App No. 23A470

In the Supreme Court of the United States

STATE OF IDAHO,
Applicant,

V.

UNITED STATES OF AMERICA,
Respondent.

To the Honorable Elena Kagan,
Associate Justice of the United States Supreme Court
And Circuit Justice for the Ninth Circuit

BRIEF OF AMICI CURIAE ADVANCING AMERICAN FREEDOM; IDAHO FAMILY POLICY CENTER; AMERICAN CONSERVATIVE UNION FOUNDATION; AMERICAN FAMILY ASSOCIATION ACTION; AMERICAN VALUES; ANGLICANS FOR LIFE; E. CALVIN BEISNER, PH.D. (PRESIDENT, CORNWALL ALLIANCE FOR THE STEWARDSHIP OF CREATION); CATHOLICS COUNT; CENTER FOR POLITICAL RENEWAL (CPR); CENTER FOR URBAN RENEWAL AND EDUCATION (CURE); CHRISTIAN LAW ASSOCIATION; EAGLE FORUM; FAMILY COUNCIL IN ARKANSAS; CHARLIE GEROW; INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS; JAMES DOBSON FAMILY INSTITUTE; TIM JONES (FORMER SPEAKER, MISSOURI HOUSE; CHAIRMAN, MISSOURI CENTER-RIGHT COALITION); MEN FOR LIFE; MICHIGAN FAMILY FORUM; MINNESOTA FAMILY COUNCIL; NATIONAL RELIGIOUS BROADCASTERS; PROJECT 21 BLACK LEADERSHIP NETWORK; RHODE ISLAND FAMILY INSTITUTE; SETTING THINGS RIGHT; 60 PLUS ASSOCIATION; STUDENTS FOR LIFE OF AMERICA; THE FAMILY FOUNDATION (TFF) OF VIRGINIA; THE JUSTICE FOUNDATION; AND YOUNG AMERICA'S FOUNDATION SUPPORTING EMERGENCY APPLICATION FOR A STAY PENDING APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Regulations

Other Authorities

IDENTITY AND INTEREST OF AMICI CURIAE*

Amici Advancing American Freedom; Idaho Family Policy Center; American Conservative Union Foundation; American Family Association Action; American Values; Anglicans for Life; E. Calvin Beisner, Ph.D., President, Cornwall Alliance for the Stewardship of Creation; Catholics Count; Center for Political Renewal (CPR); Center for Urban Renewal and Education (CURE); Eagle Forum; Family Council in Arkansas; Charlie Gerow; International Conference of Evangelical Chaplain Endorsers; James Dobson Family Institute; Tim Jones (Former Speaker, Missouri House; Chairman, Missouri Center-Right Coalition); Men for Life; Michigan Family Forum; Minnesota Family Council; National Religious Broadcasters; Project 21 Black Leadership Network; Rhode Island Family Institute; Setting Things Right; 60 Plus Association; Students for Life of America; The Family Foundation (TFF) of Virginia; The Justice Foundation; and Young America's Foundation educate the public on the wisdom of America's Constitutional order and believe that the Ninth Circuit's unreported en banc order denying the motion to stay the injunction pending appeal undermines our Constitutional order and is not in accord with this Court's major questions doctrine under *Chevron v. NRDC*, 467 U.S. 837 (1984).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The genius of the Constitution is its structure, dividing power against itself into three coequal branches to protect the liberties of its citizens from government

* No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

overreach. Administrative agencies may only act within the confines of the power granted to them by Congress. "'Enabling legislation' is generally not an 'open book to which the agency may add pages and change the plot line.'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (quoting E. Gellhorn & P. Verkuil, *Controlling Chevron-Based Delegations*, 20 Cardozo L. Rev. 989, 1011 (1999)).

On June 24, 2022, the Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health*, 142 S. Ct. 2228 (2022), overturning *Roe v. Wade*, 410 U.S. 113 (1973). In response to the *Dobbs* decision, President Biden issued Executive Order 14,076 in which he called on the Secretary of Health and Human Services (HHS) to identify ways of expanding access to abortion and thereby increasing dangers to unborn children, among other things. 87 Fed. Reg. 42,053 (July 8, 2022). Only three days later, on July 11, the HHS Secretary issued a letter asserting to health care providers that federal law "protects [their] clinical judgment and the action that [they] take to provide stabilizing medical treatment to [their] pregnant patients, regardless of the restrictions in the state where [they] practice."[1] The Centers for Medicare and Medicaid Services (CMS) issued Guidance in conjunction with the Secretary's letter, instructing participating doctors and hospitals that, under the Emergency Medical Treatment and Labor Act (EMTALA), they are required to provide abortions as a "stabilizing treatment" or transfer the woman to another medical facility that can do so, if they determine that doing so is necessary to protect

