APP NO. 23A-470

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

RELY IN SUPPORT OF EMERGENCY APPLICATION FOR A STAY PENDING APPEAL

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INTRODUCTION

Two weeks after *Dobbs*, the Biden administration reinterpreted EMTALA—over 35 years after its enactment—to create a country-wide abortion enclave in hospital emergency rooms that accept Medicare funding. This bureaucratic mandate finds no support in EMTALA's text. That Reagan-era law prohibits emergency-room-patient dumping and operates *within* the menu of lawful medical treatments in a particular state, requiring hospitals to offer stabilizing care *from that menu.* It neither authorizes nor requires hospitals to offer care that violates state law.

The United States' position is neither "narrow" nor "modest." It obliterates pro-life laws in Idaho and more than 20 other states, as well as state or federal restrictions on medical marijuana and experimental medication if, in an emergency-room physician's judgment, such unlawful care is necessary to stabilize *any* emergency medical condition. This position is untenable given the clarity required to preempt state law. And it is particularly egregious in the abortion context, since EMTALA says nothing about abortion and requires (in multiple provisions) the stabilization of an "unborn child."

The United States' position attributes deep incoherence to Congress. According to the United States, Congress—through EMTALA—conditions hospitals' Medicare participation on performing abortions that are unlawful under state law. Simultaneously, through the Hyde Amendment, Congress prohibits hospitals from funding those same abortions with Medicare dollars. That makes no sense.

The United States' opposition turns every relevant principle on its head. Where eleven circuits say EMTALA imposes no standard of care, the United States says EMTALA demands one—abortion. Where EMTALA requires a hospital to stabilize an "unborn child," the United States sees no protection for an unborn child's life. Where EMTALA's detailed enforcement scheme forecloses equitable claims, the United States says it can sue anyway. And the United States cries waiver, ignoring that parties can make additional arguments in support of properly presented federal claims. The Court should grant the stay or grant certiorari before judgment.

REPLY ARGUMENT

I. Idaho Is Likely To Prevail On The Merits.

The United States ignores the many barriers it must overcome to enjoin a state law. To begin, an injunction is an extraordinary remedy and requires a clear showing that the movant is entitled to it, particularly when a plaintiff seeks to enjoin a presumptively valid state statute. Appl.13 (citations omitted). That standard is heightened by the presumption against preemption and EMTALA's savings clause. *Ibid.* And it is heightened further still because EMTALA is Spending Clause legislation that must speak "unambiguously" on such a major question. Appl.14–15 (citation omitted). EMTALA, which dictates nothing about "abortion" at all, lacks such preemptive reach. Contra Opp.37.

The United States tries to avoid these barriers—and its multitude of merits problems—by complaining that Idaho is raising new arguments on appeal. That is factually wrong, as the record below shows. And it is legally wrong because it con-

flates appellate arguments with claim or issue preservation. This Court's "traditional rule is that once a federal claim [or issue] 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." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (cleaned up); accord *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). That's doubly true when dealing with "the correct interpretation of the law." *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 576 U.S. 1, 41 n.2 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part).

A. The United States Has No Cause of Action.

EMTALA's detailed enforcement scheme forecloses the Government from invoking the federal courts' general equitable authority. Appl.12 (citing *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U.S. 320, 328 (2015)). In its footnote response to this jurisdictional defect, the United States fails to address the enforcement scheme, citing only two cases. Opp.38–39 n.10. Neither *United States* v. *Washington*, 142 S. Ct. 1976 (2022), nor *Arizona* v. *United States*, 567 U.S. 387 (2012), contradicts *Armstrong*'s holding: "the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." 575 U.S. at 328 (cleaned up).

The twenty amici states explain an additional jurisdictional problem that the United States fails to address. Even when exercising equitable power, the federal courts have "'no authority' to create causes of action or 'remedies previously unknown to equity jurisprudence.'" Ind.Br.15 (quoting *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999)). Their authority is limited to that of equity courts "at the time of the adoption of the Constitution and the enactment of

the original Judiciary Act, 1789." *Grupo*, 527 U.S. at 318; see also *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U.S. 563, 568 (1939). And the United States cites no case suggesting it can obtain injunctive relief against states based on an alleged conflict between state law and grant conditions.

