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Legal Sidebar

EMTALA Emergency Abortion Care Litigation: Overview and Initial Observations (Part II of II)

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As discussed in Part I of this Legal Sidebar series, after the Supreme Court decided *Dobbs v. Jackson Women's Health Organization* and state abortion restrictions began going into effect in some states, the Department of Health and Human Services (HHS) issued a July 2022 guidance document (HHS Guidance) regarding the enforcement of the Emergency Medical Treatment and Active Labor Act (EMTALA). The HHS Guidance reiterates hospitals' and their physicians' obligations under EMTALA to provide stabilizing care—including abortion in medically appropriate circumstances—when a patient presenting at an emergency department is experiencing an emergency medical condition. After HHS issued the Guidance, the State of Texas, in *Texas v. Becerra*, sued to block enforcement of the Guidance while HHS, in *United States v. Idaho*, sued the State of Idaho to block enforcement of Idaho's abortion ban to the extent it conflicts with EMTALA. At the preliminary injunction stage, the district courts reached conflicting conclusions as to the validity of the Guidance and whether EMTALA preempted the state abortion restriction at issue. The *Texas* court enjoined the Guidance in Texas while the *Idaho* court enjoined part of Idaho's abortion restriction. This part of the Legal Sidebar provides an overview of the district court orders and some initial observations regarding those decisions and the parties' litigating positions.

District Court's Decision in *Texas v. Becerra*

The State of Texas and two plaintiffs representing physician organizations opposed to elective abortions sued to challenge the HHS Guidance. The plaintiffs assert, among other arguments, that the HHS Guidance exceeds HHS's statutory authority and was improperly issued without the requisite notice-and-comment process. In an August 2022 order, the U.S. District Court for the Northern District of Texas agreed and granted the plaintiffs' motion for preliminary injunction, temporarily enjoining the HHS Guidance in Texas.

As a threshold matter, the court concluded that the plaintiffs had standing to sue and that the HHS Guidance is a final agency action subject to judicial review. As to standing, which requires plaintiffs to

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establish they have suffered an injury in fact, the court found that "the Guidance's reading of EMTALA theoretically allows for abortions in cases prohibited by Texas law." The court noted, for example, that the HHS Guidance states that abortion may be required for emergency medical conditions that are likely to become emergent, while Texas law requires the life-threatening physical condition to already be present. The differences between the HHS Guidance and Texas law, in the court's view, are material and sufficiently establish an actual injury both to Texas's sovereign interests to enforce its own laws and to the organizational plaintiffs' members who face potential enforcement actions by HHS. The court further concluded the HHS Guidance is a reviewable final agency action, rejecting HHS's argument that it "simply restates the preexisting and long-understood requirements" of EMTALA.

On the merits, the court held that plaintiffs are likely to succeed on their claim that the HHS Guidance exceeds HHS's statutory authority. In the court's view, EMTALA does not directly address whether a physician must perform an abortion when he or she believes it would resolve a pregnant woman's emergency medical condition. The court observed that instead, EMTALA's definition of "emergency medical condition"—which references, for a pregnant woman, a condition that threatens her health *or* the health of the "unborn child"—creates an obligation to stabilize *both* the pregnant woman and her unborn child. In the court's view, EMTALA therefore leaves unresolved what to do when an emergency medical condition threatens the health of both the pregnant woman and the unborn child, such that there is no direct conflict between EMTALA and state laws that attempt to address such circumstances. Under EMTALA's preemption provision, the court reasoned, such a nonconflicting state law is preserved. By requiring a physician to provide abortion as a stabilizing treatment where the gap-filling state law prohibits such a treatment, the court continued, the Guidance exceeds EMTALA.

In so concluding, the court rejected HHS's argument that EMTALA's reference to the health of an "unborn child" is merely meant to ensure that a hospital's EMTALA obligations extend to a scenario "where the unborn child's health (and not the pregnant patient's health) is threatened." In the agency's view, Congress did not intend this reference to limit EMTALA-mandated care to pregnant patients when they themselves experience an emergency medical condition, particularly if the condition also falls within one of the other two disjunctive criteria for establishing an emergency medical condition.

