 2016. But in a piece published by Vox in 2016, multiple investigations have found that states and schools that have had legal protection for trans people, they have never linked an instance of sexual assault or harassment in a bathroom to trans-friendly policies. Right? Actually the only bathroom harassment that's going on is bathroom harassment against trans people, right? Like-

- Jessica Pieklo: Yeah.
- Imani Gandy: This whole bathroom panic has actually led to non-trans people being harassed because they look like they might be trans because, for example, they have a short haircut.
- Jessica Pieklo: This is the very definition of panic, right?
- Imani Gandy: Yes.
- Jessica Pieklo: I think of it as like a parallel to stranger danger that we teach our kids about, right? The actual danger is not the stranger that might attack you. The actual danger in this instance is to trans folks who are just trying to go to the goddamn bathroom.
- Imani Gandy: Right, right. It reminds me of the John Mulaney bit where he's talking about street smarts.
- John Mulaney: "Time for street smarts with Detective J.J. Bittenbinder. Shut up, you're all going to die. Street smarts!" That was the general tone.
- Imani Gandy: Like bathroom smarts! There are people in their bathroom that are trying to kill you. What do you do? Street smarts!
- Jessica Pieklo: I mean, it's just like-
- Imani Gandy: It's absolutely absurd.
- Jessica Pieklo: Okay, so along that line though, I hear this "common sense concern," right? Won't mixing up bathrooms just cause all sorts of societal chaos, right? We heard that in a massive social upheaval. That's what Justice Gorsuch was so concerned within in oral arguments where we just can't tell who's peeing where, and everyone is uncomfortable as a result. I thought that's common sense. Don't we all lead to know where people are peeing and why?
- Imani Gandy: Jess, where have you peed? And when did you pee? I mean, what are we doing here? Are we having McCarthy trials about bathrooms? I mean, look, folks like to argue that forcing people to use bathrooms that correspond to their biological sex is going to lead to trans women who look like men using the women's bathroom. But that's backwards, right? Because when it comes to a cisgender woman feeling uncomfortable in a bathroom, is a cis woman going to feel more comfortable using the bathroom with someone say like Benjamin Melzer, who in 2016 became the first trans man to grace the cover of German Men's Health? Or is a person going to feel uncomfortable using the bathroom with someone like Janet Mock?

Now the idea here is that Benjamin Melzer is a trans man, and he's actually really super hot. You should go look him up.

Jessica Pieklo: So good looking.

Imani Gandy: He is super-active and built and yoked-

Jessica Pieklo: That's a drink of water.

Imani Gandy: And by God.

Jessica Pieklo: Sorry.

Imani Gandy: And then you've got Janet Mock who's one of the most beautiful women on Earth.

Jessica Pieklo: Precisely.

Imani Gandy: So you're trying to tell me that you would prefer a cis woman who's "afraid" of being assaulted in a bathroom would prefer to use a bathroom with someone like Benjamin Melzer, who presents as a man, as opposed to Janet Mock, who presents as a woman and is a woman just as Benjamin Melzer is a man. It doesn't make sense. These people haven't thought it through. So the real question is what leads these cis women to feel uncomfortable about sharing a bathroom with say Janet Mock or Laverne Cox or Jamie Clayton who was the actress in Sense8.

These are all trans women who are able to "pass" as women. So it seems to me — and I'm not trans and you're not trans, and maybe this is a conversation we should be having with trans people — but it seems to be that there's an issue here about trans people who are able to pass versus trans people who are not.

Jessica Pieklo: Absolutely.

Imani Gandy: And I just think that people have it backwards, and people are so sort of behold into this panic that they haven't really thought about what it would mean to force people who are born with biological female genitals to use a women's bathroom if they are men with huge pecks and six pack abs and beards and chest hair. It just doesn't make any sense.

Jessica Pieklo: It doesn't and I think that really underscores the whole idea of it's just being panic, right? The idea of panic is that you're not really grounded in reality, and these concerns are not grounded in reality. So it was really upsetting to see Justice Sonia Sotomayor sort of take the charge in those.

But we got to talk about something else too. That was her use of the word "transgendered" in arguments because it didn't just happen once.

- Imani Gandy: It happened several times.
- Jessica Pieklo: And also yikes.
- Imani Gandy: Yeah, double triple yikes. It's transgender. It's transgender, not transgendered. And I know a lot of people are probably like, "What's the big deal? It's just like an extra couple of letters on the end." It's a big deal because trans people say it is. Honestly, that's really the only answer. If you're saying something that's offensive to someone and they tell you, "Hey, this is offensive and I'd prefer you to use this language," then just use the language that they're asking you to use because it's no skin off your back, and it shows the trans person that you're talking to that you actually give enough of a shit to try to listen to how they feel and how they want to be referred.
- Jessica Pieklo: So Justice Sotomayor, transgender, please.
- Imani Gandy: Transgender. We love you. Please say transgender and not transgendered.
- Jessica Pieklo: Okay, so why does Sotomayor fall for bathroom panic or using transgenders matter other than just we're not happy about it?
- Imani Gandy: Well, because it's absolutely a given that there's going to be a bathroom case or some kind of case where the Supreme Court is going to be called upon to rule on trans bodies. That case is going to wind up at the Supreme Court. In fact, one already did but was sent back down to the lower court. That was the Gavin Grimm case, right? The high school student who sued the Gloucester County school board. And in fact last May, the court declined to hear a bathroom panic case out of Pennsylvania. That case is called Doe v. Boyertown, and we did an entire episode on it-
- Jessica Pieklo: We did.
- Imani Gandy: Which you should absolutely go back and listen to it. Apparently we did. I had forgotten that we did. But time is a-
- Jessica Pieklo: We both forgot, to be fair, Imani.
- Imani Gandy: We did. We did. We've done a lot of episodes over the past couple of years. It's okay that we forget. Also, we should probably take our Ritalin. But the point is it's only a matter of time before the Supreme Court is asked to essentially pass judgment on trans identities. And that's going to have profound implications. For example, imagine a ruling that effectively accepts the conservative argument that it is possible to raise a religious objection to a trans person's existence.
- Jessica Pieklo: I object to you being.

