

EMTALA and State Abortion Bans: Juggling a Power Struggle

DOI: 10.52214/vib.v11i.13414

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ABSTRACT

This paper argues that EMTALA and state laws governing abortion access do conflict and that federal law should preempt state law to the extent of the conflict. This paper's purpose is to give a brief overview of the legal issues, identify practical issues and dangers associated with restrictive abortion laws, and contextualize preemption in the current political moment. The topic here is medical emergency – this paper does not address abortion for either nonmedical or nonemergency reasons. Lastly, this paper is designed to appeal to those in many disciplines, including bioethics, and provide a primer on the relevant legal concepts for those not practicing law. Much of it reads as an explainer addressing many intertwined laws and arguments.

Keywords: EMTALA, pregnancy, abortion, medical emergency, bioethics, Spending Clause, Supremacy Clause

I. INTRODUCTION

The Emergency Medical Treatment and Labor Act (EMTALA)¹ appears to conflict with restrictive state abortion laws. Generally, federal law preempts state law in matters where they conflict.² State abortion laws should be unenforceable when they conflict with EMTALA, i.e., specifically when abortions are needed to stabilize patients. We argue that EMTALA preempts restrictive state abortion laws when the medical intervention required to stabilize the patient is an abortion. In *Moyle v. Idaho*,³ addressing the issue of whether EMTALA preempted the restrictive Idaho abortion law, the Supreme Court sent the case back to the lower courts, but the justices addressed many of the relevant issues: whether the laws conflict, preemption and the Supremacy Clause, the Spending Clause, and various interpretations of EMTALA and Idaho's abortion law.⁴ This paper's purpose is to give a brief overview of the legal

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Disclosure: Editor-in-Chief of Voices in Bioethics. This paper was anonymously peer reviewed and then edited by staff editors.

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issues, identify practical issues and dangers associated with restrictive abortion laws, and contextualize preemption in the current political moment. The topic here is medical emergency – this paper does not address abortion for either nonmedical or nonemergency reasons. Lastly, this paper is designed to appeal to those in many disciplines, including bioethics, and provide a primer on the relevant legal concepts for those not practicing law. Much of it reads as an explainer addressing many intertwined laws and arguments.

II. WHAT DOES EMTALA REQUIRE?

EMTALA requires emergency departments to screen patients to determine whether they are experiencing a medical emergency. EMTALA defines medical emergency as follows, “a person is having a medical emergency if they are in labor or suffering from a condition that, without immediate attention, could be reasonably expected to place their health in serious jeopardy, seriously impair their bodily function, or cause serious dysfunction to an organ.”⁵ Once screened, if an emergency medical condition is present, the hospital must stabilize, or if stabilization is not possible in the facility, transfer the patient. EMTALA caselaw covers what level and type of screening and stabilization meets the rigor of the law. When a hospital cannot stabilize the person, a timely transfer is imperative.

EMTALA requires hospitals to stabilize patients when “the absence of immediate medical attention could be reasonably expected to either result in a serious health risk, or seriously threaten bodily functions or organs.”⁶ Stabilize is defined as providing treatment necessary “to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or . . . to deliver (including the placenta).”⁷ Medical literature demonstrates that abortion may be necessary for life-threatening complications of pregnancy, including sepsis. Therefore, EMTALA requires hospitals to provide abortions if the physician determines that terminating the pregnancy is required to stabilize the patient.⁸ Many scholars, lawyers, and healthcare providers take the position that abortion can be medically necessary and that EMTALA should ensure abortions to stabilize, providing a robust body of ethics, legal, and medical literature.⁹

III. HAS VIOLATING EMTALA HARMED WOMEN?

Since restrictive state abortion laws became enforceable after *Dobbs v. Jackson Women’s Health*,¹⁰ twelve states enacted (or began to enforce) severely restrictive abortion laws.¹¹ State policies vary concerning exceptions for saving the life of the mother and for pregnancies resulting from rape and incest.¹² Beyond the twelve states that nearly ban abortion, 15 states have restrictive laws prohibiting abortion after various gestational stages.¹³ In Georgia, at least two women have died due to the restrictive law. One attempted a medical abortion at home and did not go to the hospital out of fear they would not treat her. The other “languished” in the hospital while doctors refused to perform dilation and curettage despite sepsis.¹⁴ In Florida, women were denied abortion care and received risky substandard care. One was sent home with antibiotics after preterm premature rupture of membranes, i.e., after her “water broke” before she was full term.¹⁵ She almost died, losing significant blood when the miscarriage occurred in her own bathroom.¹⁶ Restrictive abortion laws have led to sub-standard care including inappropriate discharges resulting in severe outcomes including sepsis.¹⁷ Infections grow quickly and the need for an abortion can become dire as sepsis is described as “a race against time.”¹⁸

There are many personal stories – yet it has been difficult to aggregate the numbers. ProPublica has tried to track how many women have died or suffered serious medical harm due to a lack of timely abortions during medical emergencies.¹⁹ Yet states have not been properly tracking deaths and other physical harms due to delays in emergency abortion care.

Additionally, many women have driven themselves or been transferred and airlifted to neighboring states without restrictive laws.²⁰ In *Moyle v. United States*, Justice Kagan noted that, “To ensure appropriate medical care, the State’s

largest provider of emergency services had to airlift pregnant women out of Idaho roughly every other week, compared to once in all of the prior year (when the injunction was in effect).²¹ However, when time is of the essence, stabilization must be local.²² Delays in providing care can cause hemorrhage, loss of the uterus, infertility, or death.²³

A 2022 study on the impact of Texas's six-week abortion ban in two hospitals found significantly worse outcomes arose when all patients in preterm labor with at least one clinical indication for induction of labor were treated with state-required "expectant management" rather than induction. Expectant care or expectant management means waiting for the miscarriage to finish on its own and may involve bed rest, examination by ultrasound, and antibiotics.²⁴ Fifty-seven percent of those with ruptured membranes experienced "a serious maternal morbidity," such as infection or hemorrhage.²⁵

EMTALA requires abortion when its delay could damage the uterus and fallopian tubes.²⁶ Additional emergencies that may require emergency treatment include premature rupture of membranes, ectopic pregnancy, incomplete miscarriage,²⁷ sepsis, molar pregnancy, and pre-eclampsia.