B. EMTALA Does Not Supersede State Standards of Care.

The United States purports to ground its argument that EMTALA requires abortions in the statute's language requiring "'necessary stabilizing treatment.'" Opp.13 (quoting 42 U.S.C. 1395dd(b)). Yet the issue is not whether EMTALA requires "hospitals to provide the minimum level of care necessary to stabilize a patient's emergency medical condition," Opp.27, but rather who decides *which treatments* are among those a hospital is authorized to provide. The federal government's position—that the decision lies solely within the unreviewable judgment of "an emergency-room physician who concludes that a pregnant woman needs an abortion"—is atextual. Opp.2. It would require rewriting § 1395dd(b)(1)(A) to require the provision of "such treatment[, *regardless of whether such treatment is authorized under state or federal law*,] as may be required [*in the view of the treating physician*] to stabilize [an emergency] medical condition."

The United States cites no authority for that essential premise. And it is contrary to "the language and design of the statute as a whole," *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988), which unmistakably leaves to the states matters concerning "the practice of medicine or the manner in which medical services are provided." 42 U.S.C. 1395. Such standards of care lie within the states' traditional

police powers. *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996). And that is why—apart from the Ninth Circuit's unreasoned order here—every court of appeals decision has rejected the notion that EMTALA imposes a federal standard of care.[1]

The United States' attempt to impose such a standard in the emergency room, determined solely by physician judgment, flouts "the text and structure of the statute." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). It would be a truly extraordinary preemption theory that allowd private parties like hospitals to opt out of governance by state powers, reserved under the Tenth Amendment, through the simple expedient of agreeing to participate in Medicare. And whatever the merits of the United States' interpretation, it cannot sustain an injunction against Idaho law in view of the presumption against preemption, *Medtronic*, 518 U.S. at 485, the need for a "clear showing" for an injunction, *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008), and the demand to impose spending clause conditions "unambiguously," *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981), especially on such a major question, Appl.15.

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[1] *Gatewood* v. *Wash. Healthcare Corp.*, 933 F.2d 1037, 1038–39 (D.C. Cir. 1991); *Correa* v. *Hosp. San Francisco*, 69 F.3d 1184, 1192 (1st Cir. 1995); *Hardy* v. *N.Y.C. Health & Hosp. Corp.*, 164 F.3d 789, 792–93 (2d Cir. 1999); *Byrne* v. *Cleveland Clinic*, 519 F. App'x 739, 742 (3d Cir. 2013) (per curiam); *Vickers* v. *Nash Gen. Hosp., Inc.*, 78 F.3d 139, 142 (4th Cir. 1996); *Cleland* v. *Bronson Health Care Grp., Inc.*, 917 F.2d 266, 268, 272 (6th Cir. 1990); *Nartey* v. *Franciscan Health Hosp.*, 2 F.4th 1020, 1025 (7th Cir. 2021) (per curiam); *Summers*, v. *Baptist Med. Ctr. Arkadelphia*, 91 F.3d 1132, 1136–37 (8th Cir. 1996); *Eberhardt* v. *City of Los Angeles*, 62 F.3d 1253, 1258 (9th Cir. 1995); *Urban By and Through Urban* v. *King*, 43 F.3d 523, 525 (10th Cir. 1994); *Holcomb* v. *Monahan*, 30 F.3d 116, 117 & n.2 (11th Cir. 1994).

The flaws in the United States' argument are obvious when considering its implications. Appl.19. If physician judgment is a federal trump card in the emergency room, it would allow a hospital to administer an experimental drug that is neither FDA-approved nor covered by Medicare. Cf. *Abigail All. for Better Access to Developmental Drugs* v. *von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007). It would also authorize an emergency-room physician to treat mental health conditions with marijuana, surgical interventions, or euthanasia medications, despite contrary state law. *E.g.*, Idaho Code § 37-2705(d)(28) (THC schedule I controlled substance); *id.* § 39-4514 (prohibition of euthanasia). The United States offers no answer to these arguments.

Most of all, the United States' theory would open the same "mental health" loophole for abortion, which is neither narrow nor modest. The United States would have the Court believe that the central conflict between EMTALA and Idaho law concerns abortions to save the life of the mother. Opp.8. But as the motion panel's decision explains, Idaho law allows those procedures. *Planned Parenthood Great Nw.* v. *State*, 522 P.3d 1132, 1203 (Idaho 2023). The real conflict concerns a greater issue: the United States' theory would require emergency-room doctors to perform abortions whenever they think (or the United States says in hindsight) those abortions are necessary to avoid "serious jeopardy" to the mental health of the mother. 42 U.S.C. 1395dd(e)(1)(A)(i). That would turn emergency rooms into federal abortion enclaves governed not by state law, but by physician judgment, Appl.2, 21, as enforced by the United States's mandate to perform abortions on demand, including by finishing incomplete chemical abortions. Appl.6, 21–22.