Imani Gandy: Right. I mean, what is that? And that is what they are claiming when they insist that their "sincerely held religious belief that biological sex is immutable and therefore cannot be changed," that's what they're claiming, that their beliefs serve as a veto over a trans person's right to exist.

Jessica Pieklo: That's just bonkers.

Imani Gandy: There is no room for error here, and we need Sonia Sotomayor. Please, Sonia, please get on board. We need you to get on board. Trans people need you to get on board.

Jessica Pieklo: I mean, you're right. There is absolutely no room for error here also because the other side has shown that they get what's at stake in these cases. Right? One of the things that blew me away during oral arguments was solicitor general Noel Francisco, formally of the Alliance Defending Freedom, one of the biggest anti-trans litigation mills out there, our current solicitor general dropped a "cisgender" in his arguments. This may be the first time cisgender got dropped in oral arguments in the Supreme Court and it came from a former ADF attorney, and it didn't sound awkward and it didn't sound rehearsed. It sounded like someone who's been intellectually working in this area for a while now and knows how to navigate this space.

So if Noel Francisco can say cisgender fluently and not use transgendered when he actually believes the terrible things associated with folks who say transgendered on the regular, then Justice Sotomayor should be able to get this as well.

Imani Gandy: Yes, she absolutely should. And Justice Sotomayor has demonstrated that she is the one Justice who can connect civil rights violations to real world consequences. And we need her to be able to do that for trans rights cases, whether it's Harris Funeral Homes or some future case involving rules forbidding trans people from using the bathroom that corresponds to their gender identity. And she's done this in a couple of cases before, right? For example, her *descent and Utah v. Strieff* is practically a black lives matter manifesto. And that's one of the cases we focused on in our episode when we talked about how much she's a boss. So you should go back and listen to that case.

And she did the same thing in *Husted versus A. Randolph Institute*, another case that we did a podcast about, and that case was about the Ohio voter purging nonsense. And she was able to draw a connection between historical voter suppression and the pernicious effects of Ohio's voter purge process. And so this idea that she's able to connect the dots when it comes to police brutality, when it comes to voter suppression, it demonstrates that she's going to be able to connect the real world consequences of the oppression of trans people to what their lived reality is. And it's important that she be able to make that connection between the law and lived reality so that we can have some hope that trans people will be recognized as human at some point in the near future,

which is something that people like, I don't know, every lawyer working at ADF doesn't want to see.

We know she is adept at taking these stale legal principles and painting a broader, bigger picture about how these principles will actually affect people's lives. So that's why I found her comments during the title seven arguments so disappointing. And that's why I want to take her out for a bottle of rosé and then go ride bikes.

Jessica Pieklo: I think she'll get it.

Imani Gandy: She will.

Jessica Pieklo: I do. I do.

Imani Gandy: She will absolutely get it. I have no doubt that she will get it. It's just that she needs to be called in, and I think we are the people to do it. So Sonia, if you're listening or if you are a clerk of Sonia's and you're listening, have her call us. We will provide the wine and the bikes even.

Jessica Pieklo: Totally. That is right up my alley. I got that. If I can do anything, it's the active lifestyle stuff.

Imani Gandy: Right. We're not going to go bike riding in the mountains because I will die. So I need a straight, flat surface.

Jessica Pieklo: Absolutely. Just around the mall in DC.

Imani Gandy: Exactly, exactly. Just bike ride around the mall.

Jessica Pieklo: Oh Justice Sonia Sotomayor. There is honestly nobody on the bench who is better at getting these principles and creating law that articulate the ways in which civil rights violations harm people so very specifically and so very deeply. So please let's get on the other side of this issue soon.

Imani Gandy: Yes, let's do that. And on that note we are going to wrap up our lovely call in for Justice Sotomayor. If you would like to talk to us about how much we love Sotomayor and how much we need her to get better on trans rights, you can follow me on Twitter @AngryBlackLady. You can follow Jess on Twitter @Hegemommy, H-E-G-E-M-O-M-M-Y. And you can follow @Rewire_News. And you can and should join our Facebook group-

Jessica Pieklo: Do it.

Imani Gandy: Because guess who's back in the news, guys? Justice Brad McBeer. Chugs McCaverton. Beer-pong Flip-the-cup.

Jessica Pieklo: Beer-pong Flip-the-cup?

Imani Gandy: I don't know. Any of these beer-related Kavanaugh monikers.

Jessica Pieklo: Justice Kegstand is still one of the good ones.

Imani Gandy: Justice Kegstand. I like Chugs McCaverton. That's a real good one too.

Jessica Pieklo: Yes.

Imani Gandy: But answer those questions. We'd love to let you into our Facebook group, but we're trying to keep it a safe space so you know, blah blah blah-

Jessica Pieklo: You got to answer the questions.

Imani Gandy: Answer the questions, we'll let you right in. And barring that, what are we going to do, Jess?

Jessica Pieklo: We'll see you on the tubes, folks.

Imani Gandy: See you on the ding dang tubes.

Speaker 6: Boom! Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. This episode was produced by Marc Faletti, who is also our executive producer. And the Rewire.News editor-in-chief is Jodi Jacobson.