States have ethical obligations to protect citizens experiencing emergencies and should avoid imposing barriers that prevent others from assisting. A floor based on constitutional or federal law had offered protection prior to *Dobbs v. Jackson Women's Health Organization*.²⁸ Ethical obligations of doctors in emergencies may conflict with restrictive state laws arising after *Dobbs*.²⁹ Obligations of government to the people are thwarted by restrictive laws at the state level and by a failure of EMTALA enforcement or hard law³⁰ to clarify or codify a specific right to emergency abortions.

IV. WHAT IS PREEMPTION?

Preemption is the idea that a law of a higher authority will govern rather than a law of the lesser authority. It generally applies when laws conflict. The Constitution includes the Supremacy Clause, which states that the Constitution, federal laws, and treaties are the "supreme Law of the Land."³¹ The breadth of preemption law covers the ways in which the federal government, including administrative agencies, can set floors and ceilings for state laws, can take over certain subject matters (like the FDA governs approval of prescription drugs), and must prevail over conflicting state and local laws, including state constitutions. However, preemption is not absolute; it requires that the federal law is within Congress' authority,³² and cannot unconstitutionally infringe on states' rights. The "presumption against preemption" holds that courts should not assume federal laws governing areas normally left to states, i.e., state police powers, do preempt.³³ Preemption cases look at the validity of the federal law rather than focusing on the state law exclusively.

V. WHAT IS THE BASIS FOR EMTALA'S PREEMPTION OF STATE LAW?

EMTALA contains a preemption clause which states, "The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section."³⁴ Therefore, the law is not ambiguous; preemption is explicit rather than implied. *EMTALA preempts state law when it conflicts with it.*

EMTALA should govern as per the Supremacy Clause and the breadth and depth of Supreme Court cases on preemption. It seems to be a clear express preemption and yet somehow the Fifth Circuit concluded the opposite, prioritizing state law over federal, and issued an injunction against enforcement of EMTALA when such enforcement requires an abortion to stabilize the patient in violation of Texas' abortion ban.³⁵

VI. DOES THE PREEMPTION CLAUSE APPLY TO RESTRICTIVE STATE ABORTION LAWS?

Impossibility Preemption. State and federal law are most obviously

in conflict when “compliance with both federal and state regulations is a physical impossibility.” *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

The paradigmatic case of “impossibility preemption” occurs when, as in the FLSA overtime example, a federal statute says “private entities must do X” and a state law says “private entities may not do X.” When that occurs, the Supremacy clause plainly voids the state law.³⁶

The state laws prohibit actions that EMTALA compels. Any other reading of the state laws and EMTALA would limit either EMTALA or the state law. If EMTALA were read to never require abortion, then there would be no conflict, but the ability of EMTALA to effectively require screening and stabilization would be undermined. State laws would endanger women seeking abortion care for things like sepsis.

VII. MOYLE V. UNITED STATES PROCEDURAL HISTORY

Moyle v. United States is currently the best indication of where the Supreme Court stands on EMTALA and abortion. Idaho’s law bans abortion except to prevent death.³⁷ There is an exception for cases of rape and incest, and the law imposes a paper trail to validate those legal abortions. The US District Court issued an injunction against enforcement of the Idaho law when it conflicts with EMTALA. The Ninth Circuit Court of Appeals declined to stay the injunction. Then, the Supreme Court granted certiorari (before the Ninth Circuit heard the appeal), staying the injunction for months earlier in 2024. (This means from January to June Idaho was permitted to enforce its strict abortion law. To comply with EMTALA without violating Idaho’s criminal law, Idaho hospitals arranged airlifts for patients in need of abortions to stabilize them. In many cases, they did not provide abortions to those patients presenting with medical emergencies for which an abortion would be the standard of care and a stabilizing procedure.) The Supreme Court heard arguments but, at the end of June, decided that certiorari was improvidently granted. Therefore, the injunction against Idaho’s law was reinstated. Justice Jackson suggests that the Supreme Court will need to face the preemption issue at some point.³⁸ The disparity between the Fifth and Ninth Circuit courts indicates the need for resolution. In the meantime, the Department of Justice has dropped the Biden-era case against Idaho.³⁹

VIII. DO EMTALA AND IDAHO LAW CONFLICT? DOES EMTALA EVER REQUIRE ABORTION?

The Supreme Court decision that certiorari was improvidently granted in the Idaho case touched on the relevant preemption issues.

Justice Kagan wrote a statutory analysis, joined by Justice Jackson and Justice Sotomayor. Idaho argues that EMTALA never calls on doctors to violate state laws. Kagan notes that Idaho’s argument is unlikely to succeed on the merits given that EMTALA and the Idaho law conflict:

EMTALA requires a Medicare-funded hospital to offer an abortion when needed to stabilize a medical condition that seriously threatens a pregnant woman’s life or health. See 42 U. S. C. §1395dd. Idaho allows abortions only when “necessary to prevent” a pregnant woman’s “death.” Idaho Code Ann. §18–622(2)(a)(i) (Supp. 2023).⁴⁰

Kagan responds to Justice Alito’s position that EMTALA never requires abortion. Justice Kagan’s analysis notes the importance of stabilizing patients and preventing loss of fertility and other serious harms. (Justice Jackson wrote on her own as well, suggesting the Court keep the case rather than withdraw its grant of certiorari.)