The United States responds that Idaho has not cited "any circuit precedent endorsing [its] view that state law can limit care otherwise required by EMTALA." Opp.26. But that assumes the Government's premise—that EMTALA mandates treatments "unavailable" because they are contrary to state law. Appl.18–19. The real absence of authority is on the United States' side: no precedent holds that EMTALA first *authorizes*, then *requires* specific care that state law prohibits.

The United States insists that courts "have long recognized that abortion care is among the treatments required as stabilizing treatment under EMTALA." Opp.29. Not so. None of the four, pre-*Dobbs* district court decisions it cites so held. *California* v. *United States* upheld a federal conscience law letting doctors *refrain* from performing abortions, despite the argument that EMTALA requires them. No. 05-00328, 2008 WL 744840, at *4 (N.D. Cal. Mar. 18, 2008). *Morin* v. *Eastern Maine Medical Center* concerned not an abortion but whether to deliver an unborn child that "was dead." 780 F. Supp. 2d 84, 86 (D. Me. 2010). Likewise, *Ritten* v. *Lapeer Regional Medical Center* involved a factual dispute about whether a patient "was truly in labor" and required premature delivery. 611 F. Supp. 2d 696, 715 (E.D. Mich. 2009). And *New York* v. *HHS* was not an EMTALA case at all, but a ruling against the Trump administration's regulation enforcing federal conscience laws, a case the current administration withdrew after *Dobbs*. 414 F. Supp. 3d 475, 537–39 (S.D.N.Y. 2019), *appeal withdrawn by* No. 19-4254, 2022 WL 17974424 (2d Cir. Dec. 8, 2022).

Regardless, a ruling for Idaho would not require holding that EMTALA *never* requires abortions. It would only require holding that EMTALA does not require abor-

tions *that are not among the authorized treatments for a condition in the state in question*. In pro-abortion states, abortion could be consistent with EMTALA's command that hospitals provide all patients necessary stabilizing treatments from among those that state law authorizes. By contrast, neither EMTALA's text nor purpose requires abortions that state law does *not* authorize.

C. EMTALA's Plain Text Protects "The Unborn Child."

Idaho is further likely to succeed because EMTALA does not require abortions. EMTALA does not even mention abortion. And it expressly demands care for an "unborn child" in its plain text. 42 U.S.C. 1395dd(e)(1)(A)(i); Appl.20–22. The Government's twisting of the statutory language does not change that. Opp.30–34.

EMTALA leaves hospitals—guided by state medical standards—discretion to discern whether an individual "has an emergency medical condition," and if so, how to "stabilize" that condition. 42 U.S.C. 1395dd(b)(1), (e)(3)(A). These provisions cause the United States to focus narrowly on the "individual" being treated. Opp.30–31. But when the patient is a pregnant woman, EMTALA's focus expands to include her "unborn child." The statute defines "emergency medical condition" to mean one of sufficient severity that, lacking prompt medical attention, could reasonably be expected to result in:

> 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. [42 U.S.C. 1395dd(e)(1)(A)(i) (emphasis added).]

As a result, "EMTALA's equal obligations to the pregnant woman and her unborn child create a potential conflict in duties that the statute does not resolve." *Texas* v. *Becerra*, 623 F. Supp. 3d 696, 726 (N.D. Tex. 2022).

For example, in the unlikely situation where a pregnant woman has a pregnancy-related emergency medical condition that risks her future "fertility," see Opp.1, the treating physician could prioritize the woman's fertility over the child's life or could save the child's life at the expense of the mother's fertility. "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 "State law fills this void." *Texas*, 623 F. Supp. 3d at 728 (citing 1395dd(f)). Idaho's choice to save the baby's life cannot conflict with a federal statute that expressly affirms the life and interests of the unborn child. And in the situation just articulated, "it is not impossible for hospitals and physicians to comply with both [Idaho] law and EMTALA." *Ibid.* Nor does Idaho's choice stand as an obstacle to EMTALA's purpose of ensuring that patients receive the same care no matter whether they go to a Medicare-funded hospital.

This conclusion is reinforced by EMTALA's express savings clause providing that state law is preempted only where it "directly conflicts." 42 U.S.C. 1395dd(f). And in a "field which the States have traditionally occupied," like medical practice, courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485 (cleaned up).

