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Emergency Room to the Courtroom: Providing Abortion Care Under EMTALA and State Abortion Bans

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Comments

Emergency Room to the Courtroom: Providing Abortion Care Under EMTALA and State Abortion Bans

Natasha Rappazzo*

ABSTRACT

After the Supreme Court eliminated the constitutional right to abortion in *Dobbs v. Jackson Women's Health Organization*, states began to broadly criminalize abortion. Abortion is criminalized and restricted even in situations that constitute an emergency medical condition under the Emergency Medical Treatment and Labor Act ("EMTALA"). State abortion bans with limited medical exceptions conflict with EMTALA's protections for emergency screening and stabilization. Legal challenges to the scope of EMTALA show a growing divide and uncertainty on emergency abortion care in the United States. This Comment will discuss why physicians cannot confidently provide quality and competent abortion care without the statutory protections afforded within EMTALA. This Comment argues that the vague and medically inaccurate language in state abortion bans must be preempted by

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EMTALA. Ensuring physicians are obligated to follow EMTALA's guidelines will lead to the best national public health and safety outcomes. It is within the federal government's power and responsibility to ensure state restrictions on emergency abortion care do not interfere with national protections for emergency department screening and stabilization.

TABLE OF CONTENTS

INTRODUCTION 326
I. BACKGROUND 331
A. *Overview of the Emergency Medical Treatment and Labor Act* *331*
B. *Conflict of Laws: State Abortion Bans and EMTALA* 332
1. *President Biden's Executive Action* 332
2. *Texas and Idaho Lawsuits Challenging EMTALA Guidelines* 334
C. *Legal Implications for Abortion Providers* 336
1. *Legitimate Fear of Criminalization and Violence* 337
2. *Providing Care in an Increasingly Hostile Society* 339
II. ANALYSIS 340
A. *Emergency Abortion Care is a Protected Area of National Concern* 340
1. *Congress Wrote EMTALA in Response to a National Crisis Over Emergency Care* . . . 340
2. *EMTALA's Preemption Provision and Plain Meaning Prevents States from Restricting Emergency Abortion Care* 342
B. *Federal Protection for Emergency Care Cannot Coexist with State Abortion Bans* 346
1. *Texas's Abortion Ban Violates EMTALA* 346
2. *Idaho's Abortion Laws Violate EMTALA* . . . 349
3. *EMTALA is Essential for Physicians and Patients* 351
CONCLUSION 355

INTRODUCTION

Few areas of the law are more contentious than reproductive rights. *Roe v. Wade*[1] established the right to abortion, but for years the

1. Roe v. Wade, 410 U.S. 113 (1973).

anti-abortion movement chipped away at *Roe* to ensure access to this right remained out of grasp.[2] In *Roe,* the Supreme Court found the right to privacy was broad enough to cover abortion.[3] *Roe* prioritized personal privacy and autonomy and limited a state's ability to restrict abortion access.[4] Still, *Roe*'s promise of privacy and autonomy never sufficiently reached those who needed it the most.[5]

In June 2022, *Dobbs v. Jackson Women's Health Organization*[6] overturned *Roe* on the grounds that the Constitution does not reference abortion nor was abortion "deeply rooted in the Nation's history and tradition" or "implicit in the concept of ordered liberty."[7] *Dobbs* repealed a fundamental constitutional right for the first time in history.[8] The Court's opinion broadly concluded that, in some instances, stare decisis requires overturning an "erroneous" or

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2. *See* Matt Kwong, *U.S. Anti-Abortion Activists Once 'Chipped Away' at* Roe v. Wade*—Now They've Picked Up a Sledgehammer*, CBC NEWS (May 22, 2019, 4:00 AM), https://tinyurl.com/5t49nynf [https://perma.cc/A5ZB-7YX2] (explaining how the anti-abortion movement amplified efforts to pass restrictive state laws with an ultimate goal to overturn *Roe*).

3. *See Roe*, 410 U.S. at 155 ("[T]he right of privacy, however based, is broad enough to cover the abortion decision.").

4. *See id.* at 163 (explaining that a state's interest in the health of the mother begins at the end of the first trimester and a state's interest in fetal life begins at viability). The Court reconsidered *Roe*'s framework in *Planned Parenthood v. Casey*. *See* Planned Parenthood v. Casey, 505 U.S. 833, 873 (1992) (finding that the trimester framework was not *Roe*'s essential holding). In *Casey*, the Court held that states have an interest in fetal life at all stages of pregnancy and may pass regulations that do not impose an undue burden on the right to abortion. *See id.* at 872–77 (defining an undue burden as placing a substantial obstacle in the path of someone seeking an abortion). This Comment will not explore the nuances of *Roe* and *Casey*, but it is worth noting that *Casey* narrowed the right to abortion. *See id.* at 930 (Blackmun, J., dissenting) ("[T]he Roe framework is far more administrable, and far less manipulable, than the 'undue burden' standard adopted by the joint opinion.").

