

# SCOTUS and Ninth Circuit Review

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# MOYLE V. UNITED STATES / IDAHO V. UNITED STATES

**THE ISSUE:** Does the Emergency Medical Treatment and Labor Act (EMTALA) preempt an Idaho law that criminalizes abortions except those “necessary to prevent the death of the pregnant woman”?

# Idaho's Defense of Life Act

“[E]very person who performs or attempts to perform an abortion... commits the crime of criminal abortion. Criminal abortion shall be a felony punishable by a sentence of imprisonment of no less than two (2) years and no more than five (5) years in prison.”

Except:

- “The physician determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was ***necessary to prevent the death of the pregnant woman.***”
- Rape and/or incest
- Ectopic pregnancy

# Emergency Medical Treatment and Labor Act (EMTALA)

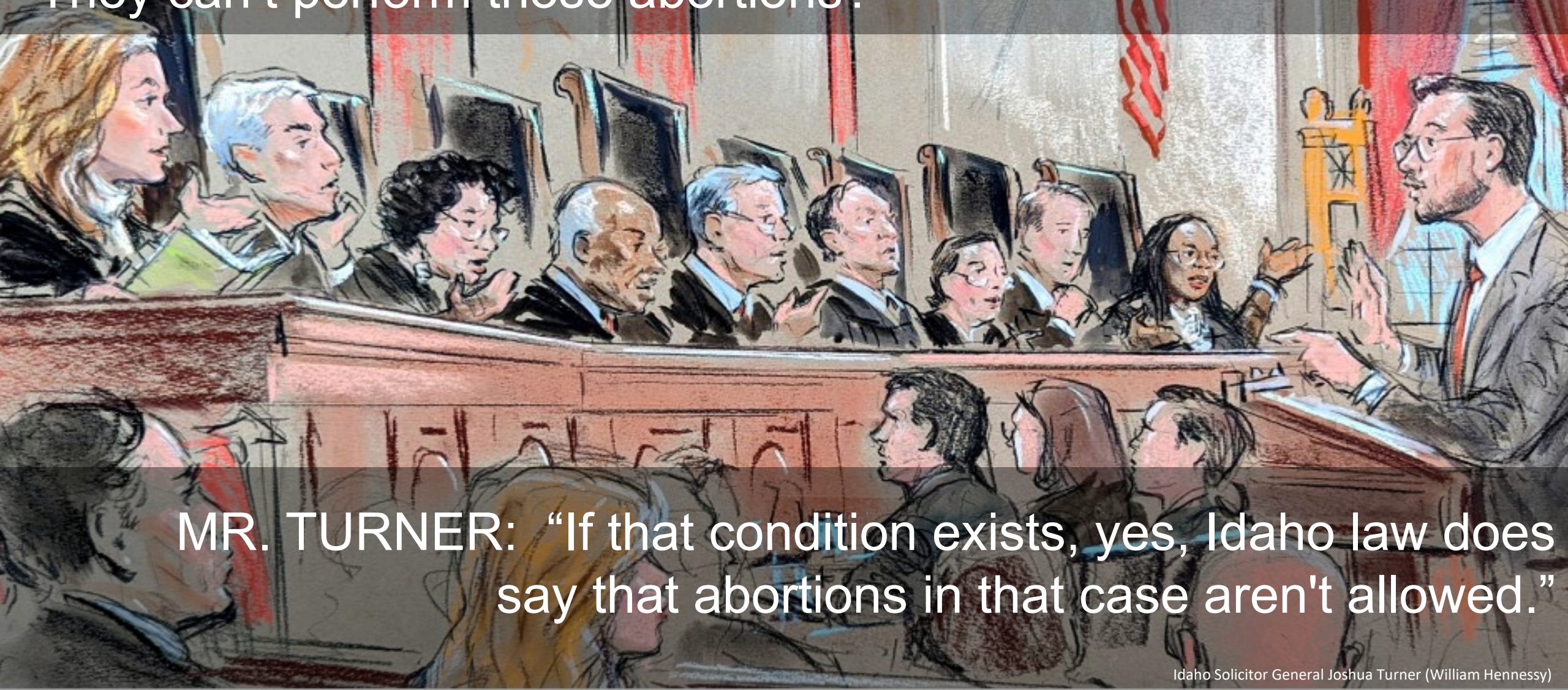
“If any individual... comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either--

- a) within the staff and facilities available at the hospital, for such further medical examination and ***such treatment as may be required to stabilize the medical condition***, or
- b) for transfer of the individual to another medical facility...”

“The term ‘emergency medical condition’ means—

- a) a medical condition... such that the absence of immediate medical attention could reasonably be expected to result in—
  - i. placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,*
  - ii. serious impairment to bodily functions, or*
  - iii. serious dysfunction of any bodily organ or part[.]”*

JUSTICE SOTOMAYOR: “Those doctors -- potential loss of an organ or serious medical complications for the woman. They can't perform those abortions?”



MR. TURNER: “If that condition exists, yes, Idaho law does say that abortions in that case aren't allowed.”