IX. DO OTHER FEDERAL LAWS OR RECENT AMENDMENTS ALTER OR LIMIT EMTALA'S REQUIREMENTS?

Justice Alito's dissent, joined by Justices Thomas and Gorsuch, suggests a reading of EMTALA that does not require abortion to stabilize women even if the woman would face grave harm or death. He suggests the Hyde Amendment indicates EMTALA was not meant to require abortion. The Hyde Amendment is a 1977 law that prohibits federal funding for abortion except when the pregnant person is endangered by the pregnancy or when the pregnancy is the result of rape or incest.⁴¹ He also notes the word abortion is not in the law – this implies he would expect all emergency procedures from appendectomy to IV antibiotics to be listed. His interpretation is a deviation from common sense and legal interpretations.

Alito refers to EMTALA's provisions for the unborn. EMTALA was revised to ensure that women could seek emergency care for fetal distress even if there is not a risk to the pregnant women themselves. As Kagan noted, this is not a "tacit withdrawal" of the otherwise well accepted requirement to treat women in need of abortions to avoid serious harm or bodily/organ injury. The references to the unborn child extend the rights of the pregnant woman to seek care, allowing women to protect the fetus and seek medical care on its behalf. Other references to the unborn similarly extend consideration to the fetus in decisions to facilitate transfers of women in labor. While considering the fetus is often the priority of the woman seeking care, "dual stabilization" is not always possible and arguably not always an appropriate goal.⁴²

X. MIGHT EMTALA VIOLATE THE SPENDING CLAUSE?

Justice Alito further entertains claims that the Spending Clause should prevent EMTALA from placing binding conditions on Idaho as Idaho was not a party to it. He uses the language of contracts about the federal law. He suggests that EMTALA has ambiguity in violation of the Spending Clause. He complicates his assertions by discussing the right to refuse and distinguishing it from the right to demand care that violates the law. EMTALA itself creates an obligation to provide stabilizing care – that patients may refuse or demand care is not relevant to the statute.

Justice Barrett's concurrence, joined by Justices Kavanaugh and Roberts, also suggests an open issue about whether EMTALA can preempt state law as it imposes on private businesses. She is open to Alito's view of the Spending Clause. Questioning the very validity of the federal law rather than focusing solely on the state law in question is a way of approaching the preemption issue. Unconstitutional federal laws should not preempt state laws.⁴³ If EMTALA's obligations imposed on states are invalid under the Spending Clause because states were "not party" to the agreement between hospitals that accept Medicare and the federal government, then all other provisions afforded by EMTALA could be invalidated as well. This would greatly impact the ability of the public to obtain emergency medical care. It is noteworthy that six justices seem to entertain the idea that EMTALA potentially violates the Spending Clause.

XI. IS THE STATE LAW AMBIGUOUS?

Justice Barrett's concurrence suggests that a broad reading of Idaho's law does not require death to be imminent. Rather the law allows a liberal interpretation of performing an abortion to prevent death. Her reading of "abortion to prevent the death of the mother" seems to interpret Idaho's law to mean that if a doctor were to think death would eventually result there is wide discretion to go ahead with an abortion. The number of airlifts out of Idaho suggests doctors do not feel so free to interpret the criminal law loosely.

Idaho could clarify its law if it does intend a loose interpretation. Amending the law, enacting additional laws, or through the state court system, Idaho could clarify that emergency abortions are acceptable and that the "saving a life" exception does not require waiting until the patient is on the brink of death or until a fetal heartbeat or cardiac rhythm stops.

XII. EXECUTIVE ACTIONS

After *Dobbs v. Jackson Women's Health* shifted abortion lawmaking to the states,⁴⁴ President Biden signed an executive order that noted the intention to take "action to protect healthcare service delivery and promote access to critical reproductive healthcare services, including abortion."⁴⁵ In July 2022, the Department of Health and Human Services (HHS) issued a guidance reiterating the obligation to continue to treat pregnant patients or patients experiencing pregnancy loss.⁴⁶ In 2023, HHS issued a reminder letter after research found violations in Missouri and Kansas.⁴⁷ In 2024, following the Supreme Court's opinions removing its grant of certiorari in *Moyle v. Idaho*, the White House reiterated its plans to continue EMTALA enforcement, noting that EMTALA may require abortion in certain circumstances.⁴⁸ CMS, HHS, and the White House have expressed intention to promote enforcement of EMTALA. So far, the Trump administration has left EMTALA intact. Yet, as noted, the Department of Justice is not pursuing ongoing EMTALA cases concerning emergency abortion and restrictive state laws.

XIII. PREEMPTION AND POLITICS

The political moment is giving rise to questions about federalism and preemption when state and federal laws clash. The current administration is characterized by a mission to reduce executive agencies' size and scope. The "DOGE" organization threatens to eliminate the bureaucracy, a sign that letting state law stand when it conflicts with federal law may be the favored position.

However, the Trump administration may be inconsistent about preemption for various reasons. A president wanting to invoke presidential power may use federal law to control states. And a president prioritizing any particular legislative agenda item may ignore preemption when an existing federal law blocks a state law that is consistent with his agenda.

While it is doubtful that a Trump executive action would have the tone and substance of Bidens', it is possible that having already extracted the votes he needed to be elected, Trump has no reason to weigh in on abortion at all. It is unclear, but not necessarily unlikely, that a Trump HHS would continue to issue letters enforcing EMTALA. Robert F. Kennedy, Jr. was pro-choice and may be unlikely to change his stance as he acclimates to his role as secretary of HHS.