The court also concluded that plaintiffs are likely to succeed on their claim that HHS improperly issued the HHS Guidance, finding that the Guidance was a policy statement that establishes or changes a substantive legal standard and is subject to the notice-and-comment requirements of the Administrative Procedure Act. Based on these conclusions, the court temporarily enjoined HHS from enforcing the Guidance within Texas. As litigation continues, the United States has asked the district court to clarify the injunction's scope, specifically whether it would prohibit HHS from enforcing EMTALA even where the federal obligation to provide stabilizing treatment dovetails with the state law's exception to the abortion ban. The United States has also appealed the district court's order to the U.S. Court of Appeals for the Fifth Circuit.

District Court's Decision in *United States v. Idaho*

In August 2022, the United States sued the State of Idaho, asserting that aspects of the state's abortion ban conflict with EMTALA, and seeking to enjoin the state from enforcing the ban to the extent it conflicts with EMTALA-mandated care. Later that month, the U.S. District Court for the District of Idaho granted the United States' motion for preliminary injunction.

The court concluded, as a threshold matter, that the United States has a cause of action against the state based on the court's inherent equitable power to enjoin a state law that conflicts with a federal statute. The court also concluded that the United States demonstrated sufficient injury in fact to establish standing, including based on the harm to its sovereign interests when its laws are violated.

On the merits, the court concluded that the United States is likely to succeed on its claim that aspects of the Idaho law conflict with EMTALA and are preempted. "[T]he plain language of the statutes," according to the court, demonstrates that EMTALA requires abortions in certain circumstances not covered by the state law's affirmative defense, making it impossible for physicians to comply with both laws simultaneously in those situations. In particular, the court concluded that EMTALA directs physicians to provide stabilizing treatment—including abortion—"if they reasonably expect the patient's condition will result in serious impairment to bodily functions, serious dysfunction of any bodily organ or part, or serious jeopardy to the patient's health." In contrast, the state law's affirmative defense, the court continued, more narrowly allows the performance of abortion when "the treating physician determines [the procedure] [is] *necessary* to prevent the patient's death." Under the state law, the court reasoned, it is not enough for a condition to be life-threatening, "which suggests only the *possibility* of death"; instead, "the patient's death must be imminent or certain absent an abortion."

The court further concluded that the Idaho law "stands as a clear obstacle" to Congress's intent to ensure adequate emergency care through EMTALA by deterring physicians from providing abortions as stabilizing treatment in some emergency situations. The inherent deterrent effect of a criminal statute is compounded here, according to the court, by both the abortion ban's structure, which provides for an affirmative defense that can only be asserted upon prosecution, rather than an exception, as well as the uncertain scope of the affirmative defense. In the court's view, the determination that a physician must make to invoke the defense—whether abortion is necessary to prevent death—is often a "medically impossible determination" given that "medical risks exist along a continuum" with a range of possible or probable outcomes. The uncertainty as to the defense's availability, according to the court, would deter even those providers who are willing to risk prosecution from providing emergency abortion care, resulting in delayed care that frustrates EMTALA's purpose to provide adequate emergency care.

After determining that the United States also met the remaining preliminary injunction factors, the court enjoined the state from enforcing the abortion ban to the extent it conflicts with EMTALA. As litigation continues in the district court, the Idaho legislature, which intervened in the case to participate in the preliminary injunction motion, asked the court to reconsider its order.

Initial Observations

In holding that the Constitution does not confer a right to abortion, and "return[ing] the issue of abortion to the people's elected representatives," one of the open questions after *Dobbs* is how state abortion restrictions will interact with existing federal law. The litigation over EMTALA's preemptive scope is one example of such an interaction. The ongoing litigation in *Texas* and *Idaho* highlights several issues related to this preemption analysis.

Preemption as a context-specific analysis. The contrasting preliminary injunction orders in *Texas* and *Idaho*—in which one court enjoined the HHS Guidance in Texas while another court enjoined Idaho's state ban in part—as well as the parties' continuing dispute over the scope of the injunctions in each case, highlight the context-specific nature of the preemption analysis. At bottom, preemption involves taking a comparative look at the relative obligations or prohibitions imposed by the applicable federal and state laws to discern the existence of any conflict. Here, the extent to which EMTALA preempts state abortion bans depends in significant part on how courts interpret the scope of EMTALA's requirements and the scope of the relevant state restrictions—more specifically, whether the *exceptions* to state restrictions permit physicians to perform emergency abortion procedures in circumstances required by EMTALA. If not, a state abortion restriction may be in direct conflict with EMTALA.

