

*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 and I have something to say. Jess and I have been doing this podcast for 9 years now. NINE YEARS. And let's just say that over those nine years, big things tend to happen when Jess is out and about on the town.

**Jess:** I wouldn't call having foot surgery being out and about on the town.

**Imani:** How many times has the Supreme Court dropped important orders when you were, say, stuck in North Carolina on a connection back to Colorado?

**Jess:** I mean quite a few.

**Imani:** And where were you when the leaked Dobbs opinion dropped. YOU WERE OUT ON THE TOWN.

**Jess:** YOU WERE WITH ME.

**Imani:** But I'm not the one who triggers this stuff. You have a responsibility, Jess! You have to stay home and you have to be VIGILANT.

**Jess:** But my foot.

**Imani:** Nobody cares about your foot, Jess! OK, that's not true. I deeply care about your foot. I'm glad you can get back to running up mountains because I know how you love it.

**Jess:** Thank you, geez.

**Imani:** Tell me—how many times were you running up a mountain when the Supreme Court dropped bad abortion news.

**Jess:** IT WAS LIKE ONE TIME.

**Imani:** That's not how I remember it.

**Jess:** Well...I'm Jess Pieklo, Rewire News Group's Executive Editor. Rewire News Group is the one and only home for expert repro journalism.

**Imani:** So a big thanks to our subscribers and welcome to our new listeners.

**Jess:** That's my line! Stop stepping on my lines! You're being a bit ridiculous, Imani. Why are you so hostile?

**Imani:** Because we're both turning 50 this year and I wanted it to be a light and breezy year for us. But instead what happened? You went on medical leave for like 6 weeks and the Supreme Court now has back to back abortion cases a mere two years after the Supreme Court shit the bed in Dobbs. And you know what they're going to do? They're going to tell pregnant people to go fuck themselves.

**Jess:** Again.

**Imani:** Again what?

**Jess:** The Supreme Court is going to tell pregnant people to go fuck themselves again.

But I just don't see how that's my fault.

**Imani:** There there, Jess. We're in it now. Let's not talk about whose fault it is. Let's just talk to the people about EMTALA.

**Jess:** But you were the one who said it was my fault.

**Imani:** It doesn't matter who.

**Jess:** Oh my god I can't with you.

**Imani:** So EMTALA. What is it?

**Jess:** The Emergency Medical Treatment and Active Labor Act (EMTALA) is a United States federal law enacted in 1986. It ensures that the public can access emergency services even if they can't pay.

**Imani:** It was primarily enacted to prohibit the practice of patient dumping, where hospitals would dump indigent patients into the street or into a shelter because the

life-saving care they need is too expensive for the hospital to bear and little government reimbursement is expected. Capitalism? Ain't it grand?

**Jess:** EMTALA imposes specific obligations on hospitals that participate in the Medicare program and which have emergency rooms. EMTALA requires these hospitals to screen and treat patients without considering their ability to pay, insurance status, national origin, race, creed, or color.

EMTALA has three main provisions:

The medical screening examination provision requires hospitals to provide a medical screening examination to any individual who comes to the emergency department and requests such an examination. This examination is required to determine if the patient has an emergency medical condition.

**Imani:** The stabilizing treatment provision requires the hospital to provide stabilizing treatment to a patient who has an emergency medical condition, regardless of the patient's ability to pay. If the hospital is unable to stabilize the patient within its capabilities or if the patient requests a transfer, an appropriate transfer should be implemented. This is the provision that the fight over EMTALA and abortion care centers on.

**Jess:** And the transfer provision requires that transfers be made in a manner that minimizes the risk to the patient's health and safety.

But as you said, the fight centers on the stabilizing treatment provision. The issue is whether stabilizing treatment should ever include abortion. And the answer to that question is yes, Obviously. The only way you get to a “no” answer is if you don't think abortion is health care. Which is what got us here in the first place

In July 2022 after the Dobbs decision the HHS- the Department of Health and Human Services issued a guidance that said yooooo states, don't forget that EMTALA covers abortion care too.

And they did that because after Dobbs a wave of “trigger bans” went into effect and there was arguably at least an open question as to the effect those bans would have on real life emergencies.

Naturally conservatives hated the guidance and it became an immediate flashpoint after Dobbs.

**Imani:** And that leads us to three cases, one out of Texas and two out of Idaho which are being litigated together and which we will discuss as one case for purposes of discussion. Let's talk about Idaho first.

The two cases out of Idaho are called *Moyle v. U.S.* and *Idaho v. U.S.* One case was brought by Idaho's GOP-controlled legislature and the other was brought by Idaho's AG Raul Labrador, which is in all honesty a truly stellar name. But I digress.

So the case is about whether or not EMTALA trumps Idaho's abortion ban.

Idaho bans abortion but has an exception for when a physician has determined in his "good faith medical judgment" that the abortion was necessary to prevent the death of the pregnant person.

**Jess:** The trial court in the Idaho case ruled that EMTALA preempts Idaho's abortion ban finding that two laws were in conflict. Idaho limits abortion where necessary to prevent death. EMTALA requires abortion care be provided to patients who are at risk of "serious impairment to bodily functions," "serious dysfunction of any bodily organ or part," both of which harm a preggo's health but aren't the equivalent of death.

**Imani:** Idaho appealed and a three judge panel of the Ninth Circuit, all Trump judges, stayed the ruling enforcing EMTALA. Weeks later the full 9<sup>th</sup> Circuit withdrew that order and set oral arguments for January 23.