XIV. SHOULD THE DEFINITION OF ABORTION BE UNIVERSAL AND EXCLUSIVE?

Several states have changed the definition of abortion to exclude the removal of embryo/fetus for ectopic pregnancy, miscarriage, or molar pregnancy or have codified exceptions to their restrictive laws.⁴⁹ For example, a 2023 Texas bill provides an affirmative defense for ectopic pregnancy and premature rupture of membranes.⁵⁰ Tennessee passed a similar law allowing abortion for ectopic pregnancies and miscarriage management. There is no evidence that states wish to treat ectopic pregnancies as viable ones and prevent standard-of-care medical treatment. The lack of clarity around miscarriage care⁵¹ leads to confusion. States have placed blame on doctors for misinterpreting the law and failing to provide emergency abortions.⁵²

A definition of abortion that excludes nonviable or low survival chance pregnancies is seen as a creative way to avoid complying with strict laws. While a common sense definition of abortion could exclude evacuating a fetus without a heartbeat, it would be difficult to narrow it enough to exclude removing a fetus that has a heartbeat but is not expected to survive post-birth or until full term or will not survive due to ruptured membranes or genetic anomalies.

Without clarity and a universal definition of abortion across law and medicine and among states, doctors have seemingly "played it safe" by risking women's lives rather than risking prosecution.

XV. WHY DO DOCTORS GO ALONG?

A fear of prosecution, having to defend oneself in court, a guilty verdict, incarceration, and loss of license are at the root of denying or delaying abortion in emergencies. In some instances, physicians who were willing to provide necessary abortions were prevented from doing so by hospital lawyers.⁵³ The uncertainty about definitions and exceptions leads to a fear of legal action.

Hospital emergency departments fear that a legal system may interpret “to prevent death” very narrowly. When restrictive state laws went into effect, the laws provided little guidance to hospitals and providers. Hospitals and doctors note a lack of clarity about how close to death the patient must be for an abortion to be permissible under the state’s law. It is possible that doctors and hospitals are being overly cautious – interpreting the laws narrowly themselves. Clarification as to whether doctors can treat women earlier and do not need to wait for death to be imminent or for a fetal heartbeat or cardiac rhythm to stop would be helpful.

There are no known cases of doctors being prosecuted for violating state restrictive abortion laws when the doctor performed the abortion based on the patient’s emergency medical condition.⁵⁴ It appears the fear of criminal prosecution is a deterrent.⁵⁵

The Hippocratic Oath appears inconsistent with denying care to women in need and at risk of serious complications and death. Rather than approaching EMTALA violations as a failure by doctors, much of the literature blames the restrictive laws, the uncertainty, and the fear of liability as if they justify the failure to provide care.⁵⁶ Possibly, if a prosecutor brought charges, some doctors would win cases, receive light to no sentences, perhaps community service, or even get clemency. Doctors have many legal and ethics theories on their side: avoiding violating federal law; a crime of necessity; benevolence/beneficence; acting as Good Samaritans and deserving immunity; conscientiously objecting to the law; rules of statutory construction for ambiguous laws; striking down the law as ambiguous or arbitrary and capricious.⁵⁷ The prison sentences built into the laws have not yet been tested in the courts.

XVI. WILL TRAVEL BANS FOR ABORTION CARE CONTRIBUTE TO EMTALA NONCOMPLIANCE?

Several Texas counties adopted laws to prohibit travel for abortions. These laws create a cause of action that anyone can bring against someone traveling for an abortion. They are considered “abortion trafficking” laws. Idaho and Tennessee have laws prohibiting accompanying a minor out of state for an abortion. There is an assumption that these laws prevent healthcare practitioners from recommending out-of-state abortions or facilitating travel or appointments.⁵⁸ Dicta from Justice Kavanaugh in *Dobbs* suggested that the right (found in caselaw) to interstate travel makes travel bans unconstitutional.⁵⁹ Nonetheless, the fear caused by a travel ban could have a chilling effect on seeking emergency care out of state. Travel bans also would conflict with EMTALA as providing a transfer to a facility for emergency care is a foundational part of the law.

Shield laws in states providing abortions may bar states from prosecuting people traveling for abortions.⁶⁰ Privacy of health information continues to be important if states were to attempt to prosecute those leaving for abortion.⁶¹

XVII. IS THE REASON FOR AN ABORTION A CONSIDERATION?

A law that targets *the reason* for an abortion may better reflect the religious nature and political priority of those supporting state restrictive abortion laws. Some anti-abortion-legality literature condemns all abortion, as do some religious organizations. However, 92 percent of Democrats, 89 percent of independents, and 79 percent of Republicans support access to abortion during pregnancy-related emergencies and miscarriage.⁶² Some members of

anti-abortion-legality groups approve of abortions to save women and to prevent serious medical harm – they approve of the abortions compelled by EMTALA – but they do not approve of abortion for other reasons.

A state could say abortion to prevent any medical harm of which the person bears a substantially elevated risk (e.g., ruptured membrane, preeclampsia, unexplained significant bleeding) is permissible. This can be comparable to rape and incest provisions – those exceptions concern extenuating circumstances beyond the patient’s control. Generally, the laws with exceptions for medical emergencies that threaten the life or health of the patient are examples of laws based on the reason for abortion care.

