Nos. 23-726 & 23-727

IN THE

Supreme Court of the United States

MIKE MOYLE, SPEAKER OF THE IDAHO HOUSE OF REPRESENTATIVES, ET AL.,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

STATE OF IDAHO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND ACLU OF IDAHO AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Kathleen R. Hartnett
Kathleen Goodhart
Darina A. Shtrakhman
K.C. Jaski
COOLEY LLP
3 Embarcadero Center
San Francisco, CA 94111

Patrick J. Hayden
COOLEY LLP
55 Hudson Yards
New York, NY 10001

Alexa Kolbi-Molinas
Counsel of Record
Jennifer Dalven
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., 18th Fl.
New York, NY 10004
(212) 549-2633
akolbi-molinas@aclu.org

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th St., NW
Washington, DC 20005

Additional Counsel Listed On Inside Cover

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

Angeline Chen
COOLEY LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004

Alexander Robledo
COOLEY LLP
500 Boylston Street
Boston, MA 02116

Paul Carlos Southwick
Emily Myrei Croston
ACLU OF IDAHO FOUNDATION
P.O. Box 1897
Boise, ID 83701

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Miscellaneous

TABLE OF AUTHORITIES
(continued)

Page(s)

STATEMENT OF INTEREST[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws, including the right of all individuals, regardless of where they live, to access necessary emergency care, as guaranteed for nearly four decades by the Emergency Medical Treatment and Labor Act ("EMTALA"). The ACLU of Idaho is a statewide affiliate of the national ACLU. Over the past twenty-five years, the ACLU has been involved in multiple challenges, including before this Court, seeking to vindicate the rights guaranteed by EMTALA generally, and with respect to emergency abortion care, specifically.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is not a referendum on *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). It requires neither the application of that case, nor a deviation from it. Rather, this case involves the straightforward application of a longstanding federal statutory mandate to provide necessary stabilizing treatment during emergencies, and its preemptive effect on a state law blocking that treatment.

---

[1] No party or counsel for a party authored this brief in whole or in part, and no one other than *amici* and their counsel have made a monetary contribution to this brief's preparation and submission.

Nearly forty years ago, Congress enacted EMTALA, 42 U.S.C. § 1395dd, in response to the widespread problem of hospitals refusing to provide emergency medical treatment to individuals in need of care—either at all, or by inappropriately transferring (or "dumping") individuals from one hospital to the next, while their conditions worsened. For this nationwide problem, Congress created a nationwide solution: a federal law requiring all hospitals with emergency departments that participate in the Medicare program to provide all individuals, regardless of where they live, with "[n]ecessary stabilizing treatment for emergency medical conditions and labor," 42 U.S.C. § 1395dd(b), and expressly preempting any state or local law that "directly conflicts" with this requirement, *id.* § 1395dd(f).

As such, for almost four decades, EMTALA has—in text and in practice—imposed a statutory obligation on covered entities to provide all persons in medical crisis, including pregnant women, with necessary stabilizing treatment. EMTALA requires the provision of necessary stabilizing care or an appropriate transfer to "*any* individual" experiencing an emergency medical condition, *id.* § 1395dd(b)(1) (emphasis added), without exception. Accordingly, in those narrow but critical situations where abortion is the necessary stabilizing treatment, EMTALA's plain text requires covered hospitals to provide it, just as it requires any other stabilizing treatment, and preempts any state law to the contrary.

Petitioners' arguments to the contrary contravene the plain text and seek to rewrite history. First, EMTALA is not, as Petitioners claim, just a nondiscrimination provision that prohibits distinguishing among patients based on ability to pay, or any other criteria. *See, e.g.*, Pet. Br. 4, 32. To the contrary, EMTALA's plain text requires necessary stabilizing care be extended to each individual, and the statute requires no showing that care was withheld due to an "improper motive." *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 250 (1999) (per curiam). Regardless of what motivated Congress to act decades ago, courts cannot ignore the statutory text simply because they believe it "reaches beyond the principal evil legislators may have intended or expected to address." *Bostock v. Clayton Cty.*, 590 U.S. 644, 674 (2020) (internal quotations and citations omitted).

Second, EMTALA contains no implicit or explicit abortion exception. *See, e.g.*, Pet. Br. 17; Pet.-Int. Br. 21. EMTALA does not expressly delineate abortion as a required stabilizing treatment because the statute does not delineate *any* specific treatment that may be required to stabilize individuals facing an emergency. Instead, EMTALA's broad rule requires hospitals to provide "*such* [stabilizing] treatment as may be required." 42 U.S.C. § 1395dd(b)(1) (emphasis added); *see also id.* § 1395dd(e)(3)(A). If the fact that EMTALA did not expressly mention a specific stabilizing treatment meant that covered hospitals had no obligation to provide it, the statute itself would be a nullity. Moreover, the fact that Medicare does not cover all emergency abortions is irrelevant, as EMTALA explicitly states its protections apply

regardless of whether Medicare reimbursement is available. Likewise, that other federal statutes include explicit abortion exceptions only underscores that Congress deliberately did not include one here.

EMTALA's references to the "unborn child" do not create an abortion carve-out either. *See* Pet.-Int. Br. 28; Pet. Br. 32. These references were added to expand and clarify covered hospitals' obligations in two specific contexts: when transferring a pregnant woman who is in labor, 42 U.S.C. §§ 1395dd(c)(1)(A)(ii), (c)(2)(A), (e)(1)(B)(ii), and when a pregnant woman seeks "immediate medical attention" for "her unborn child," even where her own life or health is not at risk, *id.* § 1395dd(e)(1)(A). This expansion and clarification of the law's protections did not *sub silentio* amend EMTALA to exclude pregnant women from obtaining stabilizing abortions when such care is immediately necessary to protect their own health or lives.

