Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

Supreme Court Allows Emergency Abortions in Idaho but Leaves Litigation Unresolved

July 12, 2024

On June 27, 2024, the Supreme Court, in a one-sentence, unsigned (*per curiam*) order accompanied by four concurring and/or dissenting opinions, concluded that it had "improvidently granted" review before judgment in *Moyle v. United States*, a case about access to emergency abortion services. In January 2024, the Court agreed, on the State of Idaho's application, to review one question: whether the Emergency Medical Treatment and Labor Act (EMTALA), a federal law that generally requires Medicare-participating hospitals to provide emergency care to any individual regardless of their ability to pay, preempts—or supersedes—parts of an Idaho law criminalizing the performance of many abortions. At the time, the Court also stayed the district court's preliminary injunction, allowing the state law to go into effect in full. Under its *per curiam* order, however, the Court determined that it should not have agreed to hear the case at this juncture, and the litigation is to resume in the lower courts. The order also reinstated the district court's preliminary junction, blocking Idaho from enforcing its abortion restriction in emergency circumstances in which a physician determines that abortion is the necessary stabilizing care.

This Sidebar provides background on the case's litigation history, an overview of the concurring and/or dissenting opinions that accompanied the order, and certain observations and considerations for Congress.

Background

Idaho's Abortion Restriction and HHS's Guidance on EMTALA

After the Supreme Court, in June 2022, decided *Dobbs v. Jackson Women's Health Organization*, in which the Court overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* and held 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 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 version of Section 622 generally defined abortion as the use of any means to intentionally terminate a "clinically diagnosable pregnancy" and did not exclude acts to address certain pregnancy

Congressional Research Service
https://crsreports.congress.gov
LSB11196

complications such as ectopic pregnancies. The law also did not provide any exceptions to the abortion ban. Section 622 instead provided two affirmative defenses that physicians could invoke upon prosecution. First, an accused physician could have avoided conviction by proving, by a preponderance of evidence, that the abortion, in the physician's good faith medical judgment, "was necessary to prevent the death of the pregnant woman" and 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 have asserted an affirmative defense based on a reported case of rape or incest.

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 (July 2022 HHS Guidance, or Guidance) regarding EMTALA. Under this federal law, hospitals—as a condition of receiving federal Medicare funding—must provide services to any individual presenting at an emergency department. Congress enacted EMTALA in 1986 amid reports of hospital emergency rooms refusing to treat poor or uninsured patients. The law 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.

EMTALA includes an express preemption provision (42 U.S.C. § 1395dd(f)) stating 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."

The July 2022 HHS Guidance states that, under EMTALA's 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 include "ectopic pregnancy, complications of pregnancy loss, or emergency hypertensive disorders." 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.

Litigation over Idaho's Abortion Restriction

In August 2022, the United States sued the State of Idaho, asserting that aspects of the state's abortion ban conflict with and are preempted by EMTALA. Later that month, the U.S. District Court for the District of Idaho agreed that the United States was likely to succeed on this claim and granted the United States' motion for a preliminary injunction, blocking the state from enforcing its abortion ban to the extent it conflicts with EMTALA. In particular, the district court found that EMTALA requires abortions as stabilizing treatment in certain circumstances not covered by the state law's affirmative defenses. Whereas EMTALA requires an abortion when physicians "reasonably expect" the procedure to prevent serious harm, the court reasoned, the state law permits an abortion only when abortion is *necessary* to prevent the patient's death—that is, when death is imminent or certain absent an abortion. Section 622, the court continued, also conflicts with EMTALA by deterring physicians from providing abortions as stabilizing treatment in some emergency situations, such that the Idaho law "stands as a clear obstacle" to Congress's intent to ensure adequate emergency care through EMTALA.