XVIII. WHO IS THE MOST IMPACTED BY RESTRICTIVE ABORTION LAWS DURING EMERGENCIES?

These laws target biological women exclusively. The sex gap itself is a form of discrimination. Women in positions of vulnerability, whether by location, income, race, or ethnicity are worse off. People from rural areas, people with low incomes, and people from marginalized communities who traditionally struggle to access health care seek care in emergency departments more often than those with high incomes and reliable health insurance.⁶³ The poor will be affected by restrictive abortion laws more than the wealthy, who have a higher likelihood of traveling to access safe abortion care. Nonetheless, the danger cuts across all income groups in that dire emergencies develop quickly and regardless of income, people with impending sepsis may run out of time. Some people/groups do have an elevated risk:

- Those with the least money and resources;⁶⁴
- Those with less access to transportation;⁶⁵
- Those without health insurance;⁶⁶
- Those living in rural communities;⁶⁷
- Undocumented immigrants;⁶⁸ and,
- Those with disproportionately more maternal mortality (e.g., Black women) than other groups.⁶⁹

The Black population is high in many of the states with the most restrictive laws. Other than the District of Columbia, Mississippi and Louisiana have the highest proportions of Black Americans at 38 percent and 33 percent, respectively.⁷⁰ Black and Hispanic women are more likely to experience pregnancy complications. Texas has a large Hispanic population⁷¹ deeply impacted by the strict laws.

When groups have faced significant past discrimination, including racism, they arguably should be protected. While they do not necessarily require special treatment to make up for the past, there are strong ethics-based arguments to ensure that populations that have experienced racism and other discrimination be ensured of equal treatment, ethically speaking, and equal protection under the law. In bioethics, the principle of justice is used to prevent preying upon the vulnerable and to establish practical ways to ensure and promote fairness.⁷² State abortion laws are an injustice in that the denial of emergency care would not be the same across the board – instead, these denials of care directly impact women only and disproportionately impact historically and currently vulnerable groups.

XIX. BIG TAKEAWAYS

Doctors and hospitals will likely continue to face uncertainty in the short term. States and the Supreme Court may weigh in on EMTALA, preemption, and state law. In the long run, Congress can make a law protecting abortion rights; states can provide guidance defining abortion; and additional bills like Texas 3058 can clarify which emergency

services are excluded from prohibitions on abortion. There are continuing risks to those potentially requiring emergency abortions:

- The Spending Clause arguments could invalidate EMTALA despite the tenuous reasoning.
- The Supreme Court will continue to be imbalanced and politicized.
- States could begin enforcing the laws/prosecuting practitioners.

However, some checks on state power remain:

- The right to interstate travel is likely to remain intact.
- Nonprofit organizations provide safe and reliable interstate travel and accommodations.
- Referendums, grassroots campaigns, and bad publicity may lead to the repeal of restrictive state laws.
- HHS may continue to provide guidance suggesting EMTALA will be enforced.

And other strategies have not been satisfactorily tried:

- Lawsuits challenging state laws based on racial disparity/discrimination rather than preemption will likely continue, and states may resolve them differently, based on state constitutions.
- Arguments based on equal protection for gender were unaddressed in *Dobbs*.⁷³
- Providers of abortion could perform all emergency care required by EMTALA, forcing states to choose to prosecute or not and forcing state judicial systems to become even more involved.

XX. CONCLUSION

Arguments abound on both sides of the issue contributing to some legal uncertainty. This explainer set forth some of the disputes concerning the law. However, EMTALA should preempt state law when the two conflict. The conflict is narrow. In cases where an abortion is needed as life-saving care or to prevent significant injury or organ damage, hospitals should provide stabilizing abortion. Regardless of EMTALA and state laws, saving lives and preventing harm is an ethical duty in the field of medicine. Despite Spending Clause challenges and Justice Alito's tenuous reasoning, EMTALA should be enforced. It should survive constitutional challenges and protect those providing all sorts of emergency care to people in need.

¹ 42 U. S. C. §§1395dd. (Medicare-participating hospitals with an emergency department are required to screen patients for medical emergencies and provide stabilizing treatment before transferring or discharging the patient, irrespective of an individual's ability to pay.)

² For more about the preemption doctrine, which stems from the Supremacy Clause, see Congressional Research Service (2019) Federal Preemption: A Legal Primer. <https://crsreports.congress.gov/product/pdf/R/R45825/1>; Clark, B. (2003) The Supremacy Clause as a Constraint on Federal Power. 71 Geo. Wash. L. Rev. 91. https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1474&context=faculty_publications (suggests federal law that "exceeds the scope" of congressional authority should be subject to judicial review – the Supremacy Clause refers to federal laws properly enacted with congressional authority; argues that judicial review should not be limited to review of the state law in preemption cases; it should include review of whether the federal law was properly enacted.)

³ Moyle v. United States, 603 U.S. ____ (2024). <https://www.oyez.org/cases/2023/23-726>

⁴ Idaho Statutes Title 18 Crimes and Punishments Chapter 6 Abortion and Contraceptives. <https://legislature.idaho.gov/statutesrules/idstat/title18/t18ch6/sect18-622/>

⁵ 42 U.S.C. § 1395dd(e) (2018).

⁶ Moyle v. United States, 603 U.S. ____ (2024)/United States v. Idaho, quoting and citing EMTALA, 42 U. S. C. §§1395dd(b)(1), (e)(1)(A). <https://supreme.justia.com/cases/federal/us/603/23-726/>

⁷ 42 U.S.C. § 1395dd(e)(3)(A)

⁸ Biden-Harris Administration Reaffirms Commitment to EMTALA Enforcement (2024). HSS Press Release. <https://www.hhs.gov/about/news/2024/07/02/biden-harris-administration-reaffirms-commitment-emtala-enforcement.html>

⁹ For example, Rapazzo, N. (2023). Emergency Room to the Courtroom: Providing Abortion Care Under EMTALA and

State Abortion Bans, 128 DICK. L. REV. 325. <https://ideas.dickinsonlaw.psu.edu/dlr/vol128/iss1/9>; Macklin, A., Michael, J., and Sakimoto, K. (2023). Between EMTALA and State Abortion Restrictions: The Post-Dobbs Dilemma. American Health Law. <https://www.americanhealthlaw.org/content-library/connections-magazine/article/b7a49aa7-ec78-48dd-b254-be04e2db46f7/between-emtala-and-state-abortion-restrictions-the>

¹⁰ Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022). <https://supreme.justia.com/cases/federal/us/597/19-1392/>

¹¹ See Abortion in the United States Dashboard, KFF. <https://www.kff.org/womens-health-policy/dashboard/abortion-in-the-u-s-dashboard/> (Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia.)

