No. 23A469

In the Supreme Court of the United States

MIKE MOYLE, SPEAKER OF THE IDAHO HOUSE OF REPRESENTATIVES, ET AL.,

Applicants,

v.

UNITED STATES,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR STAY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
SUPPLEMENTAL BRIEF FOR APPLICANTS 1
CONCLUSION 5

TABLE OF AUTHORITIES

Cases

Cipollone v. Liggett Grp., Inc.,
505 U.S. 504 (1992) 3

Citizens United v. FEC,
558 U.S. 310 (2010) 3

Dep't of Ed. v. Brown,
143 S. Ct. 541 (2022) 4

Dobbs v. Jackson Women's Health Organization,
597 U.S. 215 (2022) 1

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 3

Students for Fair Admissions, Inc. v. Univ. of N. Carolina,
142 S. Ct. 896 (2022) 4

Texas v. Becerra, No. 23-10246,
---- F.4th ---- (5th Cir. Jan. 2, 2023) 2, 4, 5

United States v. Texas,
142 S. Ct. 14 (2021) 4

United States v. Texas,
143 S. Ct. 51 (2022) 4

Statutes

42 U.S.C. §1395 3

42 U.S.C. §1395dd 1, 2, 3, 4

Idaho Code §18-622 1

Other Authorities

Ctrs. for Medicare & Medicaid Servs., *Reinforcement of EMTALA Obligations Specific to Patients who are Pregnant or are Experiencing Pregnancy Loss (QSO-21-22-Hospitals-UPDATED JULY 2022)* (July 11, 2022) 1

SUPPLEMENTAL BRIEF FOR APPLICANTS

The United States Department of Justice sued Idaho (and has so far succeeded) based on an extraordinary theory: a section of the federal Medicare Act preempts the Idaho Defense of Life Act. That state law, passed by a super-majority of the Idaho Legislature, prohibits abortions except in cases of rape, incest, or when necessary to protect the life of the mother. *See* Idaho Code §18-622. The federal law, the Emergency Medical Treatment and Active Labor Act (EMTALA), prohibits hospitals from turning away indigent patients with emergency medical conditions. *See* 42 U.S.C. §1395dd. The government announced its novel preemption theory mere weeks after this Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). EMTALA, so goes the argument, requires hospitals to perform abortions as a "stabilizing treatment" for emergency medical conditions, 42 U.S.C. §1395dd(b), even if prohibited by state law.[1] The district court blessed that theory and issued a preliminary injunction. A panel of the Ninth Circuit briefly stayed the preliminary injunction, Stay.App.24a, until the *en banc* Ninth Circuit reinstated it, Stay.App.1a. Stay applications are now pending in this Court to stay the preliminary injunction pending appeals in the Ninth Circuit and this Court. *See Moyle v. United States*, No. 23A469 (docketed Nov. 27, 2023); *Idaho v. United States*, No. 23A470 (docketed Nov. 27, 2023).

[1] Ctrs. for Medicare & Medicaid Servs., *Reinforcement of EMTALA Obligations Specific to Patients who are Pregnant or are Experiencing Pregnancy Loss (QSO-21-22-Hospitals-UPDATED JULY 2022)* (July 11, 2022).

Yesterday, the U.S. Court of Appeals for the Fifth Circuit issued a decision that interprets EMTALA exactly as the Idaho Legislature has interpreted it. *See Texas v. Becerra*, No. 23-10246, ---- F.4th ---- (5th Cir. Jan. 2, 2023) (included at Supp.App.1a-25a). EMTALA is not a nationwide abortion mandate. It does not purport to impose nationwide standards of care. *See id.*, slip op. at 19. Indeed, the only treatment specified in EMTALA is the *delivery* of an "unborn child," a life EMTALA also protects, for women in labor. 42 U.S.C. §1395dd(e). Beyond that, "EMTALA does not mandate any specific type of medical treatment, let alone abortion." *Texas*, slip op. at 19.