Third, EMTALA does not allow state law-created exceptions to the stabilization requirement. *See* Pet. Br. 17; Pet.-Int. Br. 18. To hold otherwise would transform a federal law that *mandates* stabilizing treatment for any individual who needs it into one that sanctions *withholding* it whenever a state chooses to do so. EMTALA's preemption provision makes clear that its obligations cannot be narrowed or nullified by state laws that bar stabilizing treatment. 42 U.S.C. § 1395dd(f).

Finally, Petitioners' arguments are contradicted by history and practice. Congress, the Department of Health and Human Services (under multiple

administrations), and federal courts have long recognized what EMTALA's text makes clear: EMTALA requires hospitals to provide stabilizing abortions when a pregnant woman's health or life is at imminent risk, just like any other stabilizing treatment that a patient requires. This lengthy, consistent, and faithful understanding of EMTALA's text refutes any claim that the Government has created a new interpretation of EMTALA in the wake of this Court's decision in *Dobbs*. Idaho's ban on emergency health-saving abortions may be a recent development; EMTALA's mandatory obligations and preemptive effect are not.

ARGUMENT

"[I]n any case of statutory construction," the Court's "analysis begins with the language of the statute," and "where the statutory language provides a clear answer, it ends there as well." *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 254 (2000) (internal quotations and citations omitted). Otherwise, the Court "would risk amending statutes outside the legislative process reserved for the people's representatives" and "would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations." *Bostock*, 590 U.S. at 655. For nearly four decades, EMTALA's "broad language" has obligated hospitals to provide necessary stabilizing treatment or an appropriate transfer to *any* individual, without exception, and its express preemption clause has overridden any state law to the contrary. *See Pasquantino v. United States*, 544 U.S.

349, 372 (2005) (holding that "broad language" of wire fraud statute covered defendants' conduct). "[N]o canon of statutory construction permits [the Court] to read the statute more narrowly," *id.*, to exempt patients who need emergency abortions from its protections.

I. EMTALA Requires Stabilizing Treatment or Appropriate Transfer for "*Any* Individual" With an Emergency Medical Condition, Without Exception.

EMTALA's text imposes an unambiguous requirement on covered hospitals: they "must" provide "any individual" experiencing an emergency medical condition ***either*** **(1)** such medical treatment "as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur" upon discharge, ***or*** **(2)** an appropriate transfer. 42 U.S.C. §§ 1395dd(b), (e)(3)(A).[2] EMTALA does not delineate

[2] This requirement applies to all individuals, "whether or not eligible for benefits under [Medicare]." 42 U.S.C. § 1395dd(b)(1). An emergency medical condition is one where 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." *Id.* § 1395dd(e)(1)(A). With respect to a pregnant woman who is having contractions, an emergency medical condition is one

the specific treatments that must be provided or make any exception for any specific conditions or stabilizing treatments or procedures; the only exception the text allows is where the individual refuses to consent to stabilizing treatment or transfer. *Id.* § 1395dd(b)(2), (3). Even where a hospital lacks the "staff and facilities available" to stabilize a particular condition, it is not relieved of its statutory obligation. *Id.* § 1395dd(b)(1). Rather, EMTALA requires the hospital to directly transfer that individual to an appropriate facility that can provide the needed treatment, *id.* §§ 1395dd(b)(1)(B), (c)(2)(A), "through qualified personnel and transportation equipment," *id.* § 1395dd(c)(2)(D).

In short, when "any individual" comes to a covered hospital with an emergency medical condition, the hospital "must" do one of two things under EMTALA: provide treatment necessary to stabilize before discharge or provide an appropriate transfer. 42 U.S.C. § 1395dd(b)(1). "By its terms, the statutory language is mandatory." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 661 (2007); *see also Delta Air Lines, Inc. v. August*, 450 U.S. 346, 369 (1981) (Rehnquist, J., dissenting) ("[T]he word 'must' is so imperative in its meaning that no case has been called to our attention where that word has been read 'may.'" (quoting *Berg v. Merchant*, 15 F.2d 990, 991

---

where "there is inadequate time to effect a safe transfer to another hospital before delivery" or where "that transfer may pose a threat to the health or safety of the woman or the unborn child." *Id.* § 1395dd(e)(1)(B).

(6th Cir. 1926))). Unless an individual refuses treatment or transfer, nothing in EMTALA's text permits covered hospitals to deny necessary treatment or an appropriate transfer.

Petitioners' argument that EMTALA requires "merely equal treatment" based on ability to pay or any other factor, Pet. Br. 4, 32, cannot be squared with the words Congress chose. Congress knows how to write nondiscrimination provisions. *See, e.g.*, 49 U.S.C. § 11501(b)(1) (Railroad Revitalization and Regulatory Reform Act of 1976, prohibiting taxation of rail transportation property using a "higher ratio" than that used for "other commercial and industrial property in the same assessment jurisdiction"); 29 U.S.C. § 623(i)(10) (Age Discrimination in Employment Act of 1967, providing that employee benefit plans do not constitute age discrimination where a covered employee's accrued benefits are "equal to or greater than that of any similarly situated, younger" employee); 29 U.S.C. § 1182(b)(1) (Health Insurance Portability and Accountability Act of 1996 (HIPAA), providing that covered health plans "may not require any individual . . . to pay a premium or contribution which is greater than such premium or contribution for a similarly-situated individual enrolled in the plan on the basis of any health status-related factor"). But in contrast to such provisions, EMTALA's text does not permit covered hospitals to withhold necessary stabilizing treatment from an individual facing an emergency, so long as they withhold such treatment consistently. *See* 42 U.S.C. § 1395dd(b)(1) (covered hospitals "must" provide "any individual" stabilizing treatment or appropriate