The Government's primary case, *In re Baby "K" (Three Cases)*, 16 F.3d 590 (4th Cir. 1994), is a perfect illustration of EMTALA's care for all human life and its narrow preemptive sweep. Opp.20, 24–26, 35. The Fourth Circuit held that a physician's EMTALA duty to stabilize a baby *already born* preempted a hospital's claim that

Virginia law allowed it to withhold stabilizing care demanded by EMTALA where it deemed that care "medically or ethically inappropriate." *In re Baby "K"*, 16 F.3d at 597 (quoting Va. Code Ann. § 54.1-2990 (1993)). The child had anencephaly—"a congenital malformation in which a major portion of the brain, skull, and scalp are missing"—rendering her "permanently unconscious." *Id.* at 592. So the baby alone—not the mother—had an emergency medical condition. *Ibid.* And there was no question that Virginia state law allowed the stabilizing care requested—placing the child on a ventilator; the hospital had previously provided that very care to the child. *Id.* at 592–93. That was why the Fourth Circuit rejected the hospital's attempt to invoke Virginia's allowance for an individual physician to let the child die, holding that approach preempted by EMTALA's "stabilizing treatment" mandate. *Id.* at 597. Ironically, the United States relies on this case requiring hospitals to *preserve* a child's life as grounds to require them to take it.

In addition, the infant's stabilization in *Baby "K"* did not require the doctor to weigh the risks to mother and child against one another. "[I]t is the conflict in treatment duties, which *only* arises in the case of a pregnant woman, that takes abortions outside the realm of conflict preemption." *Texas*, 623 F. Supp. 3d at 729 (emphasis added). By not resolving "how stabilizing treatments must be provided when a doctor's duties to a pregnant woman and her unborn child possibly conflict," Congress left it to the states, and "there is no direct conflict." *Id.* at 730 (citing 1395dd(f)). "Regardless of how much the President … may disagree with [this] Court's decision in *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), it does not

allow [him] to rewrite EMTALA's unambiguous terms to justify causing harm to an unborn child." Catholic.Health.Care.Br.8.

The United States' contrary arguments hold no water. First, while the Dictionary Act defines "individual" to exclude babies in the womb, Opp.30–31, EMTALA expressly protects a pregnant woman's "unborn child" in 42 U.S.C. 1395dd(e)(1)(A)(i).

Second, that EMTALA references "the woman *or* her unborn child," *ibid.* (emphasis added), does not mean that if it comes down to a choice of the child's life or the mother's fertility, the mother's interest always prevails. Contra Opp.32–33. "If you are offered coffee or tea, you may pick either … or you may for whatever reason order both. This is the ordinary sense of the word, understood by everyone." Bryan A. Garner, *Garner's American Modern Usage* 45 (2d ed. 2003). It is precisely because EMTALA does *not* choose between mother and child that there is no conflict with an Idaho statute that requires saving the child's life in such circumstances.

Third, nothing in EMTALA's text authorizes abortion when state law prohibits it. Contra Opp.33. The provision the United States invokes for this unlikely principle, 42 U.S.C. 1395dd(b)(2), merely grants the power to "refuse[ ]" consent, not to affirmatively choose an abortion. Again, EMTALA says nothing about abortion at all.

Fourth, the United States correctly says that "when Congress intends to create special rules governing abortion…, it does so explicitly." Opp.33–34 (citations omitted). Here, Congress said nothing about abortion in EMTALA's text; instead, it amended EMTALA to *protect* a pregnant woman's "unborn child." The United States cannot interpret the statute the opposite way absent another amendment.

Finally, it remains true that the Hyde Amendment prohibits the use of federal funds—including Medicare funds—to pay for abortions "except in cases of danger to the life of the mother, rape, or incest." Appl.21 (quoting *Planned Parenthood Ariz. Inc.* v. *Betlach*, 727 F.3d 960, 964 (9th Cir. 2013)). While the Hyde Amendment does not reference "the scope of EMTALA's stabilizing obligation," Opp.36, it would be incoherent for Congress to condition Medicare funding on the provision of illegal abortions that Congress has prohibited hospitals from funding with Medicare dollars.

II. The Balance Of Harms Weighs Decisively In Idaho's Favor.

A. The United States' brief shows that the answer to the question of harm follows the answer on Idaho's likelihood of success. The United States admits the "sound" principle that a state suffers irreparable injury "when the implementation of one of its statutes is enjoined." Opp.43. It says that principle does not apply because Idaho's Defense of Life Act is preempted. *Ibid.* But as explained above, that is incorrect, and the irreparable harm remains. The result is preemption of pro-life laws in more than 20 states, including Idaho's, preemption of countless other laws in every state, all while forcing pro-life emergency room doctors across the country to perform abortions on demand, including by finishing incomplete chemical abortions.

So the United States pivots and asks the Court to deny the Application because of a purported "long and unexplained delay in seeking relief." Opp.41. But as the motion panel explained, App.C.15–16, the relevant delay is not of the Applicants, but of the district court—and in turn, of the United States.

