

*This transcript is a version of the episode.*

**Imani:** Hello fellow law nerds! Welcome to a special reaction 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.

Well Imani, we finally got the EMTALA decision—not once but twice thanks to another SCOTUS leak!—and well they punted. What's that all about?

**Imani:** Well Jess, let me tell you a little story about something called DIG. What the Supreme Court did is something called dismiss the case as improvidently granted, which basically means they heard oral arguments, they read some briefs, they were like, you know what? We don't really want to deal with this shit right now, we're going to go ahead and punt.

And as far as the leak is concerned, I truly think it was just like, the Supreme Court basically butt-dialed us, right? Because there was no reason for the case to leak a day early.

It's not like the Dobbs leak where we had two months to flip out and try and figure out what the hell is going on. Who did the leak? Is Johnny Roberts going to figure it out? Did Sammy the Leak do it? What kind of beer is Brett Kavanaugh drinking? We didn't know what was going on. But here it clearly was someone who just accidentally posted it and then took it down. But by the time that happened, Bloomberg Law was already on the case. They were like, yo, we've got a Supreme Court leak and then we were off to the races.

So dismissed as improvidently granted is basically a cop out.

**Jess:** While this was a procedural ruling, SCOTUS did give some pretty big hints as to how it's thinking about the issue of state abortion bans and federal law. Let's start with the bright spots for a change. That's Justice Jackson.

**Imani:** Justice Jackson did not come to play. She knows what's going on. I can tell. I'm a black woman. She's a Black woman. We have meetings. She basically called everyone bitch asses. She wrote an opinion disagreeing with the DIG. And she's right.

*So, to be clear: Today's decision is not a victory for pregnant patients in Idaho. It is a delay. While this Court dawdles and the country waits, pregnant people experiencing emergency medical conditions remain in a precarious position, as their doctors are kept in the dark about what the law requires. This Court had a chance to bring clarity and certainty to this tragic situation, and we have squandered it. And for as long as we refuse to declare what the law requires, pregnant patients in Idaho, Texas, and elsewhere will be paying the price. Because we owe them—and the Nation—an answer to the straightforward pre-emption question presented in these cases, I respectfully dissent.*

**Jess reax** It's a cowards decision—if Trump wins we get the Department of Life and no EMTALA fight because it's full steam ahead to fetal personhood.

**Imani:** Then there's Sammy "the leak" Alito

- The man is a liar. If there's one thing you should remember it's that he is willing to rewrite a statute to suit his agenda: "The Government's preemption theory is plainly unsound. Far from requiring hospitals to perform abortions, EMTALA's text unambiguously demands that Medicare-funded hospitals protect the health of both a pregnant woman *and* her unborn child."

This is a lie. The statute say "or" her unborn child. What's wild is that later he ascites the entire statute where it clearly says "OR her unborn child." So Alito just thinks we're stupid.

Do we think his clerk leaked this one too?! Or Martha-Ann?! Will there be flags? What happens next with the EMTALA fight

**Jess:** This case goes back to Idaho for further proceedings which means for now patients can't be denied emergency abortion care in Idaho. But there's a terrible 5th Circuit decision in place dealing with Texas' ban. Just logistically speaking that decision affects millions more people so really underscoring this punt is not a win

**Imani:** Fetuses can't consent to health care. We made this point in the pod before the Idaho case even made it to the Supreme Court. At that time we were talking about Texas v. Becerra, which is a scary decision given the amount of personhood language Matty K and the Fifth slipped into their rulings.

- And that's what happened in *Texas v. Becerra*, where Kacsmaryk—and the Fifth Circuit— agreed that, essentially, there's no such thing as a life-saving abortion

since the abortion terminates the “unborn child” and EMTALA requires doctors to provide stabilizing treatment to that unborn child.

- You may be thinking to yourself, “that sort of makes sense.” You probably are quibbling with the use of the term “unborn child” since it’s not a scientific word, and the fact that it appears in EMTALA probably frustrates you as much as it does me. But just looking at the statute as written, how can stabilizing treatment include abortion? That’s not going to stabilize the unborn child.
- Well, yes—that is true. But the Fifth Circuit literally rewrote the statute to make that true.
- The statute doesn’t require that life-saving care be provided to the pregnant person and their unborn child. The statute specifically says that emergency care must be provided if the pregnant person has a medical condition that will place their life or the life of their unborn child in serious jeopardy.
- “Or.”
- *Not* “and.”
- It’s the patient who gets to decide what treatment they want. Fetuses can’t consent to health care. A fetus also can’t refuse health care chosen by the person carrying it. Moreover, EMTALA neither contemplates nor requires emergency room doctors to consider the wants and needs of a fetus when presenting a pregnant patient with stabilizing treatment options. How could a doctor consider those wants and needs if the fetus is not able to communicate them?
- And to the extent that the state—or anyone—would presume to speak for the fetus, how do we even know that the fetus would want to be born?

Biden admin has appealed that Fifth Circuit decision to SCOTUS and they are sitting on it— we’ll see if they take it or not.

**Jess:** And again, a Trump Department of Life will render this whole fight moot because they will simply read EMTALA differently—issue different guidance—and based on Alito’s dissent and what we know from Project 2025 that would use EMTALA for advance fetal personhood.