transfer); *see also Matter of Baby K*, 16 F.3d 590, 595–96 (4th Cir. 1994) (rejecting argument that EMTALA's stabilization requirement requires "only . . . uniform treatment" because such a construction "conflicts with the plain language of EMTALA"); *Eberhardt v. City of Los Angeles*, 62 F.3d 1253, 1259 n.3 (9th Cir. 1995) (same); *cf. Bostock*, 590 U.S. at 659 ("The consequences of the law's focus on individuals rather than groups are anything but academic."). And, as this Court has recognized, rejecting a similar attempt to cabin EMTALA's scope, the stabilization requirement "contains no express or implied 'improper motive' requirement." *Roberts*, 525 U.S. at 250.

To argue that EMTALA does not mean what it says, Petitioners are forced to "retreat beyond" the text to "the legislature's purposes in enacting [EMTALA]." *Bostock*, 590 U.S. at 666.[3] However, "we are a government of laws, not of men, and are governed by what Congress enacted rather by what it intended." *Digital Realty Tr., Inc. v. Somers*, 583 U.S. 149, 172 (2018) (Thomas, J., concurring) (internal citations and quotations omitted); *see also Bostock*, 590 U.S. at 653 ("Only the written word is the law[.]"). Thus, as the courts of appeals have long recognized, the purported

---

[3] *See, e.g.*, Pet.-Int. Br. 36 ("EMTALA was enacted in response to Congress's concerns that hospitals were 'dumping' indigent patients."); *id.* at 37 ("It is not the purpose of EMTALA to force hospitals to treat medical conditions using certain procedures but to instead to prevent hospitals from neglecting poor and uninsured patients" (internal quotations and citations omitted)); Pet. Br. 36 ("[T]he purpose of EMTALA is to provide emergency care to the uninsured." (internal citations omitted)).

motivation for EMTALA cannot alter or override the plain terms of the stabilization requirement.[4]

II. EMTALA Contains No Abortion Exception.

A. EMTALA's Lack of an Explicit Reference to Abortion or Other Stabilizing Treatment Does Not Exempt Such Care.

Petitioners are on no stronger ground in arguing that EMTALA "does not require specific medical

---

[4] *See, e.g.*, *Lopez-Soto v. Hawayek*, 175 F.3d 170, 176 (1st Cir. 1999) ("It cannot be gainsaid that, in enacting EMTALA, Congress was driven by a concern that hospitals were refusing to admit and treat uninsured patients," but courts interpret statutes "through detailed analysis of concrete statutory language, not by reference to abstract notions of generalized legislative intent."); *Cherukuri v. Shalala*, 175 F.3d 446, 448 (6th Cir. 1999) (EMTALA's "literal language reaches well beyond its stated purpose"); *Collins v. DePaul Hosp.*, 963 F.2d 303, 308 (10th Cir. 1992) ("The fact that Congress, or some of its members, viewed [EMTALA] as a so-called 'anti-dumping' bill, i.e., a bill designed to prohibit hospitals from 'dumping' poor or uninsured patients in need of emergency care, does not subtract from its use of the broad term 'any individual.'"); *Gatewood v. Washington Healthcare Corp.*, 933 F.2d 1037, 1040 (D.C. Cir. 1991) ("Though [EMTALA's] legislative history reflects an unmistakable concern with the treatment of uninsured patients . . . the Act's plain language unambiguously extends its protections to '*any* individual' who seeks emergency room assistance."); *Brooker v. Desert Hosp. Corp.*, 947 F.2d 412, 414 (9th Cir. 1991) ("The legislative history of the Act does indicate that Congress intended to prevent hospitals from refusing to treat or from dumping patients who lack insurance . . . . The language of the Act, however, does not set forth any specific economic status criteria," and "any discrepancies between the language of the Act and its legislative history are overshadowed by the clarity of the Act.").

treatments," and therefore does not require abortion. Pet.-Int. Br. 21; *see also id.* at 7 ("EMTALA makes no reference to 'abortion' or other medical procedures"); Pet. Br. 17 ("EMTALA does not even mention 'abortion.'"). EMTALA does not attempt the impossible task of identifying *any* of the particular procedures an individual might need to stabilize their emergency condition. *See, e.g.*, Am. Hosp. Ass'n ("AHA") Amicus Br. 19–20 ("Congress recognized that untrained legislators never could have specified *every* form of care that might be needed for *every* type of medical emergency a hospital might confront."); *cf. Texaco Marine Servs., Inc. v. United States*, 44 F.3d 1539, 1544 (Fed. Cir. 1994) ("Absent the impossible task of having Congress list in the statute every type of repair expense that it intended be encompassed within the statute, the statute could not be any clearer on its face."). Instead, EMTALA requires *whatever* treatment is necessary to stabilize an emergency condition. *See* 42 U.S.C. § 1395dd(e)(3)(A) ("The term 'to stabilize' means . . . to provide *such* medical treatment as may be necessary to assure, within reasonable medical probability, [] no material deterioration of the condition" (emphasis added)); *see also* St. Luke's Health Sys. ("St. Luke's") Amicus Br. 6 ("[T]hat EMTALA does not require 'any particular procedure' [] is not the experience of trained medical providers who comply with the law." (internal citations omitted)). Notably, even Petitioners do not contend that abortion is never a necessary stabilizing

treatment. *See* Pet. Br. 31; Pet.-Int. Br. 29–30.[5] Thus, where, as here, "Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." *Bostock*, 590 U.S. at 669.