Both the district court's preliminary injunction and the *en banc* Ninth Circuit's refusal to stay that preliminary injunction are irreconcilable with the Fifth Circuit's decision. The Fifth Circuit correctly rejected the federal government's sweeping reading of EMTALA—offered both in the Fifth Circuit and the Ninth Circuit below. *Compare id.*, slip op. at 16 ("In HHS's view, EMTALA mandates *whatever* a medical provider concludes is medically necessary to stabilize *whatever* condition is present," which would include abortion), *with* United States Br. 37, ECF No. 33, *United States v. Moyle*, No. 23-35440 (9th Cir. Sept. 8, 2023) ("Under the Supremacy Clause, Idaho may not prosecute (or disturb the licenses of) any medical provider based on their performance of conduct that, in the provider's judgment, was necessary stabilizing treatment under EMTALA") (quotation marks omitted). The Fifth Circuit explained that neither EMTALA's text nor the Medicare Act as a whole prescribes abortions: "A plain reading shows that Congress did not explicitly address whether physicians must provide abortions when they believe it is the necessary 'stabilizing

treatment'…." *Texas*, slip op. at 17 (quoting 42 U.S.C. §1395dd(b)(1)). Rather, "the purpose of EMTALA is to provide emergency care for the uninsured." *Id.* at 18.

Echoing arguments that the Idaho Legislature has made here and below, the Fifth Circuit also explained that EMTALA "imposes obligations on physicians with respect to both the pregnant woman *and her unborn child*." *Id.* at 21 (emphasis added) (citing 42 U.S.C. §1395dd(e)(1)(A)(i)). With that "dual requirement," "EMTALA requires hospitals to stabilize both the pregnant woman and her unborn child." *Id.* at 21-22. There is no basis to accept the federal government's view of EMTALA as a sweeping mandate to terminate the life of an unborn child, when EMTALA expressly protects that life. *See* 42 U.S.C. §1395dd(e)(1)(A)(i).

Finally, the Fifth Circuit also agreed that "medical treatment is historically subject to police power of the States, not to be superseded unless that was the clear and manifest purpose of Congress." *Texas*, slip op. at 19 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992)). Applied here, "EMTALA does not impose a national standard of care." *Id.* The Medicare Act states that "[n]othing 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." 42 U.S.C. §1395.[2] And EMTALA itself assures that its

[2] The United States repeatedly refers to Applicants' arguments as "forfeited," including reliance on section 1395. US.Resp.34; *see also* US.Resp.3, 28, 36. Such arguments are not forfeited. When a "claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010) (cleaned up).

provisions "do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section." 42 U.S.C. §1395dd(f).

There is only one way to reconcile the Fifth Circuit's reading of EMTALA with the proceedings below: to stay the preliminary injunction issued by the district court. The district court enjoined the enforcement of Idaho's law on the very theory rejected by the Fifth Circuit—that "the stabilizing care EMTALA requires a physician to offer may include terminating a-still developing pregnancy" and may be a prohibited "'abortion'" under Idaho law. Stay.App.36a; *compare Texas*, slip op. at 17-19 (EMTALA does not require abortions as stabilizing treatment). That reading of EMTALA has no basis in EMTALA's actual text, as the Fifth Circuit has just concluded and as the Ninth Circuit panel initially concluded. *See Texas*, slip op. at 17-19; Stay.App.12a-20a, *vacated*, Stay.App.1a.

In the light of the Fifth Circuit's intervening decision, the Court could also construe the stay applications as petitions for writ of certiorari before judgment and schedule the cases for full merits briefing and argument *See, e.g.*, *United States v. Texas*, 142 S. Ct. 14 (2021); *see also, e.g.*, *United States v. Texas*, 143 S. Ct. 51 (2022); *Dep't of Ed. v. Brown*, 143 S. Ct. 541 (2022); *Students for Fair Admissions, Inc. v. Univ. of N. Carolina*, 142 S. Ct. 896 (2022). It is no longer the case, as the government argued in its response (at 45), that "[n]o court of appeals has yet definitively ruled on EMTALA's interaction with state-law prohibitions on abortion." The Fifth Circuit has ruled EMTALA cannot be read to prescribe standards of care that conflict with state

law. *Texas*, slip op. at 17-19. Meanwhile, Idaho's law has been preliminarily enjoined on the specious ground that EMTALA prescribes contrary standards of care. And the *en banc* Ninth Circuit has refused to stay that preliminary injunction. Stay.App.1a. That conflict need not be prolonged, and this Court can resolve whether there is any justification for the federal government's unprecedented re-write of EMTALA.

CONCLUSION

For the foregoing reasons, Applicants respectfully ask the Court to stay the preliminary injunction of Idaho state law. Additionally, in the light of the Fifth Circuit's intervening decision and to avoid protracting the Court's resolution EMTALA's scope, the Court could also construe the stay applications as petitions for writ of certiorari before judgment and schedule the cases for full merits briefing and argument.

Respectfully submitted,

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