In January 2023, while Idaho asked the district court to reconsider its decision, the Idaho Supreme Court interpreted Section 622's necessary-to-prevent-death defense in a separate case. The state supreme court held, among other conclusions, that the affirmative defense is narrower than a broader "'medical emergency' exception" contained in a related state abortion restriction that more closely mirrors EMTALA's text. The state supreme court, however, also held that the phrase "necessary to prevent the death of a pregnant woman" sets forth a "clearly subjective standard" that focuses on the physician's "'good faith medical judgment' on whether [an] abortion was 'necessary to prevent the death of the pregnant woman.'" This subjective "good faith" standard, according to the court, does not require a physician to demonstrate "a 'medical consensus' on what is 'necessary' to prevent" death, or a "'certain percent chance' . . . that death will occur." The district court declined to reconsider its preliminary injunction order based on the Idaho Supreme Court's decision, concluding that the state supreme court's decision supported issuance of the preliminary injunction.

In April 2023, while Idaho's appeal of the preliminary injunction order was pending before the Ninth Circuit, 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, such as "the removal of an ectopic or molar pregnancy."

In September 2023, a three-judge panel of the Ninth Circuit disagreed with the district court and stayed the preliminary injunction, allowing Section 622 to take effect in full. In the appellate 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." EMTALA, in the court's view, "does not impose *any* standards of care on the practice of medicine." 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 necessary-to-prevent-death exception—as amended by the Idaho Legislature and as interpreted by Idaho's Supreme Court. The court further concluded that Section 622 does not pose an obstacle to the purposes of EMTALA because Section 622 does not "interfere with the provision of emergency medical services to indigent patients."

The Ninth Circuit granted the United States' petition to rehear the case before the full court and vacated the stay order pursuant to court rules, reinstating the district court's 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 considered whether EMTALA preempts Idaho's abortion law in circumstances in which terminating a pregnancy would be needed for emergency stabilization treatment.

Supreme Court's Order and Accompanying Opinions

On June 27, 2024, the Supreme Court issued a *per curiam* order dismissing Idaho's petition as improvidently granted and lifting the Court's stay on the preliminary injunction. The Court did not issue an opinion discussing the order's reasoning, but all the Justices wrote or joined one of four opinions concurring and/or dissenting in the result.

Justice Kagan wrote an opinion joined by Justice Sotomayor, concurring in the decision because, in her view, EMTALA and the Idaho law conflict in "cases in which continuing a pregnancy does not put a

woman's life in danger, but still places her at risk of grave health consequences, including loss of fertility." Idaho's argument that there is no conflict because EMTALA "never require[s] a hospital to 'offer medical treatments that violate state law,' even when they are needed to prevent substantial health harms," is one that, in Justice Kagan's view, is unlikely to succeed on the merits. Accordingly, she reasoned that the state's arguments "never justified emergency relief or our early consideration of this dispute." The Court's order, according to Justice Kagan, "puts the case back where it belongs," where the district court's decision "now can go to the Court of Appeals, and the District Court can afterward consider further evidence and arguments for the purpose of final judgment."

In a part of her opinion also joined by Justice Jackson, Justice Kagan expressly rejects the argument that EMTALA never requires hospitals to provide an abortion, no matter how much that procedure is needed to prevent grave physical harm. In her view, EMTALA "unambiguously requires that a Medicare-funded hospital provide whatever medical treatment is necessary to stabilize a health emergency," including abortion in rare circumstances. Justice Kagan rejects Justice Alito's view that EMTALA's reference to an "unborn child" in its definition of emergency medical condition alters this obligation for a pregnant woman. In her view, "unborn child" was added there to ensure that "a woman with no health risks of her own can demand emergency-room treatment if her fetus is in peril" and "does not displace the hospital's duty to a woman whose life or health *is* in jeopardy and who needs an abortion to stabilize her condition."

Justice Barrett wrote an opinion, joined by Chief Justice Roberts and Justice Kavanaugh, concurring in the decision because, in her view, "the shape of these cases has substantially shifted" since the Court granted certiorari and "the parties' positions are still evolving." In her view, developments since the district court's preliminary injunction order, including amendments of the Idaho law by the state legislature and interpretation by the state supreme court, made the scope of the parties' dispute "unclear." In particular, Justice Barrett noted that with respect to the parties' disputes over "whether EMTALA requires hospitals to provide abortions . . . as necessary stabilizing care," the United States' interpretation of EMTALA's requirements "is far more modest than it appeared" when the Court granted certiorari and stay. Similarly, in her view, the state's position on the scope of Section 622's exception has also evolved to encompass more emergency circumstances. She also noted that the state raised a "difficult and consequential argument" for the first time before the Court regarding "whether EMTALA, as a statute enacted under Congress's spending power and that operates on private parties, *can* preempt state law." This issue, she explained, should be addressed by the lower courts in the first instance. Accordingly, she concludes the case is not appropriate for early resolution and should be permitted "to run [its] course in the courts below."