As this Court has made clear, there is no "canon of donut holes" that permits a different result. *Id.* EMTALA does not mention other stabilizing treatments—for example, administering epinephrine, setting a broken bone, or suturing an open wound—either. But no one would seriously argue that failure to provide any of these treatments, where "necessary," 42 U.S.C. § 1395dd(e)(3)(A), would comport with EMTALA simply because Congress did not explicitly list them in the statute. Such "tacit exceptions" would swallow the "general statutory rule." *Bostock*, 590 U.S. at 669. Indeed, it is difficult to see how EMTALA's principal obligation to provide "necessary" stabilizing treatment to each "individual," 42 U.S.C. § 1395dd(b), would have any force if, as Petitioners contend, EMTALA "cannot be construed to demand [any]

---

[5] That Idaho law currently permits *some* stabilizing abortions is ultimately irrelevant to Petitioners' primary argument: That EMTALA does not require the provision of any stabilizing abortions at all or, alternatively, that if it does, Idaho is free to enforce a conflicting state law. Likewise, Petitioners-Intervenors' attempt to distinguish between a medical procedure that constitutes an "abortion," and those medications or procedures Idaho has either exempted from its definition of abortion, opted not to criminalize, or recently decided to permit (*i.e.*, treatment for an ectopic or molar pregnancy), *see* Pet-Int. Br. 8–10, 29–30, is beside the point. That is so because Petitioners' contention is still that Idaho may define such care as "abortion," and thereby exempt it from EMTALA's protections.

specific procedures" needed to stabilize that individual, Pet. Br. 25; *see also* Pet.-Int. Br. 43.[6]

Petitioners' argument that this is tantamount to setting "national standards for specific medical procedures," Pet.-Int. Br. 37, is a red herring, and would, once again, render EMTALA's clear commands meaningless. *See also* Pet. Br. 26–27. As the courts of appeals have widely recognized, EMTALA created a new federal cause of action not for malpractice, but for the "failure to treat." *Gatewood*, 933 F.2d at 1041; *see also Bryant v. Adventist Health Sys./West*, 289 F.3d 1162, 1168–69 (9th Cir. 2002); *Hardy v. N.Y.C. Health & Hosps. Corp.*, 164 F.3d 789, 792–93 (2d Cir. 1999); *Summers v. Baptist Med. Ctr. Arkadelphia*, 91 F.3d 1132, 1137 (8th Cir. 1996); *Vickers v. Nash General Hosp., Inc.*, 78 F.3d 139, 142 (4th Cir. 1996). The statute "was not intended to guarantee proper diagnosis or to provide a federal remedy for misdiagnosis or medical negligence" but to "fill a lacuna in traditional state tort law by imposing on hospitals a legal duty (that the common law did not recognize) to provide emergency care *to all*." *Hardy,* 164 F.3d at 792–93 (internal quotations and citations

[6] That EMTALA contains private enforcement provisions and sets forth express penalties, including exclusion from the Medicare program altogether, only underscores that Congress intended the stabilization requirement to *do* something. *See* 42 U.S.C. §§ 1395dd(d)(1), (2).

omitted) (emphasis added).[7] As such, courts have long correctly distinguished between cases where a covered entity failed to provide necessary stabilizing treatment ("failure to treat"), which are plainly covered by EMTALA, and cases involving an inadvertent or negligent failure to detect or provide the correct treatment, which are not. This case, where Petitioners concede, as they must, that abortion can be a necessary stabilizing treatment and that Idaho law prohibits providing it for certain emergency medical conditions, clearly falls into the former category, not the latter.

Petitioners' remaining arguments for an implied abortion exception fare no better. Petitioners argue that the fact that Medicare covers some, but not all, emergency abortions renders EMTALA "incoheren[t]." Pet. Br. 35; *see also* Pet.-Int. Br. 34. But Congress explicitly refused to limit EMTALA's stabilization requirement to situations where Medicare reimbursement would be available. *See* 42 U.S.C. § 1395dd(b)(1). This claimed "incoherence," Pet. Br. 35, is thus a deliberate feature of the statutory

---

[7] Petitioners' attempt to rely on these and other EMTALA cases is misplaced. Pet. Br. 26–27; Pet-Int. Br. 26–27. Beyond confirming that EMTALA does not create a federal cause of action for malpractice—which is not in dispute—none of these cases suggests, let alone holds, that individuals experiencing emergency medical conditions are not entitled to care that meets the definition of a stabilizing treatment for their condition. For example, *Matter of Baby K* squarely rejects such a reading, even where state law would allow the care to be withheld. 16 F.3d at 595–98.

scheme: EMTALA mandates stabilizing treatments for all, even if federal funds will not pay for those treatments. What treatments must be provided and what treatments must be paid for are simply different questions, which can be coherently answered differently.

Indeed, by pointing to other federal statutes that explicitly exempt abortion, *see* Pet. Br. 34–35; Pet.-Int. Br. 32–34, Petitioners only underscore that EMTALA does not do so. Congress knows how to exempt abortion when it wants; it did not do so in EMTALA because EMTALA's stabilization requirement contains no exceptions for abortion or any other necessary stabilizing treatment. *Cf. Bostock*, 590 U.S. at 656–57 ("No doubt, Congress could have taken a more parsimonious approach[,] [a]s it has in other statutes . . . . But none of this is the law we have.").