5. *See* Melissa Murray, *Race-ing* Roe: *Reproductive Justice, Racial Justice, and The Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2050 (2021) ("[*Roe*] offered no quarter to those women whose reproductive 'choices' were shadowed by economic insecurity, the absence of safe and affordable childcare, and racial and gender injustice.").

6. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

7. *Id.* at 2242 (overturning *Roe* and *Casey*). While this Comment will not analyze why abortion is rooted in the history and tradition of the Nation, it is worth noting that the Fourteenth Amendment was ratified to bring liberty to enslaved persons who had no control over their families, bodies, or reproductive capacity, thus showing reproductive autonomy is deeply rooted in this Nation. *See generally Melissa Murray in Conversation with Dr. Celeste Watkins-Hayes on Reproductive Justice*, FORD SCHOOL (Sept. 15, 2022), https://tinyurl.com/3wrxesjn [https://perma.cc/TZM2-4R28].

8. *See Dobbs*, 142 S. Ct. at 2347 (Breyer, SOTOMAYOR & KAGAN, JJ., dissenting) ("Rescinding an individual right in its entirety and conferring it on the State, an action the Court takes today for the first time in history, affects all who have relied on our constitutional system of government and its structure of individual liberties protected from state oversight.").

"weak" constitutional decision.[9] The Court said they would no longer let *Roe* "usurp authority that the Constitution entrusts to the people's elected representatives."[10] To restore regulatory authority, the Court determined they must "return" full regulatory power to the states so *Roe* may no longer "short-[circuit] the democratic process."[11] This claim not only ignores the fact that since 1973 states have increasingly passed abortion restrictions, but it ignores the acceleration of racially motivated state abortion restrictions since the 1860s.[12]

The degradation of *Roe* and its progeny was the culmination of a decades-long crusade against women,[13] queer communities, people of color, those with low incomes, and all who struggle to access adequate healthcare.[14] The impact of *Dobbs* and the annihilation of nearly 50 years of abortion jurisprudence was immediately felt across the country, especially in communities that already faced unequal access to abortion.[15] As of September 2023, 14 states have criminalized abortion and enforced near-total abortion bans with

9. *See id.* at 2243, 2262 (majority opinion) (determining that stare decisis is not an inexorable command). Stare decisis is the doctrine that a court must follow earlier judicial decisions when the same points arise again in litigation; in Latin, stare decisis means "to stand by things decided." *See Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

10. *Dobbs*, 142 S. Ct. at 2247.

11. *Id.* at 2237, 2243, 2277 (arguing that allowing the state legislatures to make determinations on abortion is most in line with the Constitution).

12. *See U.S. States Have Enacted 1,381 Abortion Restrictions Since* Roe v. Wade *Was Decided in 1973*, GUTTMACHER INST. (June 21, 2022), https://tinyurl.com/8zty6na5 [https://perma.cc/LWS7-TMX3]; Brief for The Am. Hist. Ass'n et al. as Amici Curiae Supporting Respondents at 21, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) ("Storer [a founder of the anti-abortion movement in America] believed that abortions were endangering what he saw as the ideal America: a society of white Protestants in which women adhered strictly to their proper 'duties'—marriage and childbearing.").

13. This Comment recognizes the disproportionate impact that abortion policies have on women, including transgender women. At the same time, this Comment is aware that individuals who become pregnant and rely on abortion services are also transgender men, gender diverse, or do not identify as women. Further, the exclusion of other gender identities from the narrative on abortion stigmatizes queer abortion care and needlessly shuts out those who will benefit from abortion advocacy. Therefore, this Comment will use gender neutral language when discussing pregnancy and abortion. When citing statutes, cases or other sources, this Comment may quote gendered language if relevant.

14. *See* Michele Goodwin, *Complicit Bias and the Supreme* Court, 136 HARV. L. REV. 119, 158 (2022) (arguing that anti-abortion laws are a form of sex discrimination that cause and exacerbate race discrimination and suffering; predicting that the *Dobbs* decision will amplify preexisting patterns of socioeconomic distress).