¹² Policy Tracker: Exceptions to State Abortion Bans and Early Gestational Limits (2025). KFF. <https://www.kff.org/womens-health-policy/dashboard/exceptions-in-state-abortion-bans-and-early-gestational-limits/> (8 states have no rape or incest exception; 6 states have no health exception.)

¹³ For maps categorizing states various ways, see <https://states.guttmacher.org/policies/> (uses five categories of state law); <https://reproductiverights.org/maps/abortion-laws-by-state/> (12 “illegal”; additional 11 “hostile”); <https://www.cnn.com/us/abortion-access-restrictions-bans-us-dg/index.html> (13 states ban; 7 have a 6 to 18 week limit.); <https://www.kff.org/womens-health-policy/dashboard/abortion-in-the-u-s-dashboard/> (12 ban; 6 limit between 6 and 12 weeks; four states have a limit between 18 and 22 weeks gestation.)

¹⁴ Surana, K. (2024). Afraid to Seek Care Amid Georgia’s Abortion Ban, She Stayed at Home and Died. *ProPublica* <https://www.propublica.org/article/candi-miller-abortion-ban-death-georgia>; <https://www.propublica.org/series/life-of-the-mother>

¹⁵ Pre-labor rupture of membranes occurs when the fetal membranes rupture before the onset of labor contractions, if this occurs before 37 weeks gestation. The pre-labor rupture increases the risk of complications such as intra-amniotic infection and placental abruption. Dayal, S., Jenkins, S., Hong, P. (2024). Preterm and Term Pre-labor Rupture of Membranes (PPROM and PROM). *StatPearls Publishing*. <https://www.ncbi.nlm.nih.gov/books/NBK532888/>

¹⁶ Kitchener, C., et al. (2023). Two Friends Were Denied Care after Florida Banned Abortion. One Almost Died., *Washington Post*. <https://www.washingtonpost.com/politics/2023/04/10/pprom-florida-abortion-ban>

¹⁷ Chernoby, K. and Acunto, B. (2024). Pregnancy Complications After Dobbs: The Role of EMTALA, *Western Journal of Emergency Medicine*. Vol. 25, <https://escholarship.org/uc/item/5j81n18f>

¹⁸ Santhanam, L. (2022). How abortion bans will likely lead to more deadly infections. *PBS*.

<https://www.pbs.org/newshour/health/how-abortion-bans-will-likely-lead-to-more-deadly-infections>

¹⁹ Surana, K., Elba, M., et al. (2024). Are Abortion Bans Across America Causing Deaths? The States That Passed Them Are Doing Little to Find Out. *ProPublica*. <https://www.propublica.org/article/abortion-bans-deaths-state-maternal-mortality-committees#>

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- ²¹ *Moyle v. United States*, 603 U.S. ____ (2024)/*United States v. Idaho*, (Kagan, conc.)
- ²² Goodwin, Whelan, and Gostin, 2024.
- ²³ Cohen, Donley, and Rebouché, 2023.
- ²⁴ Nanda, K., Lopez, L., Grimes, D., Pegg, A., Nanda, G. (2012). Expectant care versus surgical treatment for miscarriage. *Cochrane Database Syst Rev*. <https://pmc.ncbi.nlm.nih.gov/articles/PMC6464924/>
- ²⁵ Nambiar, A., Patel S., et al. (2022). Maternal morbidity and fetal outcomes among pregnant women at 22 weeks' gestation or less with complications in 2 Texas hospitals after legislation on abortion. *Research Letters. American Journal of Obstetrics and Gynecology*. <https://doi.org/10.1016/j.ajog.2022.06.060>; see also Simmons-Duffin, S. (2023) In Oklahoma, a Woman Was Told to Wait until She's "crashing" for Abortion Care. *NPR*. <https://www.npr.org/sections/health-shots/2023/04/25/1171851775/oklahoma-woman-abortion-ban-study-shows-confusion-at-hospitals>
- ²⁶ Cohen, Donley, and Rebouché, 2023.
- ²⁷ Cohen, Donley, and Rebouché, 2023.
- ²⁸ 597 U.S. ____ (2022) <https://supreme.justia.com/cases/federal/us/597/19-1392/>
- ²⁹ Giubilini, A., Schuklenk, U., Minerva, F., & Savulescu, J. (2024). Conscientious commitment, professional obligations and abortion provision after the reversal of *Roe v Wade*. *Journal of Medical Ethics*. 50(5), 351-358. <https://jme.bmj.com/content/50/5/351.abstract>; additionally, some physicians wish to never perform abortions and may find that *Roe v. Wade* violated their own values – in such cases conscientious objection was generally available to them as long as proper care for pregnant women could be obtained.
- ³⁰ The term hard law is generally used in international human rights and means legally binding instruments rather than guidances.
- ³¹ Constitution of the United States (Article VI, Clause 2).
- ³² Schweitzer, D. (2011). The Law of Preemption. *National Association of Attorneys General*. <https://www.naag.org/wp-content/uploads/2020/10/The-Law-of-Preemption-2d-ed.-FINAL.pdf>
- ³³ *Wyeth v. Levine*. 555 U.S. at 555 (2009). <https://casetext.com/case/wyeth-v-levine-2/>
- ³⁴ 42 U.S.C. § 1395dd(f).
- ³⁵ *Texas v. Becerra*, No. 23-10246 (5th Cir. 2024). <https://law.justia.com/cases/federal/appellate-courts/ca5/23-10246/23-10246-2024-01-02.html#>
- ³⁶ Schweitzer, D. (2011). The Law of Preemption. *National Association of Attorneys General*. <https://www.naag.org/wp-content/uploads/2020/10/The-Law-of-Preemption-2d-ed.-FINAL.pdf>
- ³⁷ Idaho Statutes Title 18 Crimes and Punishments, Chapter 6, Abortion and Contraceptives. <https://legislature.idaho.gov/statutesrules/idstat/title18/t18ch6/sect18-622/> (abortion is permissible when it is necessary to prevent the death of the woman.)
- ³⁸ *Moyle v. United States*. 603 U.S. ____ (2024) <https://supreme.justia.com/cases/federal/us/603/23-726/>
- ³⁹ Ollstein, A. (2025). Trump admin moves to drop fight over emergency abortions, reversing Biden admin stance. *Politico*. <https://www.politico.com/news/2025/03/04/trump-emergency-abortion-00211399>
- ⁴⁰ *Moyle v. United States*.