Idaho appealed to the Supreme Court and the Supreme Court decided to skip the 9<sup>th</sup> Circuit proceedings and granted cert before judgment.

And that's where we are. Waiting for oral arguments to be scheduled at SCOTUS.

**Jess:** Let's talk about Idaho's arguments.

First, Idaho argues that a provision in federal Medicare law states EMTALA should not empower federal officers or employees to control medical practice or services.

- DOJ counters, stating this provision doesn't address whether EMTALA limits Idaho's abortion ban and only applies to federal officers, not Congress-enacted obligations like EMTALA's stabilization requirement.
- Purpose of the provision is to prevent federal officials from second-guessing medical decisions, not to safeguard state bans on medical procedures.

Second, Idaho interprets the EMTALA provision related to stabilizing a pregnant patient's "unborn child" if that "unborn child" is experiencing a medical emergency as a prohibition against terminating the pregnancy.: "EMTALA's regard for the unborn child's life and health precludes interpreting it as a mandate to kill that child." Which... fuck off already.

DOJ counters that EMTALA, in such cases, requires hospitals to offer both stabilizing treatments, allowing the patient to choose, without expressing a preference between the pregnant patient and the unborn child which seems pretty obvious.

**Imani:** EMTALA requires a hospital to offer a patient stabilizing treatment. You obviously can't offer a fetus any sort of treatment. The person who is being asked to weigh the risks and benefits of the stabilizing treatment is the patient. If the patient decides that an abortion is going to be what's necessary to stabilize their own condition, then that's what they choose. Emtala does not say that between treating a pregnant patient and a pregnant patient's child you have to always err in favor of the child. That's personhood nonsense

**Jess:** More broadly, Idaho is arguing that EMTALA doesn't require ANY necessary stabilizing treatment if that treatment isn't authorized by state law. That's a can of worms that shouldn't be opened Also they're arguing that EMTALA only requires that all patients be treated the same. It doesn't turn every emergency room into an abortion clinic, which is what ADF is alleging.

Now let's slide on over to Texas. The trial court and the Fifth Circuit sided with Texas and to do so basically rewrote the EMTALA statute.

Remember that patient argument we just talked about in Idaho? Well the Fifth Circuit took an "or" in the statute that requires medical providers offer stabilizing treatments to a pregnant person or their fetus and changed it to an and. THAT IS A HUGE DIFFERENCE ESPECIALLY TO THE ANTIS BECAUSE IT FURTHERS THE IDEA THAT ABORTION IS NEVER HEALTH CARE TO A FETUS

**Imani:** I've had a bug up my ass about the difference between the Idaho and Texas cases when it comes to the standard of medical judgment as a matter of law.

The Idaho exception applies to prevent the pregnant person's death. And Texas medical exception applies if—and hang onto your butts; I'm reading this whole thing—"in the exercise of reasonable medical judgment, the pregnant female on whom the abortion is performed, induced, or attempted has a life threatening physical condition aggravated

by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced.”

Now if you fell asleep while I read that, that makes a lot of sense. But I felt that it was important to read what Texas medical exception says so that you can understand that it basically makes no goddamn sense. It certainly does not give abortion providers in Texas any concrete bases on which to make their judgment such that their judgment won't be questioned later on in a lawsuit and as a result land them in jail.

In fact, there is a case going on in Texas right now where something like 20 women are begging the state of Texas twenty women and their doctors are begging the state of Texas to provide some clarity on Texas's medical exception so that doctors there will know when they're allowed to perform an abortion. That's the Zurawski case.

Will SCOTUS impose Texas's standards on the country?

**Jess** This is why we have a supremacy clause. To have baseline standards for all 50 states. That's what EMTALA is!

Meanwhile, in Idaho, the Idaho Supreme Court has said that if a doctor performs an abortion and has subjective good faith medical judgment that the abortion is necessary to prevent the pregnant person's death then that abortion automatically falls within Idaho's abortion ban exception.

**Imani** reax: So it's less bad in Idaho when it comes to EMTALA but it's still pretty bad. But at least it seems that doctors are a little bit more protected should they exercise their medical judgment and have it questioned later. And that's really the difference between reasonable medical judgment and good faith medical judgment. Reasonable medical judgment means whatever a group of doctors say. And if that group of doctors are a bunch of anti choice jamokes, then say goodbye to your medical license, and potentially your freedom if you're in Texas because the legislature still refuses to clarify what the hell its medical exception means.

Doctors should be allowed to rely on their own best medical judgment, then they can provide the care to their patients that is necessary while also not fearing that some judge is going to come up behind them and strip them of their license or throw them in jail because a bunch of other doctors who weren't in the room at the time the abortion the emergency abortion was performed decide that the emergency abortion wasn't necessary.

We forgot to talk about one really important thing and I'm frankly appalled that you haven't brought it up yet and I think this is a testament to how you can never go on vacation again because pre foot surgery Jess would have latched onto this like a babe to a teat... Since it has to do with admin law.

**Jess:** Well, I mean, you wrote the script and put this last. It's not like I forgot!

**Imani:** I should hope not because the Texas case is a fake case. This is another fake case being pushed through the legal system by people with an agenda. Why is it a fake case? Because Texas is basically suing over a non binding document that the Biden administration issued after Dobbs came down.

**Jess:** Yes! Federal agencies issued guidance documents all the time just to explain how it understands the law. But it doesn't impose new obligations on anyone. It shouldn't form the basis of a lawsuit. This lawsuit should have been tossed out immediately but it wasn't.