There is also no "duty to interpret Congress's statutes as a harmonious whole," Pet.-Int. Br. 31 (quoting *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 502 (2018)), that compels a different conclusion. This Court's "rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them." *Epic Sys. Corp.*, 583 U.S. at 511. The fact that Congress elects to approach an issue differently in different statutes does not give this Court license to rewrite Congress's legislation in search of its idea of "harmony." *Id*; *cf. Bostock*, 590 U.S. at 656–57. To the contrary, this Court has recognized "[i]t is not our function to . . . treat alike subjects that different

Congresses have chosen to treat differently." *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991), *superseded by statute as stated in Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994).

B. EMTALA's References to the "Unborn Child" Do Not Create an Abortion Exception.

Petitioners also argue that EMTALA does not require abortion where necessary to stabilize an emergency medical condition because the statute's references to the "unborn child" preclude any such requirement. *See* Pet-Int. Br. 28; Pet. Br. 32. This argument, too, finds no support in the text or in any canon of statutory interpretation.

EMTALA's references to the "unborn child" were added in 1989, and all but one of these references appear in provisions that deal exclusively with hospital *transfers* during childbirth. *See* Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, §§ 6211(c), (h), 103 Stat. 2246, 2248 (codified at 42 U.S.C. §§ 1395dd(c)(1)(A)(ii), (c)(2)(A), (e)(1)(B)(ii)). As the statutory text makes clear, these references ensure that transfers during childbirth properly account for risks to the pregnant woman and "her unborn child." In no way does it follow that, in so doing, Congress *sub silentio* excluded pregnant women from the protections contained in EMTALA's stabilization requirement (an entirely different provision) when abortion is necessary to stabilize an emergency medical condition unrelated to childbirth. *See generally Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 455 (2022) ("To discern [] ordinary meaning, [] words

must be read and interpreted in their context, not in isolation." (internal quotations and citations omitted)); *Biden v. Nebraska*, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) ("[T]he meaning of a word depends on the circumstances in which it is used. To strip a word from its context is to strip that word of its meaning." (internal citations omitted)).

EMTALA's only other reference to the "unborn child" appears in the definition of "emergency medical condition" and is similarly designed to *expand* coverage, not restrict it. *See* Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 6211(h), 103 Stat. 2248 (codified at 42 U.S.C. § 1395dd(e)(1)(A)(i)). This reference clarifies the definition of "emergency medical condition" to *include* where a pregnant woman might seek "immediate medical attention" for "her unborn child," even if the pregnant woman herself is not experiencing an emergency medical condition. *Id.* Here, again, that expansion of the statute—namely, Congress's decision to ensure that a pregnant woman can seek stabilizing treatment for conditions threatening her life or health *or* that of "her unborn child"—in no way precludes pregnant women from obtaining an abortion where that is the treatment necessary to stabilize their own

emergency medical condition. *Saxon*, 596 U.S. at 455; *Biden*, 143 S. Ct. at 2378.[8]

III. EMTALA Prohibits State-Created Exceptions to its Stabilization Requirement.

EMTALA's text also refutes Petitioner's argument that EMTALA's stabilization requirement merely "operates *within* the menu" of stabilizing treatments that a state may choose to provide. Pet. Br. 17; *see also* Pet.-Int. Br. 18.

As explained above, *supra* Section I, EMTALA's stabilization requirement is unequivocal: Hospitals "must" provide "*such treatment as may be required*" to stabilize "any individual" with an emergency medical condition, without qualification. 42 U.S.C. § 1395dd(b)(1) (emphasis added). The statute does not

---

[8] The Attorney General is wrong to claim that it is not a "faithful" reading of the word "or" in this context to allow the pregnant woman's "*non-life-threatening interest*" to "prevail[]." Pet. Br. 34 (emphasis added). EMTALA's text plainly does not distinguish between life- and health-threatening emergency medical conditions. 42 U.S.C. § 1395dd(e)(1)(A). Thus, the addition of "or her unborn child" to that provision either necessarily excludes all pregnant women who need stabilizing abortions, including life-saving ones, from EMTALA, or it excludes none of them. As set forth above, the only natural reading of the text is the latter. Petitioners-Intervenors fall into a similar trap, contending this amendment imposes "dual stabilization requirements" that require a pregnant woman's condition to stand and fall with that of "her unborn child," *unless* the pregnant woman's condition is life-threatening, in which case apparently her interest prevails. Pet.-Int. Br. 26. EMTALA's text does not support that convoluted calculus either.

require covered hospitals to treat only certain conditions, or to provide only certain treatments; it categorically requires the provision of "such treatment of the medical condition as may be necessary," *id.* § 1395dd(e)(3)(A), full stop. Indeed, even where a covered hospital lacks the "staff and facilities" to provide the necessary stabilizing treatment, it is not discharged of its obligations; EMTALA still requires it to ensure an appropriate transfer, through qualified personnel and appropriate equipment, to a hospital that can provide the necessary treatment. *Id.* § 1395dd(b)(1); *see also infra* pp. 20–22 (discussing "staff and facilities available" provision). In a nutshell, EMTALA "fill[s] a lacuna" in state law by creating a new federal "legal duty . . . to provide emergency care to all." *Hardy*, 164 F.3d at 793. This lacuna would reemerge if state law could simply eliminate that duty, as Petitioners contend.

