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Legal Sidebar

EMTALA Emergency Abortion Care Litigation Over Idaho's Abortion Restriction Heads to the Supreme Court

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On April 24, 2024, the Supreme Court is set to hear oral argument in *Moyle v. United States*, a case about access to emergency abortion services. Specifically, the case concerns whether the Emergency Medical Treatment and Labor Act (EMTALA), a federal law that generally requires Medicare-participating hospitals to provide emergency care to any individuals regardless of their ability to pay, preempts parts of an Idaho law criminalizing the performance of many abortions. As amended, the state law generally prohibits abortions except in limited circumstances. After this state restriction took effect, the United States sued Idaho, alleging that the state law conflicts with EMTALA by prohibiting physicians from providing abortions in certain emergency circumstances, as required by EMTALA. After the district court sided with the United States and issued a preliminary injunction that stopped the state from enforcing its abortion restriction to the extent it conflicted with EMTALA, the State of Idaho and the state legislature appealed and eventually filed applications with the Supreme Court seeking to stay the injunction. The Supreme Court granted the stay application, allowing the state law to go into effect in full while the Court considers the preemption question. This Sidebar provides background on EMTALA and relevant Idaho law, an overview of the lower courts' decisions, and certain observations and considerations for Congress.

Background

The preemption doctrine, grounded in the Constitution's Supremacy Clause, provides that federal law supersedes conflicting state laws. Federal law can preempt state law either *expressly* (i.e., through a statutory provision that explicitly specifies the scope of state laws that are displaced) or *impliedly*, including when it is "impossible for a private party to comply with both state and federal requirements" or when implementation of state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

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EMTALA

Congress enacted EMTALA in 1986 amid reports of hospital emergency rooms refusing to treat poor or uninsured patients. The law requires hospitals, as a condition of receiving federal Medicare funding, to provide services to any individual presenting at an emergency department or face potential enforcement action. EMTALA generally requires Medicare-participating hospitals with emergency departments (1) to provide an appropriate medical screening examination to an individual requesting examination or treatment to determine whether an emergency medical condition exists; and (2) if such a condition exists, to provide necessary treatment to stabilize the individual before any transfer can take place. EMTALA defines an *emergency medical condition*, in relevant part, as

> a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) 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, or (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part.

Participating hospitals and responsible physicians that negligently violate EMTALA's requirements may be subject to civil monetary penalties or other enforcement action. Responsible physicians that engage in repeated or gross violations may also be excluded from participation in federal health care programs. Central to the *Moyle* litigation, EMTALA includes an express preemption provision (42 U.S.C. § 1395dd(f)) that addresses the interaction of the federal act and state law. This provision specifies that EMTALA does "not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section."

Idaho's Abortion Restriction

After the Supreme Court, in 2022, decided *Dobbs v. Jackson Women's Health Organization*, in which overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* in holding that the U.S. Constitution does not confer a right to an abortion, abortion access restrictions took effect or were enacted in many states.

In Idaho, the state legislature has enacted several laws aimed at restricting abortion access. Among them, the state legislature added Idaho Code § 18-622, or Section 622, which generally makes performance of an abortion—at any pregnancy stage—a felony punishable by two to five years in prison. The initially enacted Section 622 generally defined abortion as the use of any means to intentionally terminate a "clinically diagnosable pregnancy." Unlike abortion restrictions in several other states, Section 622 did not exclude from the definition actions to address certain pregnancy complications that may necessitate emergency treatment, such as ectopic pregnancies.

As initially enacted, Section 622 also did not provide any exceptions to the abortion ban. The provision, instead, provided two affirmative defenses that physicians could invoke upon prosecution. First, an accused physician could avoid conviction by proving, by a preponderance of evidence, that the abortion, in the physician's good faith medical judgment (1) "was necessary to prevent the death of the pregnant woman" and (2) was performed in a manner that "provided the best opportunity for the unborn child to survive, unless, in his good faith medical judgment, termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman." Second, an accused physician could assert an affirmative defense based on a reported case of rape or incest. Because of these features of Section 622, it was considered by some commentators to be one of the strictest abortion restrictions in the country.