[1] Letter to Health Care Providers, SECRETARY OF HEALTH AND HUMAN SERVICES, https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf (last visited November 21, 2023).

the life of the mother, even if providing the abortion would be contrary to state law.[2] It is doubtful that such legislation, directed as it was at providing emergency care for patients unable to afford treatment and enacted by a bipartisan group of senators and representatives, signed by President Reagan, and with language designed to protect the interests of unborn children, was decades later discovered to be a Trojan horse for abortion through all nine months of gestation.

Yet the Guidance threatens noncompliant doctors and hospitals with hefty penalties. Guidance at 5. If given effect, this interpretation would expand the meaning of the 1986 statute to include abortion as a form of treatment and would illegally override legitimate state laws designed to protect women and the unborn.

EMTALA imposes three basic requirements on physicians and hospitals when a patient enters an emergency department seeking care. First, they must screen the patient "to determine whether an emergency medical condition . . . exists." 42 U.S.C. § 1395dd(a). Then they must either provide necessary stabilizing treatment for the person or transfer the individual to another medical facility. 42 U.S.C. § 1395dd(b)(1). Among other requirements, a transfer under section (b) may not occur unless the doctor certifies that the medical benefits of transferring the patient outweigh the increased risks of doing so. 42 U.S.C. § 1395dd(c)(1)(A)(iii). Further, if the emergent situation is labor, the doctor must also consider the risk of the transfer "to the unborn

[2] *Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss*, CENTERS FOR MEDICARE & MEDICAID SERVICES (July 11, 2022), https://www.cms.gov/files/document/qso-22-22-hospitals.pdf (last visited November 21, 2023).

child." 42 U.S.C. § 1395dd(c)(1)(A)(ii). The Guidance issued by CMS tells doctors and hospitals that, when treating pregnant women with emergency conditions, EMTALA requires them to perform abortion as a "stabilizing medical treatment," if it is deemed necessary, and that any state law to the contrary is preempted. Guidance at 1. However, nothing in the language of EMTALA requires that doctors and hospitals provide abortion as a form of "treatment."

This Guidance is part of a pattern of Biden Administration behavior to expand the power of the executive branch through dubious claims. Where Congress is unwilling to act on one of the President's policy priorities, the administrative state is there to fill the gap. Two notorious examples of this overreach have been struck down by this Court in the last two years. The first is the Occupational Safety and Health Administration's (OSHA) workplace vaccine mandate, which the Court struck down in 2022 because it exceeded the agency's statutory authority. *NFIB v. OSHA*, 142 S. Ct. 661 (2022). The second, the Biden Administration's effort to unilaterally cancel student loan debt, was struck down in 2023 for exceeding the Department of Education's statutory authority. *Joseph R. Biden, President of the United States, et al. v. Nebraska, et al.* 600 U.S. ___ (2023). Here, the Biden Administration seeks to preempt constitutional laws enacted by states like Idaho as an exercise of their legitimate interests in safeguarding unborn life and maternal health. As Justice Gorsuch notes, "When an agency claims to have found a previously 'unheralded power,' its assertion generally warrants 'a measure of skepticism.'" *West Virginia v. EPA*, 142 S. Ct. at 2623 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302,

324, (2014)). It is the President's responsibility to "take Care that the Laws be Faithfully executed." U.S. Const. Art. II § 3. To do so requires executing the laws as passed by Congress. When a presidential administration acts beyond the law as established by Congress, the courts have a duty to hold it to account.

ARGUMENT

The 1780 Massachusetts state constitution prohibited each of its government's three branches from exercising the powers of the other two so that, "it may be a government of laws and not of men." Mass. Const. pt. 1, art. XXX. When Congress delegates its authority to executive agencies, the risk increases that we will have a government of men (bureaucrats), and not of laws. This case demonstrates the danger posed by delegation which creates an opportunity for agency officials to pursue their political goals in flagrant disregard of the rule of law.

