

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

Today, we're exploring a significant legal development from Harrisburg that could have profound implications for abortion access.

**Imani:** Harrisburg? As in Pennsylvania? The birthplace of my mother? My grandmother? Gritty? Cheesesteaks? Angry Eagles fans booing Santa Claus and throwing wooder at each other?

**Jess:** The one and the same. The Pennsylvania Supreme Court, which sits in Harrisburg, has issued a ruling overturning an important precedent that would have blocked abortion providers in Pennsylvania from challenging the state's ban on Medicaid coverage for abortions.

The case is called *Allegheny Repro Health Center v. DHS* and it revolves around the question of whether Medicaid must cover abortions in Pennsylvania. There's a statute that bars PA's Medicaid program from paying for abortions for low-income people. It basically follows the Hyde Amendment and says that Medicaid can only cover abortions in limited exceptions like rape, incest, and if the life of the pregnant person is at risk. We'll refer to that statute as the "Coverage exclusion" because coverage for medical care for pregnant people excludes coverage for abortion.

**Jess:** Plaintiffs in the case are a group of providers and they are arguing that this violates the Pennsylvania Constitution, which unlike the United States Constitution, contains an equal rights amendment.

**Imani:** What does it say?

**Jess:** Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.

**Imani:** OK I'm going to skip right to the point because when this news dropped on social media, it seems like a lot of folks were confused about what this ruling actually does.

The big question on everyone's mind is this: Did the Pennsylvania Supreme Court find a fundamental right to abortion in the PA Constitution?

Let me say straight out of the gates, no. No, it did not. Only two out of the seven justices did:

Judges Christine Donohue and David Wecht. That's not even a plurality. It's just two justice's opinion.

So, let's get that clear, they did not find a fundamental right to abortion. Nor did the Court find that the Medicaid abortion ban, the subject of the lawsuit, was unconstitutional. So, if the Court didn't find a fundamental right to abortion and didn't overturn the Medicaid ban, then why is everyone so excited about this opinion?

**Jess:** Because the Court paved the way for the abortion providers who are plaintiffs in the case to continue challenging the Medicaid ban as unconstitutional. And they did that by overruling a 1985 case that foreclosed just that sort of challenge.

Let me explain: In 1985 in a case called *Fischer v. Dept of Welfare*, SCOPA held that a Medicaid coverage exclusion for abortion did not violate the ERA in the Penn constitution.

SCOPA said that the coverage exclusion wasn't a distinction based on sex but rather a distinction based on abortion.

**Imani:** I'm sorry, what now.

**Jess:** Yeah. The Court classified the exclusion as based on abortion not on sex.

**Imani:** That makes no sense.

**Jess:** Suuuuuure. It makes complete and total sense! You see, the Pennsylvania legislature wasn't trying to discriminate against women, they were trying to discriminate against abortion. And if it just so happens that the only people who get abortions are women, then too bad. (Obviously our listeners know that not only women get abortions, but this was 1985 and people were regressive then.)

It was a bad decision that was poorly reasoned. And I'm not just saying that because it was a decision that I disagreed with. This wasn't one of those poorly reasoned reversals like with *Dobbs* and *Roe*. SCOPA painstakingly went through the ways in which it had failed when issuing the Fischer ruling in 1985.

The Supreme Court pointed out that it had gotten it wrong: Even if somehow the coverage exclusion is facially neutral, it runs afoul of the PA ERA because the ERA prohibits legislative regimes that appear to be neutral but that are discriminatory in fact.

The court also ruled that even if the coverage exclusion was facially neutral, it is entirely rooted in gender-based stereotypes regarding the primacy of childbearing and child rearing for women. They had previously ruled that sex-based qualifications are ok as long as they are based on unique characteristics that differ between the sexes.

**Imani:** That seems like it can be used to excuse all sorts of discrimination.

**Jess:** It can and was. The Court had also previously ruled that treating women differently based on pregnancy or unique physical properties doesn't constitute sex-based discrimination.

**Imani:** But of course it does. That is asinine. Furthermore, as providers in the case point out, there's no parallel coverage exclusion for men. All repro health services are covered for men including all sex-based health-care consultations and procedures. The only repro health service excluded from coverage is abortion when the pregnancy is not life threatening and not the result of incest or rape. That's what the SCOPA said. They also said, "Abortion is health care."

**Jess:** Did they say motherfuckers?

**Imani:** No, but it was implied. So, if the ruling didn't overturn the Medicaid ban and didn't find a fundamental right to abortion, you're telling me that it's still great because it reinterprets the ERA in a way that lets the providers move forward with their challenge.

**Jess:** Exactly. And frankly, I don't see how this ban doesn't get tossed out.

Here's one of my favorite bits from the majority opinion:

The government does not bear a constitutional obligation to provide medical care to the indigent, nor is the government required to financially support the exercise of a fundamental right, including a woman's exercise of her right to reproductive autonomy. However, once the government chooses to provide medical care for the indigent ... the government is obligated to maintain neutrality so as not to intrude upon the constitutional right to full reproductive autonomy, which includes the right to terminate a pregnancy."

**Imani:** The opinion is also just really good for the abortion rights movement generally. As David Cohen, who is one of the attorneys who was part of the litigation team for this case put it, it's a great building block to accomplish the goal of finding a fundamental right to abortion in the Pennsylvania Constitution.

The way the opinion took into account perspectives from reproductive justice organizations, the way it called the evidence proffered about how this ban, for example, hurts Black women more "well sourced" and basically recited dismissively the counterclaims that Black women are being targeted by Big Abortion and that because mutual aid exists, indigent people have no trouble accessing abortion.

Also, these two justices went in on the *Dobbs* opinion, describing all the ways in which *Dobbs* had gotten the history of abortion in Pennsylvania wrong. Basically, turned to Alito and said "bitch, you lyin'."

“Because our Article I rights are inherent, we are not constrained, as the Dobbs court believed it was, to determine whether abortion is deeply rooted in the history or traditions of the Commonwealth.

*Dobbs* relied on PA case law to disprove arguments that a right to abortion was deeply rooted in the nation’s history. It turns out that the Court misread the case law—abortion until quickening was permitted in Pennsylvania

**Jess:** There’s so much with this case that we haven’t discussed, and we’ll come back to this issue as the case returns to the lower court, but I want to talk more broadly about why this case is so important:

It demonstrates the importance of state courts in the abortion rights fight. In Pennsylvania, two of seven justices think there’s a fundamental right to abortion in the constitution. Perhaps that number will increase once this case makes its way back to the PA Supreme Court. Abortion rights advocates have an opportunity to make their case in Pennsylvania not just for a fundamental right to abortion, but for a right to Medicaid coverage.

It can be done! We’ve seen it. Look at the Kansas Supreme Court decision. That started a domino effect when it comes to protecting abortion rights in the states.