

# THE U.S. FIFTH CIRCUIT COURT OF APPEALS IS POISED TO ADDRESS EMERGENCY ABORTIONS AND THE SCOPE OF EMTALA'S PREEMPTION OF STATE ABORTION LAWS

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## U.S. Policy and Regulatory Alert

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On 10 March 2023, the U.S. Department of Justice (the DOJ) appealed<sup>1</sup> to the Fifth Circuit Court of Appeals an amended final decision by the Northern District of Texas (the Texas District Court) that struck down U.S. Department of Health and Human Services (HHS) guidance regarding the Emergency Medical Treatment and Labor Act (EMTALA). Specifically, the HHS guidance addressed EMTALA's preemption of state abortion laws.

In the wake of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*,<sup>2</sup> numerous state abortion laws took effect that established various parameters (e.g., reinstating pre-Roe statutes, establishing new restrictions, and providing exceptions) for when abortions are permissible in emergency situations. Consequently, stakeholders questioned whether state laws that draw emergency exceptions more narrowly than how EMTALA defines an emergency medical condition are preempted by EMTALA. Shortly after the *Dobbs* decision, HHS laid out its position in a 11 July 2022 memorandum issued to state survey directors (the EMTALA memo) that asserted, among other things,<sup>3</sup> that state laws purporting to limit abortion services more narrowly than provided under EMTALA are preempted.<sup>4</sup>

Three days after HHS issued the EMTALA memo, the Texas Attorney General (AG) filed a federal complaint in the Texas District Court seeking a declaratory judgment that HHS had acted beyond its authority in issuing the EMTALA memo, as well as an injunction seeking to prevent enforcement of the EMTALA memo.<sup>5</sup> The Texas District Court agreed with the Texas AG's arguments, reasoning that EMTALA contains "equal obligations" to both a pregnant woman and her unborn child and, therefore, does not directly conflict with Texas state law. Accordingly, the Texas District Court granted Texas' request for an injunction, in part, in a preliminary order issued 23 August 2022.<sup>6</sup> (For an in-depth discussion of this Texas District Court decision, and the issue of EMTALA preemption of state abortion laws generally, please see our companion article, available [here](#)).

This preliminary order led to an interlocutory appeal by the DOJ to the Fifth Circuit; however, to create a procedurally more straightforward path to appeal, the Texas District Court ultimately issued an amended final decision on 13 January 2023 affirming the preliminary order. Accordingly, the federal government dismissed its interlocutory appeal, and it has now appealed the amended final decision.

The outcome of this appeal could significantly impact how hospitals, health systems, and other providers deliver emergency abortion care across the country. HHS continues to stand behind the EMTALA memo, which has only been enjoined in the state of Texas to date,<sup>7</sup> stating that it would investigate reports or complaints regarding an

EMTALA violation and “will not hesitate” to refer states attempting to prohibit providers from offering emergency care consistent with EMTALA to the DOJ “to take appropriate legal action.”<sup>8</sup>

At the same time, related federal litigation is underway in the District of Idaho, where, in a preliminary order issued on 24 August 2022—one day after the Texas District Court's preliminary order—the Idaho District Court reached a contrary decision to the Texas District Court, finding that EMTALA preempted an Idaho state law that provided only a narrow affirmative defense to criminal liability for providing emergency abortion care. As of the publication of this alert, the Idaho District Court case has a motion for reconsideration filed by the Idaho AG pending, and the Idaho State Legislature has filed an interlocutory appeal to the Ninth Circuit seeking to overturn a lower court decision disallowing them from intervening in the case. Ultimately, though, it is anticipated that once a final decision is issued by the Idaho District Court, that decision will likewise be appealed to the Ninth Circuit, which could set up a showdown between the Fifth and Ninth Circuits as to the scope of EMTALA preemption and, quite possibly, lead to another U.S. Supreme Court case concerning abortion.

For an in-depth discussion on the Texas and Idaho orders and their impact on emergency abortion services, please see our companion article, available [here](#). K&L Gates will continue to monitor these federal cases and their impact on EMTALA and will provide updates as this issue unfolds.

## FOOTNOTES

<sup>1</sup> See Notice of Appeal, Texas v. Becerra, No. 5:22-CV-185-H (N.D. Tex. filed Mar. 10, 2023).

<sup>2</sup> Dobbs v. Jackson Women's Health Org., 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022).

<sup>3</sup> For example, the EMTALA memo also discussed HHS's position that a determination of whether an emergency medical condition exists, and what stabilizing treatment may be needed, rests with the practitioner conducting the medical screening examination.

<sup>4</sup> CMS Memo, QSO-22-22-Hospitals, Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss, (July 11, 2022, revised Aug. 25, 2022), <https://www.cms.gov/files/document/qso-22-22-hospitals.pdf>.

<sup>5</sup> Complaint, Texas v. Becerra, No. 5:22-CV-185-H (N.D. Tex. filed July 14, 2022), [https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/20220714\\_1-0\\_Original%20Complaint%20Biden%20Admin.pdf](https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/20220714_1-0_Original%20Complaint%20Biden%20Admin.pdf).

<sup>6</sup> Memorandum Opinion and Order, Texas v. Becerra, No. 5:22-CV-185-H (N.D. Tex. issued Aug. 23, 2022).

<sup>7</sup> It is also enjoined nationwide against the two named plaintiffs in the litigation, the American Association of Pro-Life Obstetricians and Gynecologists and the Christian Medical and Dental Association.

<sup>8</sup> Letter from Xavier Becerra, Secretary, & Chiquita Brooks-LaSure, Administrator, CMS, to Governors (Aug. 26, 2022), <https://www.hhs.gov/sites/default/files/hhs-letter-to-governors-reproductive-health-care.pdf>.

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