EMTALA's express preemption clause puts the matter beyond any doubt: *Any* state or local law requirement that "directly conflicts" with *any* of EMTALA's requirements, including the stabilization requirement, is preempted. 42 U.S.C. § 1395dd(f). The preemption clause contains no exception for types of state laws, *i.e.*, "state healthcare laws," Pet.-Int. Br. 27, and this Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face," *Dean v. United States*, 556 U.S. 568, 572 (2009) (citation omitted). Here, there are no grounds for this Court to add words to a statute that are not present, particularly where another provision of EMTALA defers explicitly to a specific category of state law—making clear that Congress knew to create such

exceptions when it saw fit to do so. *See* 42 U.S.C. §§ 1395dd(d)(1), (2) (incorporating state damages law); *cf. Dean*, 556 U.S. at 573 ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal citations and quotations omitted)). Put simply, an outright ban on stabilizing treatment by a state is in "direct conflict" with EMTALA's mandate that stabilizing treatment be provided to all, and Petitioners do not even try to explain what "direct conflict" would mean if not this.

Congress could not have spoken more plainly, yet Petitioners would turn the "the assumption that the ordinary meaning of that language accurately expresses the legislative purpose" on its head, "creating [] utterly irrational loophole[s]." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383, 386 (1992) (internal citations and quotations omitted). Instead of a law that mandates necessary stabilizing care be provided to all individuals, EMTALA would become one that sanctions withholding care whenever a state chooses to bar it. And, instead of preempting directly conflicting state laws, its requirements could be narrowed or nullified by state law. *See generally Honeycutt v. United States*, 581 U.S. 443, 454 n.2 (2017) ("[T]he Court cannot construe a statute in a way that negates its plain text.").

Petitioners' attempts to justify such a result are unavailing. First, Petitioners argue that the phrase "within the staff and facilities available" in the

stabilization requirement, 42 U.S.C. § 1395dd(b)(1)(A), means "only as permitted under state law." *See* Pet. Br. 28. However, it strains credulity to think this is the phrase Congress would use to express that concept, particularly when the ordinary understanding of that phrase in this context is that it refers to something altogether different—a hospital's technical capacity to provide the requisite stabilizing treatment, such as whether it has sufficiently trained staff, equipment, or other necessary resources. *See, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (internal quotations and citations omitted)). Thus, it is unsurprising that the courts of appeals and the federal government have long read "staff and facilities available" to mean precisely what it says. *See, e.g.*, *Matter of Baby K*, 16 F.3d at 597 (rejecting argument that state law concerning specific treatments may render "staff and facilities" unavailable within meaning of stabilizing treatment); 42 C.F.R. § 489.24(d)(1) (EMTALA requires stabilizing treatment "*[w]ithin the capabilities of* the staff and facilities available at the hospital" (emphasis added)); *see also Arrington v. Wong*, 237 F.3d 1066, 1073 (9th Cir. 2001); *Burditt v. U.S. Dep't of Health & Hum. Servs.*, 934 F.2d 1362, 1370 n.8 (5th Cir. 1991). Tellingly, Petitioners point to no support in case law or legislative history for this novel interpretation of the text.

Moreover, even if Petitioners' reading were correct, it would not permit hospitals to turn patients away. The phrase "within staff and facilities available" qualifies only the provision of treatment, yet the stabilization requirement unambiguously requires *either* treatment *or* an appropriate transfer—this interpretation would not relieve covered entities of the duty to provide the latter.

Second, the fact that a separate section of the Medicare Act, 42 U.S.C. § 1395, states that "[n]othing in this subchapter 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," *id.*, does not change EMTALA's plain meaning. *See* Pet. Br. 20, 24; Pet.-Int. Br. 18, 21, 25. EMTALA's stabilization requirement was imposed by Congress, not by a "Federal officer or employee." 42 U.S.C. § 1395. Indeed, Petitioners cannot seriously contend that Congress did not intend to regulate the practice of medicine to some extent when it created a federal cause of action for a failure to provide stabilizing *medical* treatment. And even if Petitioners' interpretation of the Medicare provision—enacted in 1965—were correct, that would not dictate a different understanding of EMTALA, which, as the later, more specific, statute, must govern. *See, e.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (recognizing that "the specific governs the general," particularly where Congress has "deliberately targeted specific problems with specific solutions" (internal citations and quotations omitted)).

Third, imposing a duty to provide emergency care that cannot be nullified by state law does not create "a federal remedy for medical malpractice in emergency rooms." *Summers*, 91 F.3d at 1138. If anything, it is Petitioners who—by seeking to dictate what stabilizing treatments are appropriate, as well as *when*—would transform EMTALA into something it is not: a statute "that purport[s] to impose nationwide rules for *how* patients must be stabilized." Pet.-Int. Br. 25. Rather than ask solely whether stabilizing treatment or an appropriate transfer was provided, as EMTALA's text commands, 42 U.S.C. §§ 1395dd(e)(3)(A), (b)(1), Petitioners would have courts consider the particular emergency medical condition the individual was experiencing, what treatment or procedure may be necessary to stabilize that condition, and then whether that treatment or procedure is permitted under state law in order to determine whether the failure to stabilize was justified. This is precisely what EMTALA's text forecloses.