If an agency's interpretation of a statute it administers triggers what has been called the major questions doctrine, the agency will need to show a clear statement of authority from Congress for that interpretation before the reviewing court may defer to the agency's interpretation. *See West Virginia v. EPA*, 142 S. Ct. at 2621 (2022) (Gorsuch, J., concurring). Because the Federal Government's proposed interpretation of EMTALA seeks to settle an issue of great political importance, intrudes on a specific domain of state law, and is not based on a clear statement from Congress, it deserves no deference.

I. The Department of Health and Human Services' Interpretation of EMTALA is Not Entitled to Deference Because it Seeks to Settle an Issue of Great Political Significance and Because it Seeks to Intrude Into a Specific Domain of State Law.

In *West Virginia v. EPA*, the Court's most recent case addressing the major questions doctrine, Justice Gorsuch in his concurrence found three situations in which an agency interpretation triggers the major questions doctrine, two of which are relevant here. *Id.* at 2620-21. First, there must be a clear statement "when an agency claims the power to resolve a matter of great 'political significance,' or end an 'earnest and profound debate across the country,'" *West Virginia v. EPA*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (quoting *NFIB v. OSHA*, 142 S. Ct. at 665; *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)). Second, agencies may also need a clear statement from Congress "when an agency seeks to 'intrude into an area that is the particular domain of state law.'" *Id.* (quoting *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021)). CMS's interpretation of EMTALA in this case is clearly both related to an issue of great political significance and is intended to intrude into a particular domain of state law.

First, the CMS Guidance was created to address an issue of great political significance in the United States. The "Court has indicated that the [major questions] doctrine applies when an agency claims the power to resolve a matter of great 'political significance' or end an 'earnest and profound debate across the country.'" *West Virginia v. EPA*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (internal quotation marks omitted) (quoting *NFIB v. OSHA*, 142 S. Ct. at 665). This is precisely what CMS seeks to do with its Guidance. After the Supreme Court overturned *Roe v. Wade*,

410 U.S. 113 (1973) in *Dobbs*, 142 S. Ct. 2228, President Biden issued an executive order requiring the Secretary of HHS to find ways to expand abortion access in the United States. 87 Fed. Reg. 42,053 (July 8, 2022). In its decision in *Dobbs*, the Supreme Court returned the issue of abortion regulation to the states after almost fifty years. The clear purpose of the Executive Order and the ensuing Guidance was to claw back some of that democratic power from the people and the states, and to take off the table some abortions that states may otherwise regulate to save children.

Abortion is a matter of significant political controversy in the United States, as it was in 1986 when EMTALA was passed. As the majority noted in *Dobbs*, "Abortion presents a profound moral issue on which Americans hold sharply conflicting views." 142 S. Ct. at 2240. CMS, through its Guidance, seeks to settle that controversy, at least in certain cases, by fiat.

Even if given effect, the Guidance would not prevent states from regulating most abortion within their jurisdictions, but that fact is not dispositive in this analysis. In *NFIB v. OSHA*, 142 S. Ct. 661 (2022), one of the cases identified by Justice Gorsuch as an example of agency action that sought to resolve a significant political matter, OSHA tried to coerce employers into acting as enforcers of an illegitimate vaccine mandate. *See West Virginia v. EPA*, 142 S. Ct. at 2620 (Gorsuch, J., concurring). In that case, the sheer number of Americans affected would likely have been more than those that would be affected by the CMS Guidance in this case. However, the OSHA mandate would not have reached all Americans just as the CMS guidance here would not reach all abortions. Nonetheless, given the significance of

the issue of abortion, its life-and-death nature, and the extent to which this federal action invades the regulatory interests of the states, HHS's attempt to insert itself into this important and contentious issue should trigger the major questions doctrine, and thus obviate judicial deference.

Second, the guidance intrudes into an area that is the particular domain of state law by asserting to doctors and hospitals that state law is preempted by EMTALA. States have a legitimate interest in the safety of women and their preborn children. This interest is recognized by the Court today and has been for at least three decades. *See Dobbs*, 142 S. Ct. at 2284 ("[States'] legitimate interests include respect for and preservation of prenatal life at all stages of development [and] the protection of maternal health and safety.") (citation omitted); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992). In *Dobbs* the Court held that rational basis scrutiny applies to state law restricting abortion. *Dobbs*, 142 S. Ct. at 2283. It recognized that, "A law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.'" *Dobbs*, 142 S. Ct. at 2284 (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)). Because abortion law falls within the category of health and welfare regulation, it is within the domain of state regulation.