Justice Barrett further explained that, in her view, lifting the stay on the injunction is also appropriate because the United States' position before the Court undercuts the conclusion that Idaho would suffer irreparable harm under the preliminary injunction. She noted, for instance, that the United States clarified that abortion is never required as a stabilizing treatment for mental health conditions and that federal conscience protections apply to both hospitals and individual physicians in the EMTALA context. Accordingly, she found that the injunction "will not stop Idaho from enforcing its law in the vast majority of circumstances."

Justice Jackson wrote an opinion concurring in part with the order to lift the Supreme Court's stay because in her view, the stay should not have been entered in the first place. There is, in her view, a "substantial and significant" conflict between EMTALA and Section 622. In particular, she reasoned, whereas EMTALA requires hospitals to "provide an emergency abortion that is reasonably necessary to preserve a patient's health," Section 622 criminalizes the provision of this care. Accordingly, in her view, the district court correctly issued the injunction because the answer to the preemption question is "quite clear": "Idaho law prohibits what federal law requires, so to that extent, under the Supremacy Clause, Idaho's law is pre-empted." Justice Jackson, however, dissented with the decision to dismiss the grant of certiorari because she believes the preemption question is ready for the Supreme Court to resolve on the

merits in the United States' favor. In her view, the parties' material representations regarding the issue have been consistent through court proceedings, and no representation made to the Court "reduces the conflict between state and federal law to the point that a ruling from this Court is no longer warranted." Also, in her view, "the need for a clear answer to the Supremacy Clause question" has only increased since the Court granted certiorari," given the likely recurrence of this question and the practical impact of the legal uncertainties on doctors and pregnant patients.

Justice Alito wrote a dissenting opinion joined by Justice Thomas and joined in part by Justice Gorsuch. Justice Alito, like Justice Jackson, disagreed with the decision to dismiss the grant of certiorari and believed that the Supreme Court should have examined the merits of the case, but unlike her, he argued that the Court should have concluded that EMTALA does not preempt Idaho law. By including a reference to "the health of the woman *or her unborn child*" in the definition of "emergency medical condition," EMTALA, according to Justice Alito, "requires the hospital at every stage to protect an 'unborn child' from harm." In his view, the law's text thus "shows clearly that it does not require hospitals to perform abortions in violation of Idaho law." This conclusion is, according to Justice Alito, further buttressed by the fact that EMTALA is an exercise of Congress's spending power. Any spending conditions attached to the receipt of federal money, he reasoned, must be set out unambiguously, and "it is beyond dispute that such a requirement is not unambiguously clear" because "[t]he statute does not mention abortion." Justice Alito noted that although it is unnecessary at this juncture to decide whether the Idaho State legislature is correct that EMTALA cannot preempt state criminal or public health law as a Spending Clause legislation operating on hospitals, he stated, in his view, that the United States had not identified any prior Court decision that rejects this argument. In the part of his dissent joined only by Justice Thomas, Justice Alito also dissented from the decision to lift the Court's stay of the preliminary injunction. In his view, the United States had not demonstrated that it is likely to succeed on the merits of its claims, and the state will be irreparably harmed by being enjoined from effectuating its statute.