Finally, Petitioners' parade of horribles—that if Idaho's abortion ban is narrowly preempted, other state law prohibitions, such as bans against lobotomizing children, physician-assisted death, and medical marijuana will be preempted—is another red herring. Pet. Br. 4, 25–26, 30; *cf.* Pet.-Int. 25–26. There is no credible argument that any of these could ever meet EMTALA's statutory definition of stabilizing treatment: treatment "necessary" to assure no material deterioration of an emergency medical condition requiring "immediate medical attention." 42 U.S.C. §§ 1395dd(e)(3)(A), (e)(1)(A). The same is true

for experimental and unapproved treatments; by definition, something that is untested cannot be "necessary to assure, within reasonable medical probability," stabilization of the individual's emergency condition. *Id.* § 1395dd(e)(3)(A). By contrast, *every* major medical organization—from the American Medical Association to the American College of Emergency Physicians—recognizes that abortion is sometimes the treatment necessary to stabilize a pregnant woman's emergency. *See generally* Am. Coll. of Emergency Physicians, Am. Coll. of Obstretricians and Gynecologists ("ACOG") Amicus Brief; *see also* St. Luke's Amicus Br. 2–3, 6–10 & n.6; AHA Amicus Br. 2, 26–27; Resp. Br. 14–16.[9]

Ultimately, Petitioners' state law argument boils down to this: Congress did not predict, in 1986, that almost 40 years later this Court would give states more latitude to restrict abortion and that Idaho would then seek to prohibit patients needing emergency health-saving abortions from receiving that care. *See, e.g.*, Pet. Br. 37 ("There is zero evidence Congress enacted EMTALA to mandate abortions[.]"). That may be, but as this Court has recognized, "the limits of the

[9] Petitioners' argument that EMTALA's preemptive effect will rewrite state abortion bans to include capacious mental health exceptions is similarly unfounded, and similarly ignores the limited context in which EMTALA applies. *See* Pet. Br. 30; Pet.-Int. Br. 19. While all emergency abortions may be medically indicated, that does not mean all medically indicated abortions—including those necessary to preserve mental health—fall within EMTALA's narrower definitions of what constitutes an emergency medical condition requiring immediate treatment and what constitutes stabilizing treatment.

drafters' imagination supply no reason to ignore the law's demands." *Bostock*, 590 U.S. at 653. To hold otherwise would not only risk "upsetting reliance interests in the settled meaning of a statute," but also "amending legislation outside the single, finely wrought and exhaustively considered, procedure the Constitution commands." *New Prime Inc. v. Olivera*, 139 S. Ct. 532, 539 (2019) (internal quotations and citations omitted).

IV. EMTALA Has Been Consistently Understood by All Three Branches to Require Abortion Care Where Necessary to Stabilize an Emergency Condition.

In addition to being irreconcilable with EMTALA's plain text, Petitioners' arguments seek to rewrite history. Congress, the executive branch, and the courts have all consistently recognized what the text makes plain: Covered hospitals must provide pregnant women experiencing emergency medical conditions abortion care when that is what is necessary to stabilize their conditions. Petitioners' suggestion that the Government's position in this case was "discovered nearly 40 years after EMTALA's enactment," Pet. Br. 4, is simply untrue. *See also* Pet.-Int. Br. 1 (calling Government's position a "novel legal theory").

To start, almost fifteen years ago, Congress spoke directly to this issue, in a section of the Affordable Care Act providing "Special Rules" exclusively addressing abortion. There, Congress provided that "[n]othing in this Act shall be construed to relieve any health care provider from providing emergency services as required by State or Federal law, including

section 1867 of the Social Security Act (popularly known as 'EMTALA')." 42 U.S.C. § 18023(d). This savings clause, which Congress placed in a section devoted entirely to abortion, would be meaningless if abortion was not a stabilizing treatment under EMTALA. *See Kungys v. United States*, 485 U.S. 759, 778 (1988) ("[N]o provision should be construed to be entirely redundant."); *see also Hohn v. United States*, 524 U.S. 236, 249 (1998) ("We are reluctant to adopt a construction making another statutory provision superfluous.").

Prior presidential administrations, across the political spectrum, have also understood that EMTALA requires abortions when they are necessary to stabilize an emergency. *See, e.g.*, Resp. Br. 16 n.2. For example, both the Trump and Bush administrations took the position that, notwithstanding three federal statutes, known as the Church, Coats, and Weldon Amendments that, *inter alia*, allow certain recipients of federal funds to refuse to provide abortion services, EMTALA still requires covered hospitals to ensure emergency abortion services remain available. In 2008, under President Bush, HHS promulgated a rule purporting to interpret and enforce these federal abortion refusal statutes, asserting it "d[id] not anticipate any actual conflict between EMTALA and this regulation," not because EMTALA lacked any requirement that a hospital ever provide emergency abortion care, but rather because a conflict would only arise "where a hospital, as opposed to an individual, has an objection to performing abortions that are necessary to stabilize the mother," and HHS was "unaware of any hospital that has such

a policy." 73 Fed. Reg. 78,072, 78,087–88 (Dec. 19, 2008) ("Bush Rule"); *see also California v. United States*, No. 05-328, 2008 WL 744840, at *4 (N.D. Cal. Mar. 18, 2008) (holding there was "no clear indication, either from the express language of the Weldon Amendment or from a federal official or agency," that "enforcing . . . EMTALA to require medical treatment for emergency medical conditions would [violate the Weldon Amendment] if the required medical treatment [under EMTALA] was abortion-related services").

In 2019, the Trump Administration promulgated a similar rule, stating that "[EMTALA] would not be displaced by the rule, and requires provision of treatment in certain emergency situations and facilities." 84 Fed. Reg. 23,170, 23,224 (May 21, 2019) ("Trump Rule").[10] Once again, as HHS clarified in related litigation, its position was not that EMTALA imposes no duty to provide stabilizing abortions; rather, covered entities could "continue to abide by EMTALA's requirements" and "ensure that emergency care is available to all patients" by "double staffing" whenever a staff member has a religious or moral

[10] According to HHS, where "EMTALA might apply in a particular case," it would apply "both EMTALA and the relevant [abortion refusal] law under this rule harmoniously to the extent possible." 84 Fed. Reg. at 23,183, 23,188. As an example, HHS described the case of the "emergency transportation of persons with conditions *such as* an ectopic pregnancy, where the potential procedures performed at the hospital may include abortion," which is considered to trigger EMTALA's requirements under most circumstances. 84 Fed. Reg. at 23,188 (emphasis added).

objection to providing emergency abortion care.[11] According to HHS, "[t]his flexibility to make appropriate staffing arrangements effectively eliminates any risk personnel will be unavailable to meet EMTALA's requirements."[12] Two district courts in these cases later expressly affirmed there is no abortion exception to EMTALA's stabilization requirement. *New York v. United States*, 414 F. Supp. 3d 475, 537–39, 555–56 (S.D.N.Y. 2019); *Washington v. Azar*, 426 F. Supp. 3d 704, 719–21 (adopting reasoning of *New York*).