Because the health of the mother and the unborn child are legitimate state interests, CMS' attempt to intrude on that interest should not be countenanced absent a clear statement of authority from Congress. CMS's interpretation of EMTALA regarding preemption in this case is wrong. EMTALA is explicit that it will

only preempt state law "to the extent that the [state] requirement directly conflicts with a requirement of this section." 42 U.S.C. § 1395dd(f). Thus, the question is whether there is a direct conflict between state law and EMTALA. Under EMTALA, if a patient arrives in a hospital emergency room with an emergency medical condition or in labor, the hospital must either provide required stabilizing treatment or transfer the patient to another medical facility that can provide stabilizing treatment. 42 U.S.C. § 1395dd(b)(1)(A)-(1)(B). In the case of a woman in labor, if she has not been stabilized, the doctor may only authorize her transfer to another facility if the benefits of doing so would outweigh the risks to both the woman and the "unborn child." 42 U.S.C. § 1395dd(c)(1)(ii).

There is no direct conflict between EMTALA and the relevant state law in this case. In cases of conflict-preemption, state and federal law directly conflict "where (1) it is impossible for a person to comply with both the state law and EMTALA; or (2) where the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372–73 (2000)). Idaho law merely prohibits the performance of an abortion, with certain circumstances excepted. Idaho Code § 18-622. Abortions are not illegal to save the life of the mother or, if performed in the first trimester, in cases of rape or incest. Idaho Code § 18-622(2)(a)-(b). This law in no way prevents hospitals from providing the treatment EMTALA requires, nor does it interfere with EMTALA's goal of avoiding patient dumping.

Thus, because there is no conflict between Idaho law and EMTALA, EMTALA does not preempt Idaho law in this case. By attempting to have state law ruled unconstitutional in an area recognized by the Court as one of legitimate state interest, the Guidance intrudes into a particular domain of state law and thus is not entitled to deference.

II. The Relevant Language of EMTALA Upon Which HHS Relies is Neither a Clear Statement of Authority to Regulate the Politically Contentious Abortion Issue nor is it a Clear Statement of Authority to Preempt State Law.

When the major questions doctrine applies, agencies must provide more than "a colorable textual basis" for their claims to expanded power. *See West Virginia v. EPA*, 142 S. Ct. at 2609. "Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle devices.'" *Id.* (quoting *Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (2001)). Justice Gorsuch, concurring in *West Virginia v. EPA*, wrote that the Court has considered four factors, three of which are relevant here, when determining whether the legislative authority upon which an agency bases its interpretation constitutes a clear statement.

"*First*, courts must look to the legislative provisions on which the agency seeks to rely 'with a view of their place in the overall statutory scheme.'" *West Virginia v. EPA*, 142 S. Ct. at 2622 (Gorsuch, J., concurring) (emphasis in original). CMS's Guidance runs counter to both the purpose of EMTALA and the requirements of the Social Security Act (SSA), generally. As the district court in *Texas v. Becerra* noted, "The primary purpose of EMTALA is 'to prevent patient dumping, which is the

practice of refusing to treat patients who are unable to pay.'" 2022 WL 3639525, at *22 (quoting *Marshall ex rel. Marshall v. E. Carroll Par. Hosp. Serv. Dist.*, 134 F.3d 319, 322 (5th Cir. 1998)). The Guidance does not advance this goal. Rather, it is intended to force doctors and hospitals to either provide an abortion or to transfer the woman to another medical facility where an abortion can be performed. Guidance at 4.

Relatedly, the Guidance directly violates the plain language of the SSA. "EMTALA is subject to the Medicare Act's prohibition that 'nothing in this subchapter,' which includes EMTALA, 'shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided.'" *Texas v. Becerra*, 2022 WL 3639525, at *25 (quoting 42 U.S.C. § 1395). This same court goes on to note that, "Courts across the country uniformly hold that this section prohibits Medicare regulations that 'direct or prohibit any kind of treatment or diagnosis'; 'favor one procedure over another'; or 'influence the judgment of medical professionals.'" *Id.* (quoting *Goodman v. Sullivan*, 891 F.2d 449, 451 (2d Cir. 1989)). Here, CMS has attempted to direct the medical care of pregnant women without regard to the wellbeing of the unborn child and contrary to the overarching requirements of the statutory scheme.