The uncertain scope of the life-saving exceptions to state abortion restrictions. Because the scope of exceptions to state abortion restrictions is central to the EMTALA preemption analysis, both *Texas* and *Idaho* required the states in each case to articulate their view of the parameters of their respective life-

saving exceptions. The states' litigation positions potentially highlight an issue flagged by some commentators even before the issuance of *Dobbs*—i.e., uncertainties concerning the scope of such exceptions, which all existing state abortion restrictions have in varying formulations.

In *Idaho*, where the affirmative defense allows for abortions "necessary to prevent the death of the pregnant woman," the court noted several physician declarations highlighting real-life cases of emergency pregnancy complications that required abortion as treatment—involving, for example, preeclampsia and infection with the possibility of developing sepsis. According to the physicians, it would have been unclear to them whether those circumstances would meet the law's affirmative defense standard. In its response, Idaho seemingly agreed that these circumstances fall within the affirmative defense—such that there is no conflict between EMTALA and state law—because the physicians determined in their good faith medical judgment "that the patient's life was in danger"—a standard arguably *less* stringent than the "necessary to prevent death" statutory standard.

In *Texas*, HHS defended its Guidance in part by arguing that Texas had not identified any "particular medical circumstance that falls into any gap between Texas law and EMTALA"—for example, a circumstance in which EMTALA would require abortion to avoid "serious impairment to bodily functions" but state law would prohibit the treatment because it falls outside the exclusion for when there is a "serious risk of substantial impairment of a major bodily function." In response, Texas pointed to the HHS Guidance's reference to "incomplete medical abortion." The district court accepted that as an example of a circumstance where the HHS Guidance "permits a physician to immediately complete a medical abortion—regardless of whether the unborn child is still alive and before it presents a threat to the life of the mother" in contravention of state law. Whether this is a fair reading of the HHS Guidance, however, is unclear because the Guidance does not appear to treat incomplete medical abortion differently from other pregnancy complications implicating EMTALA. As a result, some could argue the Guidance would not appear to require abortion as stabilizing care absent emergent circumstances such as severe bleeding.

Both Idaho's defensive litigation position—which appears to advance a less stringent reading of the state's life-saving exception that is more on par with EMTALA's standard—and the lack of concrete medical circumstances identified by Texas that would highlight a conflict between its law and EMTALA, tend to suggest a small gap, if any, between EMTALA and relevant state laws. In other words, these cases may suggest that, as a practical matter, in most circumstances in which EMTALA requires hospitals and their physicians to provide abortion as stabilizing treatment, such circumstances fall within the states' life-saving exceptions to their abortion restrictions.

Emergency abortion care and the "major questions" doctrine. The district court orders in *Texas* and *Idaho*—despite reaching conflicting results—are notable for one similarity. Neither court refers to the "major questions" doctrine, which both Texas and the Idaho legislature sought to invoke. As discussed in more detail in this Sidebar, the Supreme Court last term formally applied the "major questions doctrine" in rejecting the Environmental Protection Agency's reliance on its statutory authority authorizing it to lower emissions through the application of the "best system of emission reduction" to lower greenhouse gas emissions. The Court rejected this claimed authority in part because it concerned an approach—encompassing an emission trading system—involving a "major question" of "vast economic and political significance" that Congress had not clearly authorized the agency to implement.

Both Texas and the Idaho legislature argued that EMTALA could not preempt the respective state abortion restrictions because "[w]hether and when to permit abortions is an issue of vast policy and political significance" that EMTALA does not clearly address. Neither court, however, relied on this doctrine in interpreting EMTALA. The courts' silence could speak to one difference between a statute that grants an agency an open-ended authority to apply the "best system of emission reduction" versus EMTALA, which tethers its requirements to the reasonable medical judgment of physicians and the relevant standards of practice, an objective standard that likely cabins the scope of any agency discretion.

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