Petitioners make no effort to contend with this history, and their attempts to distinguish these and other federal court decisions recognizing that EMTALA requires abortion where it is necessary to stabilize an emergency medical condition are without merit. For example, contrary to what Petitioners suggest, *see* Pet. Br. 28, far from holding that EMTALA never requires abortion care, the district court in the *California* case, cited above, expressly recognized that "required medical treatment" under EMTALA includes "abortion related services," 2008 WL 744840 at *4. It subsequently dismissed the challenge to the Weldon Amendment as nonjusticiable only after holding Weldon did not interfere with such requirements. *Id.* And, given that the *New York* and

---

[11] Defs.' Consolidated Reply in Support of Defs.' Mot. to Dismiss at 17–18, *New York v. HHS*, No. 1:19-cv-04676 (S.D.N.Y. filed Sep. 19, 2019), ECF No. 224, 2019 WL 8165747.

[12] Defs.' Consolidated Mem. of Law in Support of Defs.' Mot. to Dismiss at 48, *New York v. HHS*, No. 1:19-cv-04676 (S.D.N.Y. filed Aug. 14, 2019), ECF No. 148, 2019 WL 7425364.

Washington cases directly concerned, *inter alia*, whether Congress intended for the refusal statutes to create an abortion exception to EMTALA, Petitioners' claim that they are not "EMTALA case[s] at all" is disingenuous. Pet. Br. 28. Petitioners further distort other EMTALA cases recognizing that completing a miscarriage—an abortion, where fetal demise has not occurred naturally—is required by the statute where is it the necessary stabilizing treatment.[13] The Attorney General argues these cases are irrelevant because none of them concern state abortion bans, Pet. Br. 28, but that misses the point. As discussed above, until now no court had reason to consider this question in the context of a state law ban on *all* health-saving

[13] For example, Petitioners claim that *Ritten v. Lapeer Regional Medical Center*, 611 F. Supp. 2d 696 (E.D. Mich. 2009), merely concerned a "factual dispute" over "premature delivery." Pet. Br. 28. But that's wrong. In *Ritten,* the court refused to dismiss the plaintiff-physician's claim, brought under EMTALA's anti-retaliation provisions, after his hospital had prevented him from performing a stabilizing abortion, pressuring him to transfer the patient to another facility for the procedure instead (despite the patient's unstable condition), and suspended the physician's staff privileges after he failed to do so. *Ritten*, 611 F. Supp. 2d at 708–10; *see also Morin v. Eastern Maine Medical Center*, 780 F. Supp. 2d 84, 93–96 (D. Me. 2010) (rejecting an argument that EMTALA's stabilization requirements apply "only to women who seek medical assistance for pregnancies that result in the birth of a live infant and that the protections of the statute are unavailable for pregnant women who end up aborting" as "not justified by the language of the statute").

emergency abortions.[14] But that does not erase decades of evidence that all three branches of government have consistently understood the text of EMTALA to contain no exceptions for certain stabilizing treatments generally, or for abortion specifically.

---

[14] Unlike Idaho's ban, the existence of post-viability bans, including those that pre-date the *Dobbs* decision, do not present any facial conflict with EMTALA, because after viability, delivering the fetus is not an abortion. *See* Pet. Br. 38. By definition, abortion only becomes a necessary stabilizing treatment under EMTALA when complications arise necessitating the immediate removal of the pregnancy to stabilize the woman *at a point when* the embryo or fetus cannot survive outside the woman (*e.g.*, in the context of a molar or ectopic pregnancy, or because complications arose prior to viability). *See, e.g.*, AHA Amicus Br. 5 (describing treatment for preterm premature rupture of membranes at 16 weeks of pregnancy). In other words, abortions are not required under EMTALA because the statute gives pregnant women a standalone right to decide whether and when to bear a child; abortions are required because intentionally removing the pregnancy can be necessary to stabilize certain emergency medical conditions, even though that causes embryonic or fetal demise. Post-viability, the stabilizing treatment—delivering the pregnancy—is no longer an abortion. *See* Resp. Br. 26.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

Kathleen R. Hartnett
Kathleen Goodhart
Darina A. Shtrakhman
K.C. Jaski
COOLEY LLP
3 Embarcadero Center
San Francisco, CA 94111

Patrick J. Hayden
COOLEY LLP
55 Hudson Yards
New York, NY 10001

Angeline Chen
COOLEY LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004

Alexander Robledo
COOLEY LLP
500 Boylston Street
Boston, MA 02116

Alexa Kolbi-Molinas
Counsel of Record
Jennifer Dalven
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., 18th Fl.
New York, NY 10004
(212) 549-2633
akolbi-molinas@aclu.org

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th St., N.W.
Washington, DC 20005

Paul Carlos Southwick
Emily Myrei Croston
AMERICAN CIVIL LIBERTIES UNION OF IDAHO FOUNDATION
P.O. Box 1897
Boise, ID 83701

Counsel for Amici Curiae

March 28, 2024