Second, Justice Gorsuch suggests that reviewing courts "look to the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address." *West Virginia v. EPA*, 142 S. Ct. at 2623 (Gorsuch, J., concurring). Further,

"an agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority." *Id.* EMTALA was passed in 1986 by a Congress with the House and Senate under separate party control and signed by President Reagan.[3] It is doubtful that such legislation, directed as it was at providing emergency care for patients unable to afford treatment and enacted by a bipartisan group of senators and representatives, signed by President Reagan, and with language designed to protect the interests of unborn children, was really a Trojan horse for mandatory abortion.

Third, "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *West Virginia v. EPA*, 142 S. Ct. at 2610 (quoting *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941) (internal quotation marks omitted)). Thus, it is telling that "EMTALA has never been construed to preempt state abortion laws." *Texas v. Becerra*, 2022 WL 3639525, at *28. This effort to expand the meaning of the statute to reach a hot political issue of the day is exactly the sort of overreach that should be identified by the clear statement requirement. As Justice Gorsuch notes, "When an agency claims to have found a previously 'unheralded power,' its assertion generally warrants 'a measure of skepticism.'" *West*

[3] *See* Actions - H.R.3128 - 99th Congress (1985-1986): Consolidated Omnibus Budget Reconciliation Act of 1985, H.R.3128, 99th Cong. (1986), https://www.congress.gov/bill/99th-congress/house-bill/3128/actions.

Virginia v. EPA, 142 S. Ct. at 2623 (quoting *Utility Air Regulatory Group*, 573 U.S. at 324).

Therefore, because the CMS Guidance challenged in this case triggers the major questions doctrine, and because it is based not on a clear statement from Congress, but rather on a misreading of the law contrary to the language of the statute and its context, CMS's Guidance is not entitled to deference.

Despite its noncompliance with those statutory requirements for rulemaking, the Biden Administration promptly sued the State of Idaho and used the Guidance to threaten hospitals and doctors with significant civil penalties for failing to comply with its interpretation of the statute. Guidance at 5. The Guidance was issued to advance the policy interests of the Biden Administration without an opportunity for public feedback or for the agency to respond to that feedback. Its interpretation of EMTALA to preempt state abortion laws is entirely novel. *Texas v. Becerra*, 2022 WL 3639525, at *28. This novel interpretation disregards the statute's concern for unborn life, was issued with no opportunity for criticism or correction, and exists explicitly to advance a policy goal of the President. In short, it is a blatant power grab, and thus should not be treated even as persuasive authority.

III. The Ninth Circuit's Decision is Likely to Soon Be in Conflict with Fifth Circuit.

The Ninth Circuit may soon be in conflict with the Fifth Circuit on the question of whether EMTALA requires abortions. *Texas v. Becerra*, 23-10246 (5th Cir. Nov. 7, 2023) (argument before Southwick, Engelhardt & Wilson, J.J.). The State of Texas is also currently defending its own law against an EMTALA challenge brought by doctors. Texas's Human Life Protection Act (HLPA) bans abortion unless (1) the person performing the abortion is a doctor, (2) the 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," and (3) the abortion is performed in a manner that is most likely to allow the child to survive. Tex. Health & Safety Code Ann. § 170A.002(b) (West). However, the requirement that the abortion be performed in a manner most likely to allow the unborn child to survive does not apply in cases where the method would increase the risk to the mother of death or would cause "a serious risk of substantial impairment of a major bodily function of the pregnant female." *Id.*

Finding that it is not impossible for doctors and hospitals to comply with both Texas law and EMTALA, the district court wrote in that case, "EMTALA provides no instructions on what a physician is to do when there is a conflict between the health of the mother and the unborn child" and that "[s]tate law fills this void." *Id*. As the district court there also found, Texas law does not prevent the goals of EMTALA from being accomplished. *See Id*. at 22. EMTALA's primary purpose is to ensure that

patients who are unable to pay still receive essential emergency medical treatment. *Id*. The Texas law does not compel the "rejection of patients." *Id*. (quoting *Harry v. Marchant*, 291 F.3d 767, 774 (11th Cir. 2002)).

Because this issue is being litigated in different circuits and may present as a circuit split in the near future, a revival of the district court's stay in this case would not only protect Idaho's interest but would also provide a useful signal to other lower courts considering these issues.

CONCLUSION

For the foregoing reasons, this Court should reinstate the Ninth Circuit panel's stay of the district court's injunction.

/s/ J. Marc Wheat
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