HHS's EMTALA Guidance

As part of the Biden Administration's response to state abortion restrictions, the Department of Health and Human Services (HHS) issued a July 2022 guidance document (HHS Guidance) regarding EMTALA enforcement. The HHS Guidance reiterates that Medicare-participating hospitals must provide appropriate medical screening examinations to those who come to their emergency departments and request examination or treatment. In cases where the examining physician determines that an emergency medical condition exists, the HHS Guidance continues, the hospital must also provide necessary stabilizing treatment, irrespective of conflicting state laws. The HHS Guidance states that, under these requirements, if a physician believes that a pregnant patient presenting at an emergency department is experiencing a condition that is likely or certain to become emergent, and that abortion is the stabilizing treatment necessary to resolve that condition, the physician must provide that treatment. Examples the HHS Guidance provides of relevant conditions may include "ectopic pregnancy, complications of pregnancy loss, or emergency hypertensive disorders, such as preeclampsia with severe features."

The HHS Guidance further provides that a state-level abortion restriction that "does not include an exception for the life of the pregnant person—or draws the exception more narrowly than EMTALA's emergency condition definition"—is preempted by EMTALA.

District Court's Preliminary Injunction

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 a preliminary injunction.

The court determined that the United States is likely to succeed on its claim that aspects of the Idaho law conflict with EMTALA and are preempted. Under Ninth Circuit precedents, the court explained, EMTALA's "directly conflicts" express preemption language refers to both impossibility preemption and obstacle preemption. "[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, by deterring physicians from providing abortions as stabilizing treatment in some emergency situations, the Idaho law "stands as a clear obstacle" to Congress's intent to ensure adequate emergency care through EMTALA. 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.

The court enjoined the state from enforcing the abortion ban to the extent it conflicts with EMTALA. The Idaho Legislature, which intervened for purposes of the preliminary injunction, and the State of Idaho appealed the district court's decision and moved for a stay of the injunction pending appeal.

Idaho's Amendment of Section 622

In April 2023, while the state's appeal was pending, the state legislature amended Section 622 and its related definitions. Among other changes, the provision's two affirmative defenses were amended to be statutory exceptions. As a practical matter, this change means that, in the event of a prosecution, the burden of proof lies with the state to prove that the exception does not apply, rather than on an accused physician to prove that he or she is entitled to this defense. The state legislature also amended the definition of abortion to exclude several treatments, including "the removal of an ectopic or molar pregnancy" and "the treatment of a woman who is no longer pregnant."

Idaho's Motion to Stay the Preliminary Injunction Before the Ninth Circuit and Subsequent Petition for Certiorari

In September 2023, a three-judge panel of the Ninth Circuit disagreed with the district court and stayed the preliminary injunction, on the basis that EMTALA *does not* preempt Section 622. In the court's view, the state law does not "directly conflict" with EMTALA because it is not impossible to comply with both laws. According to the court, EMTALA's "clear and manifest" purpose was to "ensure that hospitals do not refuse essential emergency care because of a patient's inability to pay." The law, in the court's view, "does not impose *any* standards of care on the practice of medicine," nor does it "require that a hospital provide whatever treatment an individual medical professional may desire."

In addition, the court continued, even if EMTALA requires abortions as "stabilizing treatment" in limited circumstances, Section 622 still does not conflict with EMTALA because "EMTALA would not require abortions *that are punishable by section 622*." In the court's view, to the extent EMTALA requires abortions in certain circumstances, such circumstances fall within Section 622's lifesaving exception—as amended by the Idaho Legislature and as interpreted by Idaho's Supreme Court following the district court's decision. The appeals court explained that the exception, as interpreted by the state supreme court, applies whenever "a doctor subjectively believes, in his or her good faith medical judgment, that an abortion is necessary to prevent the death of the pregnant woman"—with no "immediacy" or "certainty" requirement on the likelihood of death. According to the court, this clarification, together with statutory amendments that changed this exception from an affirmative defense to a statutory exception, effectively closed any gap between EMTALA's requirements and Section 622's lifesaving exception.

