

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

It's that time!

Imani: What time is that?

Jess: It's time for oral arguments in abortion case number 2.

Imani: What a terrible time.

Jess: It is. But as I always say, the only way out it is through.

Imani: Well let's go through it so we can get the fuck out!

Jess: The Supreme Court is set to hear oral arguments in *Idaho v. United States/Moyle v. United States* next Wednesday. It's two cases but we're just going to refer to them as one. We've talked a lot about this case and there's no need to go through in great detail again. Briefly, it's the case about EMTALA—the Emergency Medical Treatment and Active Labor Act. That's the law that requires patients who go into Medicare-funded ERs to be offered a medical exam and then stabilizing treatment if necessary or a transfer to another hospital if necessary.

For a more in depth analysis of this law, please check out our prior episodes like one from January on how fetuses can't consent to health care or past issues of The Fallout where we also dive into this case and its background.

Today we're going to talk about what it is we're going to be looking for during oral arguments next week. So Imani, what are you going to be looking for?

Imani: Well Jess, let me start off by saying that I own the website abortionishealthcaremotherfuckers.com for a reason. And that's because abortion is health care. But petitioners in this case are arguing that abortion But in Idaho, abortion is only health care under certain circumstances governed by state law.

Jess: Yeah Idaho doesn't really care about the health of a pregnant person. As long as you're alive and likely to stay that way, then tough luck. No abortion for you.

Imani: Right. Under Idaho state law, abortion is permitted only to save the life of the pregnant person. But under EMTALA, abortion is required if it will stabilize a patient and prevent their health from deteriorating. And that's not just me saying that. Multiple courts have also said. The Trump administration and Bush administration both treated EMTALA as if it included "abortion related services."

And I've been saying for months that there's a lot of daylight between preventing someone's health from deteriorating and preventing someone from dying. And should SCOTUS side with Idaho, then doctors will have to live in that gray area. And that's a scary case for doctors given the harsh penalties for violating abortion bans.

So I'm going to be looking for SG Prelogar to talk about the chilling effect that the reinterpretation of EMTALA offered by Idaho would have on ER doctors.

Doctors need to make quick decisions under harried circumstances and if they have to worry about a prosecutor coming up behind them and determining that the medical treatment they provided was against the law because there was another option for treatment that did not involve an abortion for example, that's going to make doctors think twice before providing care not because it's they don't believe that the care plan they've come up with is appropriate, but because they're afraid that a aggressive anti choice District Attorney is going to dispute their medical judgment.

Jess: Doctors generally aren't in the business just of making sure their patients don't die. They actually try to improve their patient's health. A ruling for Idaho would make it difficult for ER doctors to do their jobs. There are multiple serious conditions that can have long lasting health effects but that won't necessarily kill a pregnant patient like preeclampsia, infection, uterine bleeding, for example.

Imani: Your turn. I know you're going to be looking to see if the Court is going to go full personhood.

Jess: I've been in a fetal personhood rabbit hole for a while now, and this business about the fetus also being a patient is going to send me over the edge.

Imani: But the fetus isn't a patient. The statute says that when it comes to pregnant people, the stabilizing treatment must be offered to a pregnant woman or her unborn child. Not AND her unborn child as some amici have claimed.

Jess: Right. So why were their eleventy-five amicus briefs filed by conservative anti-choice groups insisting that the fetus is a patient and therefore an abortion is never necessary since the abortion would terminate one of the patients? How is a fetus supposed to consent to health care?

Imani: I don't know man.

Jess: Here's the thing. This case has the possibility of moving the personhood conversations in dangerous ways. It already has! We're already considering balancing the "rights" of a "12-week-old patient" against the rights of the person gestating that pregnancy thanks to the antis framing of this case.

And what we know about personhood is that it leaks all over the place. Just look at the recent decisions out of Alabama and Florida—both of which are STEEPED in fetal personhood. It's a direct link from that reasoning and those decisions to a decision by SCOTUS that Idaho and other states can deny emergency abortion care because abortion always takes the life of a fetus.

Imani: Hey Jess, do you remember the Articles of Confederation?

Jess: I know I'm turning 50 this month, but I wasn't actually alive then. But I'm familiar with them. They established a decentralized national government, with most power remaining at the state level. And then they smartened up and wrote the Constitution.

Imani: Precisely. Precisely. And what's in the Constitution? The supremacy clause. The supremacy clause says that federal law is that bitch and everyone must obey. Here we have a direct conflict between federal law and state law but Idaho is arguing that they have the right to just do whatever they want.

This is really a battle about federalism and the interplay between state and federal law. It's quite clear that Idaho law conflicts with federal law here. Federal law says abortion is stabilizing treatment for any number of medical conditions that causes serious jeopardy to a person's health. Idaho (and Texas because let's not forget Texas filed a lawsuit against the Biden administration challenging EMTALA and the Idaho case will determine the outcome of the Texas case.

Jess: Siding with Idaho would upend the relationship between federal and state law.

And in a way I expect would try and cut off the ability of say a state with MORE LIBERAL abortion laws from existing under a national abortion ban, for example. It's tempting to think there are some upsides in a state by state regime of rights but there really are not because that state by state regime of rights also exists in this christian nationalism experiment the conservative legal movement is running right now.

Imani: Is the catastrophe that is ongoing in places like Texas where doctors are unsure whether or not they can even treat a person without contacting lawyers and hospital administration going to spread to the emergency room where it has the potential to do real damage since doctors and emergency rooms work in fast-paced situations and don't really have time to be consulting hospital administrators and lawyers every time they want to provide medical treatment?

Jess: There's also a real concern that this sort of state gatekeeping when it comes to emergency medical treatment could spread beyond the abortion context. It may not stop with abortion. It could extend to other disfavored forms of medicine and health care like gender affirming care and HIV/AIDS related treatments, for example.

Imani: What health care is safe? Only that which the Christofascist powers that be approve of will be safe. Even though for 40 goddamn years, everyone understood abortion to be included as a stabilizing treatment. It's simply too bad that Idaho has decided in the last couple years to remove a form of health care from the realm of what constitutes health care.