# LINTHICUM V. WAGNER

**THE ISSUE:** Does participation in a legislative walkout qualify as protected First Amendment speech?

## Measure 113, amended Article IV, section 15 of the Oregon Constitution

***“Failure to attend, without permission or excuse, ten or more legislative floor sessions called to transact business during a regular or special legislative session shall be deemed disorderly behavior and shall disqualify the member from holding office as a Senator or Representative for the term following the election after the member's current term is completed.”***



- District Court denied preliminary injunction, relying on *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117 (2011)
- Ninth Circuit affirmed
- Walkouts by legislators to deny a quorum are exercises of legislative power that are not protected under the First Amendment



# CITY OF GRANTS PASS V. JOHNSON

**THE ISSUE:** Does enforcement of ordinances prohibiting camping on public property constitute “cruel and unusual punishment” prohibited by the Eighth Amendment?

# Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019):

- Eighth Amendment's cruel and unusual punishment clause bars a city from criminally prosecuting people for sleeping outside on public property when those people have no home or other shelter to go to
- Based *Robinson v. California*, 370 U.S. 660 (1962) and *Powell v. Texas*, 392 U.S. 514 (1968)
- Certiorari denied



JUSTICE KAGAN: “[T]his is a super-hard policy problem for all municipalities.”

# Causation and Damages in Data Breach Class Actions

# Hashemi v. Bosley, Inc.

- Attorney-fee motion re Strength of Plaintiffs' Case
- Even though Plaintiff had a reasonably good chance on liability, “damages methodologies in data breach cases are largely untested and have yet to be presented to a jury”
- “[I]n part because many Class Members have suffered no financial injury at all—just increased risk of financial injury.”

# Medoff v. Minka Lighting, LLC

- Motion to Dismiss
- “the exposure of social security information and the posting of... social security number[s] on the Dark Web... bears a sufficiently close relationship to the tort of public disclosure of private fact.”
- “imminent risk of identity theft,” because financial information was exposed in the breach and posted on the Dark Web
- Court also denied the motion to dismiss for lack of damages, for the same reason

# Bug Bounty Programs & Criminal Liability



# U.S. v. Sullivan

- Former Uber Chief Information Security Officer convicted of federal crime: misprision of felony, for failing to report a data incident
- 18 U.S.C. section 4 makes it a crime to, “having knowledge of the actual commission of a felony... conceals” that felony
- 18 U.S.C. section 1030 makes it a felony to “intentionally access[ ] a computer without authorization.”

# Bug Bounty Programs

- Used by businesses across the world (e.g., Airbnb, Amazon, Artsy, AT&T, BuzzFeed, Chime, Google, Dyson, Etsy, Flickr, Goldman Sachs, Hyatt Hotels, Instagram, LinkedIn, Lyft, PlayStation)
- Offers payment (a “bounty”) to external security researchers (“hackers”) who find and bring a cybersecurity vulnerability (a “bug”) to the company
- Business also retroactively “authorizes” the researcher’s access to the computer systems
- *How does this interact with 18 U.S.C. sections 4 and 1030?*

# Changes in Administrative Deference in the Ninth Circuit

# U.S. v. Castillo

- Official commentary to federal criminal sentencing guidelines, which the court held is the “equivalent of” an administrative rule
- Originally, interpretation given controlling weight unless plainly erroneous or inconsistent with a promulgated regulation
- SCOTUS narrowed this, providing that deference is appropriate only if a regulation is truly ambiguous, and before concluding a rule is ambiguous, courts first must exhaust all “traditional tools” of construction

# U.S. v. Scheu

Applied the Castillo/ Kisor rule to the guidelines, but found that the text of the guideline being interpreted was unambiguous using traditional rules of statutory construction; although, also noting that the interpretation is consistent with how the agency has applied it for years.

# Safety Valve Eligibility -- *Pulsifer v. United States*

## Construing 18 U.S.C. § 3553(f)(1)

- Rejects “complete combo” reading
- Endorses checklist approach
  - A defendant can have none of the items listed in (f)(1):
    - ✓ More than 4 criminal history points (excluding 1-point offenses)
    - ✓ Prior 3-point offense
    - ✓ Prior 2-point violent offense

The meaning of conjunctions are determined by statutory context.

# Jury Right -- *Erlinger v. United States*

ACCA 18 U.S.C. § 924(e)

*Is a jury required to find that predicate offenses were committed on different occasions?*

*Wooden's unfinished business:*

- Different occasions question is now holistic and fact-intensive.
- Does it go beyond the “fact of a prior conviction” (*Almendarez-Torres*) exception to *Apprendi* jury requirement?
- How would a jury requirement work?

# Confrontation -- *Smith v. Arizona*

Testifying expert conveys statements of non-testifying analyst to support opinion.

- Confrontation clause violation?
  - Are non-testifying analyst's statements offered for their truth?

FRE 703 implications?

Ditching the primary purpose test?

- Some Justices interested in a formality and solemnity test.



# Second Amendment -- *United States v. Rahimi*

18 U.S.C.  
§ 922(g)(8)

Prohibits the possession of firearms by persons subject to domestic-violence restraining orders

*Does it violate the Second Amendment?*

Historical  
analogue?

Is a history of disarming irresponsible/dangerous individuals enough?

*Or is a closer regulatory analogue required?*

Clarifying  
*Bruen*?

Some Justices critical of the “history and tradition” test and lower courts’ application.

*Will the test be softened in some way?*