The Applicants acted timely at all stages to protect their sovereign interest in upholding their laws. Idaho and the Legislature moved for reconsideration less than a month after the district court entered its preliminary injunction. Opp.7, 9. Yet the district court sat on that motion for *eight months* before denying it. Opp.9. The Legislature then moved the district court for a stay the same day it filed its notice of appeal. But again, the district court did not rule, so the Legislature asked the Ninth Circuit for a stay. *Ibid.* Five weeks later, the Ninth Circuit panel granted it. Opp.10. Within weeks of the en banc court's order vacating the panel ruling, the Legislature asked the en banc court for a stay. *Ibid.* And both the Legislature and the State filed their Applications here less than a week after the en banc court denied that request.

In contrast, the United States claims irreparable harm based on a statutory interpretation it first discovered in 2022, over three decades after EMTALA's enactment. It reached that interpretation based on the President's post-*Dobbs* order to "find" a federal abortion mandate somewhere in the federal code. Appl.6. The federal government's textual argument for that mandate is spurious. And its position would have long required federal funding of abortions, contrary to the Hyde Amendment.

B. Conversely, the United States says that staying the injunction would "cause the United States irreparable harm by frustrating the operation of EMTALA" and stalling "emergency care required by EMTALA." Opp.43. But EMTALA does not authorize emergency-room abortions in Medicare-funded hospitals in pro-life states.

The United States also claims irreparable harm to pregnant women in Idaho who are unable to receive abortions that state law does not authorize. Opp.44. But

EMTALA has nothing to say about such abortions. And the claim ignores the "established record of providing safe and ethical treatment for pregnancy complications without resorting to abortion." Catholic.Health.Care.Br.10–13.

Finally, the district court's injunction is not the status quo. Contra Opp.44. "[I]t is the state's action—not any intervening federal court decision—that [sets] the status quo." *Wise* v. *Circosta*, 978 F.3d 93, 98 (4th Cir. 2020) (en banc) (citing *Andino* v. *Middleton*, 141 S. Ct. 9 (2020) (mem)). Idaho's application seeks to restore the status quo—Idaho's Defense of Life Act and its protection for innocent unborn life while this case is litigated on appeal. Leaving the Ninth Circuit's unreasoned order in place will require emergency-room doctors to take unborn human life in violation of state law. Consistent with the well-reasoned panel decision below, this Court should stay the district court's injunction pending appeal.

III. An Unreasoned En Banc Order Cannot Be Sustained.

As previously detailed, see Appl.10–11, courts cannot issue the extraordinary remedy of injunctive relief without undertaking a "proper consideration" of every injunction factor. *Winter*, 555 U.S. at 23. That is why this Court has vacated injunctions pending appeal that "fail[ed] to provide any factual findings or … reasoning of [their] own." *Purcell* v. *Gonzalez*, 549 U.S. 1, 5 (2006) (per curiam). The fact that "the *district court* enjoined" Idaho's Defense of Life Act "in a thoroughly reasoned" opinion, Opp.46–47, does not excuse the en banc Ninth Circuit from showing its work before vacating a well-reasoned stay order issued by a unanimous three-judge panel. Nor does the Applicants' request for an expedited ruling. Contra

Opp.47. Given the rash of recent unreasoned Ninth Circuit injunction and stay orders, Appl.28, a stay or certiorari before judgment is warranted.

IV. This Exceptional Case Warrants Certiorari Before Judgment.

This case pits an unreasoned Ninth Circuit order against published precedent of eleven circuits and a prior published decision of the Ninth Circuit. It involves the Government's transmogrification of an old statute that expressly protects the lives of unborn children into one that mandates unlawful abortions in hospitals across the country. It does so notwithstanding the Hyde Amendment, including in states that seek to preserve unborn human life. The federal government's novel interpretation threatens religious healthcare providers who provide "safe and ethical treatment for pregnancy complications without resorting to abortion." Catholic.Health.Care.Br.10–13. And this major bureaucratic rewrite of an unambiguous statute—made without notice or comment—was admittedly concocted to thwart this Court's holding in *Dobbs*. Advancing.American.Freedoom.Br.2, 6–13.

In its effort to spite this Court's holding in *Dobbs* and the democratic choices made in that decision's wake, this administration has distorted EMTALA to target the pro-life laws of nearly two dozen states and the unborn lives those states seek to protect. Certiorari before judgment is more than appropriate. Contra Opp.45–47.

CONCLUSION

The Court should stay the injunction pending appeal or grant certiorari before judgment.

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Respectfully submitted,

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