The court further concluded that Section 622 does not pose an obstacle to the purposes of EMTALA because Congress enacted EMTALA to "prevent hospitals from neglecting poor or uninsured patients with the goal of protecting 'the health of the woman' and 'her unborn child.'" Accordingly, to the court, Section 622's abortion restrictions "do not pose an obstacle to EMTALA's purpose because they do not interfere with the provision of emergency medical services to indigent patients." After determining that the state met the remaining stay factors, including that the state would suffer irreparable harm by being prevented from enforcing Section 622, the court stayed the district court's preliminary injunction, allowing Section 622 to go into effect in full.

After the Ninth Circuit granted the United States' petition to rehear the case before the full court, the en banc court also, consistent with court rules, vacated the three-judge panel's order granting stay, again reinstating the preliminary injunction. The state then sought a stay of the preliminary injunction before the Supreme Court, which granted the application and agreed to treat it as a petition for certiorari before judgment, which the Court grants in cases of "imperative public importance." As a result of the Supreme

Court order, Section 622 was allowed to go into full effect while the Court considers whether EMTALA preempts Idaho's abortion law, particularly in circumstances in which terminating a pregnancy would be needed for emergency stabilization treatment.

Observations and Considerations for Congress

At oral argument, the Supreme Court may address several interrelated issues on preemption, including (1) whether EMTALA requires emergency abortion care as "stabilizing treatment" in specified circumstances; (2) if so, whether Section 622 would prohibit any emergency abortion care required by EMTALA such that there is a direct conflict between the two laws; and (3) even if Section 622 does not prohibit EMTALA-required abortion care—e.g., because Section 622's lifesaving exception is coextensive with EMTALA's requirements—whether the state law nevertheless produces a chilling effect on physicians that prevents them from providing EMTALA-required care in a manner that frustrates the purposes of EMTALA.

Of note, as articulated in briefs to the Supreme Court, the litigating stances of the state parties in *Moyle* do not appear to align completely. For instance, only the state legislature, which filed a separate brief from the State of Idaho, appears to agree with the three-judge Ninth Circuit panel's conclusion that, to the extent EMTALA requires emergency abortion care, EMTALA does not require care punishable by Section 622. The state, which is responsible for enforcing Section 622, does not appear to concede that Section 622's lifesaving exception is coextensive with EMTALA's requirements, opting to focus its argument instead on its view that EMTALA does not require provision of emergency abortion care. The federal government, for its part, maintains that EMTALA's requirements are broader than Section 622's lifesaving exception, because they require stabilizing treatment when it could reasonably be expected to result in grave harm to health, not only when it is "necessary" to prevent "death." The potential differences between how the state parties construe the scope of Section 622's exception could indicate uncertainty over the exception's scope. To the extent the Supreme Court considers the potential chilling effect of the state law, it remains to be seen whether this uncertainty factors into the Court's analysis.

The Court is expected to issue its decision in *Moyle* this summer, and the decision may shed light on the interplay between the scope of a health care provider's duty to provide emergency abortion services under EMTALA and state restrictions that limit a health care provider's ability to provide abortion care. While the Court's decision will likely only address the interaction between EMTALA and the relevant Idaho statute, it is possible that its forthcoming decision could affect other pending or future legal challenges, including *Texas v. Becerra*, a legal challenge involving EMTALA preemption and a Texas abortion statute. This month, federal government plaintiffs have petitioned the Supreme Court for review of the *Texas* case. Because the "ultimate touchstone" of preemption analysis is congressional intent, Congress may choose to amend EMTALA to clarify its intended scope and preemptive effect as applied to emergency abortion services, to the extent it determines appropriate.

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