Observations and Considerations for Congress

Following the *per curiam* order, litigation in *Moyle* is expected to continue in the lower courts where it left off: before the *en banc* Ninth Circuit to review the district court's preliminary injunction. The parties' litigating positions will likely by shaped by the opinions that accompanied the *Moyle* order. The opinions show that six of the nine Justices appear to have reached a conclusion as to the merits of the preemption question. Justices Kagan, Sotomayor, and Jackson concluded that EMTALA requires hospitals to provide abortions as necessary stabilizing care in some emergency circumstances and preempts Section 622 to the extent that the state's necessary-to-prevent-death exception prohibits EMTALA-required abortions. Justices Alito, Thomas, and Gorsuch, on the other hand, concluded that EMTALA does not preempt Section 622 because the federal law does not require the provision of abortions prohibited by state law.

The remaining three Justices—Justices Barrett and Kavanaugh and Chief Justice Roberts—indicated that their resolution of the preemption question may focus on at least two outstanding questions that, in their view, have not been sufficiently litigated below in the lower courts. The first question is whether, as a constitutional matter, a state law may be preempted by a federal statute that regulates private entities through Congress's Spending Clause power. This is a question that, if the Court resolves in the negative, would have implications beyond EMTALA. Several other Medicare requirements, for example, include express preemption provisions that specify circumstances under which conflicting state laws are superseded. The second question concerns the degree of overlap between any EMTALA-required abortion care and Section 622's necessary-to-prevent-death exception. On this question, both Justice Barrett's and Justice Kagan's concurring opinions appear to indicate that additional factfinding through evidentiary hearings may be appropriate as the case proceeds through the merits stage in the lower courts.

The three undecided Justices' interest in these two questions may also have implications for the pending petition for certiorari in *Texas v. Becerra*, a case that raises a similar question regarding whether EMTALA preempts Texas's abortion restriction, but on a different posture. In *Texas*, the State of Texas and two organizations representing physicians opposed to elective abortions sued HHS to enjoin the federal government's enforcement of the July 2022 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 *Texas*, the Fifth Circuit affirmed the district court's grant of a permanent injunction in favor of the plaintiff that blocked the federal government from enforcing the Guidance in Texas and against the plaintiffs. Among other things, the Fifth Circuit held that the Guidance, which requires physicians to provide an abortion when that care is the necessary stabilizing treatment for an emergency condition, exceeds HHS's statutory authority because "EMTALA does not govern the practice of medicine," which is governed by state laws. Accordingly, in the court's view, "EMTALA does not mandate medical treatments, let alone abortion care, nor does it preempt Texas law."

The lower courts in *Texas* did not address whether a state law may be preempted by a Spending Clause condition on private parties. The parties in *Texas* also did not focus their preemption analysis on the relative scope of any EMTALA requirements related to abortions and Texas's abortion restrictions, which include an exception that may be broader than Idaho's necessary-to-prevent-death exception. Under the Texas exception, physicians may perform an abortion if, in their reasonable medical judgment, a pregnant woman "has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced."

The United States filed a petition for certiorari in April 2024 seeking review of the Fifth Circuit's decision, but the initial petition asked the Court to defer the petition pending the disposition of *Moyle*. It is unclear, given *Moyle*'s *per curiam* order and accompanying split opinions, whether the Court will grant the petition at this time. While there may be enough Justices who are ready to resolve the preemption question to vote in favor of granting the petition, the lack of lower court proceedings in *Texas* on the two questions identified by Justice Barrett's concurrence in *Moyle* may also preclude the Court from ultimately resolving the preemption question in *Texas* based on the case's current posture. The Supreme Court had requested additional briefing that addresses the parties' substantive positions regarding the petition in light of *Moyle*, and that additional briefing may further inform the Court's decision on the *Texas* petition.

Justice Barrett's concurrence in *Moyle* also has potential implications for Congress. To the extent Congress determines it is appropriate to clarify EMTALA's intended scope and preemptive effect while *Moyle* and *Texas* make their way through the courts, the validity of such amendments would be subject to any Supreme Court decision regarding Congress's power to preempt state laws through Spending Clause legislation on private entities, if the Court in fact considers and resolves that question in the future. If the Court resolves the cases without addressing that question, or if the Court concludes that EMTALA may preempt state laws, Congress would continue to have leeway to clarify EMTALA's scope and preemptive effect, given that the "ultimate touchstone" of preemption analysis is congressional intent.

Author Information

Wen W. Shen
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.