⁴¹ Salganicoff, A., Sobel, L., Gomez, I. (2024). The Hyde Amendment and Coverage for Abortion Services Under Medicaid in the Post-Roe Era. *KFF*. <https://www.kff.org/womens-health-policy/issue-brief/the-hyde-amendment-and-coverage-for-abortion-services-under-medicaid-in-the-post-roe-era/>

⁴² Tobin-Tyler, E., Brown, B. (2024). The Medical, Ethical and Legal Case Against Dual Stabilization. *JAMA Intern Med*. doi:10.1001/jamainternmed.2024.7078 (clinicians face difficulty if they need to equally protect fetus and patient, i.e., provide “dual stabilization”.)

⁴³ Clark, B. (2003). The Supremacy Clause as a Constraint on Federal Power. *Geo. Wash. L. Rev.* Vol. 71, 91. https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1474&context=faculty_publications (suggests federal law that “exceeds the scope” of congressional authority should be subject to judicial review – the Supremacy Clause refers to federal laws properly enacted with congressional authority; argues that judicial review should not be limited to review of the state law in preemption cases; it should include review of whether the federal law was properly enacted.)

⁴⁴ *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). <https://supreme.justia.com/cases/federal/us/597/19-1392/>

⁴⁵ Executive Order 14076. Protecting Access to Reproductive Healthcare Services, Federal Register (2022). <https://www.federalregister.gov/documents/2022/07/13/2022-15138/protecting-access-to-reproductive-healthcare-services>

⁴⁶ Chernoby, K. and Acunto, B., 2024; Reeder, R. (2023). EMTALA Preemption of State Laws Restricting Emergency Abortions. *St. Louis U. J. Health Law & Policy*, Vol 17, 337. <https://scholarship.law.slu.edu/jhlp/vol17/iss2/7/>

⁴⁷ HHS Secretary Xavier Becerra Statement on EMTALA Enforcement. *HHS archives*. <https://public3.pagefreezer.com/browse/HHS.gov/02-01-2024T03:56/https://www.hhs.gov/about/news/2023/05/01/hhs-secretary-xavier-becerra-statement-on-emptala-enforcement.html> (Kansas has a ban after 22 weeks)

⁴⁸ Biden-Harris Administration Reaffirms Commitment to EMTALA Enforcement. *HHS*. <https://public3.pagefreezer.com/browse/HHS.gov/02-01-2025T05:49/https://www.hhs.gov/about/news/2024/07/02/biden-harris-administration-reaffirms-commitment-emptala-enforcement.html> (“In 2022, CMS issued guidance to reaffirm that EMTALA requires providers offer necessary stabilizing care for patients suffering emergency medical conditions, which might include abortion care in certain situations. Today’s letter reinforces previous letters from Secretary Becerra and Administrator Brooks-LaSure to hospital and provider associations reminding them of their obligations under EMTALA.” Press release includes letter to hospitals and other medical providers.)

⁴⁹ Donley, G. and Kelly, C. (2024). Abortion Disorientation. *Duke Law Journal*, Vol. 74, 1. https://scholarship.law.pitt.edu/fac_articles/587 (“Thirteen abortion-hostile states have changed the definition of abortion since *Dobbs*, eleven of which have added at least one definitional exclusion, most commonly for ectopic pregnancy, miscarriage, or molar pregnancy.”); Felix, M., Sobel, L., and Salganicoff, A. (2024). A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services. *Women’s Health Policy. KFF* <https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services/>

⁵⁰ Texas Bill 3058 <https://legiscan.com/TX/bill/HB3058/2023> (enacted in 2023).

⁵¹ Ranji, U., Salganicoff, A., Sobel, L. (2024). *Dobbs*-era Abortion Bans and Restrictions: Early Insights about Implications for Pregnancy Loss. *Women’s Health Policy. KFF*. <https://www.kff.org/womens-health-policy/issue-brief/dobbs-era-abortion-bans-and-restrictions-early-insights-about-implications-for-pregnancy-loss/>

⁵² Donley and Kelly, 2024.

⁵³ Rappazzo, N. (2023). Emergency Room to the Courtroom: Providing Abortion Care under EMTALA and State Abortion Bans Comments, *Dickinson Law Review*, 128, 325, p. 333; Kitchener, C. (2023). Two Friends Were Denied Care after Florida Banned Abortion. One Almost Died. *Washington Post*. <https://www.washingtonpost.com/politics/2023/04/10/pprom-florida-abortion-ban>

⁵⁴ Margaret Carpenter, a New York physician was indicted and charged with prescribing abortion pills to a person in Louisiana which has a near total abortion ban and was fined \$100,000.00 by a Texas judge for sending abortion pills to a person in Texas. However, the charges and sanctions are not related to the provision of emergency medical care and thus do not raise possibility

of conflict with EMTALA. Elassar, A. (2025). New York doctor indicted in Louisiana abortion case recognized as a leader in women's reproductive health. CNN. <https://www.cnn.com/2025/02/23/us/abortion-margaret-carpenter-new-york/index.html>

⁵⁵ Goodman, D. (2023). Abortion Ruling Keeps Texas Doctors Afraid of Prosecution. *New York Times* <https://www.nytimes.com/2023/12/13/us/texas-abortion-doctor-prosecution.html>

⁵⁶ E.g., Rappazzo, 2023.

⁵⁷ While generally conscientious objection often concerns failing to provide (e.g., contraception or abortion), here it refers to objecting to the restrictive law and providing abortion; the history of conscientious objection shows courts would not allow it to apply to failing to pay taxes, but it can apply to failing to provide abortion care or contraception in some cases. Whether it could apply to an objection to an abortion ban is unclear.

⁵⁸ Cahn, N. and Suter, S. (2024). Crossing state lines to get an abortion is a new legal minefield, with courts to decide if there's a right to travel. *The Conversation*. <https://theconversation.com/crossing-state-lines-to-get-an-abortion-is-a-new-legal-minefield-with-courts-to-decide-if-theres-a-right-to-travel-238167>

⁵⁹ 597 U.S. 215 (2022).

⁶⁰ Cahn and Suter, 2024.

⁶¹ Cahn and Suter, 2024.

⁶² Ranji, U., Salganicoff, A., Sobel, L. (2024). Dobbs-era Abortion Bans and Restrictions: Early Insights about Implications for Pregnancy Loss. *Women's Health Policy*. KKF. <https://www.kff.org/womens-health-policy/issue-brief/dobbs-era-abortion-bans-and-restrictions-early-insights-about-implications-for-pregnancy-loss/>

⁶³ Rappazzo, 2023.

⁶⁴ *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). <https://supreme.justia.com/cases/federal/us/597/19-1392/>

Breyer, Sotomayor, and Kagan, dissent. ("Some women, especially women of means, will find ways around the State's assertion of power.")

⁶⁵ See Forouzan, K., Friedrich-Karnik, A., and Maddow-Zimit, I. (2023). The High Toll of US Abortion Bans: Nearly One in Five Patients Now Traveling Out of State for Abortion Care. *Guttmacher Institute*. <https://www.guttmacher.org/2023/12/high-toll-us-abortion-bans-nearly-one-five-patients-now-traveling-out-state-abortion-care> (There has been a stark increase in interstate travel for abortion.)

⁶⁶ Hoffman, L., Ahmed, O., Salas-Betsch, I. (2022). State Abortion Bans Will Harm Women and Families' Economic Security Across the U.S. *Center for American Progress*. <https://www.americanprogress.org/article/state-abortion-bans-will-harm-women-and-families-economic-security-across-the-us/> (Of 27 states with restrictive laws (the 12 most plus 15 with significant restrictions but not total bans), "[n]one guarantee paid family and medical leave. Eighteen have gender wage gaps above the national average. Twenty-two have poverty rates for women above the national average. Seventeen have poverty rates for children above the national average. Nineteen have not extended Medicaid coverage to 12 months postpartum. Only four legally require insurers to cover an extended supply of contraceptives." Many of the states with bans have uninsured rates above the national average.)

⁶⁷ Santhanam, L. (2022). How abortion bans will likely lead to more deadly infections. *PBS*.

<https://www.pbs.org/newshour/health/how-abortion-bans-will-likely-lead-to-more-deadly-infections> (being further from care increases the risk.)

⁶⁸ Arvallo, L., Liu, H., Setty, S., et al. (2024). Deepening the Divide: Abortion Bans Further Harm Immigrant Communities *Center for Law and Social Policy*. <https://www.clasp.org/publications/fact-sheet/deepening-divide-abortion-bans-harm-immigrants-2024/>

⁶⁹ How Abortion Bans Contribute to the Cycle of Poverty. *Comic Relief*. <https://www.comicrelief.org/posts/how-abortion-bans-contribute-to-the-cycle-of-poverty#> (Black women are three times as likely to die during childbirth; Comic Relief is a 501(c)(3) aimed at alleviating poverty.)

⁷⁰ United States Census Bureau <https://www.census.gov/quickfacts/fact/table/LA/PST045224>; United States Census Bureau <https://www.census.gov/quickfacts/fact/table/MS/RHI225223>.

⁷¹ United States Census Bureau. <https://www.census.gov/quickfacts/fact/table/TX/POP010210>

⁷² Beauchamp, T. L., & Childress, J. F. (2013). Principles of biomedical ethics (7th ed.). Oxford University Press.

⁷³ Siegel, R., Mayeri, M., and Murray, M. (2023). Equal Protection In Dobbs And Beyond: How States Protect Life Inside And Outside Of The Abortion Context. *Columbia Journal of Gender and Law*. <https://openyls.law.yale.edu/bitstream/handle/20.500.13051/18292/g.pdf?sequence=1&isAllowed=y> (Court noted parties had not asserted equal protection claims.)