15. *See* Liza Fuentes, *Inequity in U.S. Abortion Rights and Access: The End of* Roe *Is Deepening Existing Divides*, GUTTMACHER INST. (Jan. 17, 2023), https://tinyurl.com/yc2raxv3 [https://perma.cc/K58Z-4UXX] (analyzing the impact of *Dobbs* in the United States, specifically addressing the impact on Black, Indigenous, and Latinx communities who face greater harm due to systemic racism and economic injustice).

limited exceptions, such as to save the life of a pregnant person.[16] The exceptions that allow physicians to provide abortions vary from state to state, but generally exceptions are vague, narrow, and offer no medical guidance.[17] Also, behind each exception for abortion is a potential criminal or civil penalty for the providing physician.[18] While the Emergency Medical Treatment and Labor Act ("EMTALA") provides federal guidelines for treating patients with emergency medical conditions, restrictive state abortion bans have complicated emergency abortion care. Now, physicians in states hostile to abortion are uncertain of the legal ramifications of stabilizing pregnant patients with obstetric emergencies.[19]

This Comment argues that the vague and medically inaccurate language in state abortion bans must be preempted by EMTALA. This Comment addresses the federal authority to preempt state law under EMTALA, the conflict of laws within medical exceptions of state abortion bans, and the legal complications for physicians as they navigate their duty to provide care. The American College of Obstetricians and Gynecologists recognizes pregnancy complications "may be so severe that abortion is the only measure to preserve a woman's health or save her life."[20] Whether a pregnant patient is facing an obstetric emergency, like an ectopic pregnancy or gestational hypertension, or they are diagnosed mid-pregnancy with an

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16. *See After* Roe *Fell: Abortion State by State*, CTR. FOR REPROD. RTS., https://tinyurl.com/4trr9d8t [https://perma.cc/57UV-Z4UY] (last visited July 14, 2023) (displaying an interactive map of the United States with the most current information on each states' abortion laws).

17. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2021) (listing the limited exceptions for abortion in Texas). *But see* 42 U.S.C. § 1395dd (outlining the federal guidelines for treating patients with emergency medical conditions).

18. *See, e.g.*, IDAHO CODE § 18-622(1) (2023) (explaining the criminal penalties for providing an abortion in Idaho); TEX. HEALTH & SAFETY CODE ANN. § 170A.005 (West 2021) (explaining the civil penalties for providing an abortion in Texas).

19. *See* Keith Zubrow, *Louisiana Doctors Detail Unintended Consequences of State's Abortion Ban*, CBS NEWS (Apr. 30, 2023, 7:00 PM), https://tinyurl.com/335pb4zx [https://perma.cc/HU5E-NMUU] ("[S]ome physicians fear that certain treatments . . . could be misconstrued as providing an abortion and be deemed illegal, despite it being the standard of care in other states."); Stephania Taladrid, *In the Post-*Roe *Era, Letting Pregnant Patients Get Sicker—by Design*, NEW YORKER (May 6, 2023), https://tinyurl.com/yrf5uhy5 [https://perma.cc/XU72-9GA5] (interviewing 12 Texas physicians who discuss the danger of Texas's abortion laws); Elizabeth Schmidt, *I'm a Doctor: Once a Patient is 'Sick Enough' for Abortion, It's Often Too Late*, THE HILL (June 6, 2023, 10:30 AM), https://tinyurl.com/mryphu5k [https://perma.cc/A4C4-4AQJ] ("[A]bortion restrictions and bans are confusing doctors in restricted states because legislators have used conflicting, non-medical terminology to write abortion policies.").

20. *Facts Are Important: Abortion is Healthcare*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, https://tinyurl.com/5n6mfues [https://perma.cc/9YSR-CYYC] (last visited July 14, 2023) [hereinafter *Facts Are Important*].

unexpected medical condition, like cancer or cardiac disease, an abortion may be the most effective treatment.[21] This Comment concludes with an appeal to lawmakers: take bold action to protect and expand abortion access now.[22]

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21. *See* Frances Stead Sellers & Fenit Nirappil, *Confusion Post-*Roe *Spurs Delays, Denials for Some Lifesaving Pregnancy Care*, WASH. POST (July 16, 2022, 9:09 AM), https://tinyurl.com/n2u8bsur [https://perma.cc/XYH6-Q4WE] (reporting the complications obstetricians face providing pregnancy care post-*Dobbs*); Reuters Fact Check, *Fact Check—Termination of Pregnancy Can Be Necessary to Save a Woman's Life, Experts Say*, REUTERS (Dec. 27, 2021, 11:39 AM), https://tinyurl.com/d4zyb4p5 [https://perma.cc/JF49-NY2W] (reporting that certain medical conditions may require abortion to avoid fatal complications); *Facts Are Important*, *supra* note 20 ("Pregnancy complications . . . may be so severe that abortion is the only measure to preserve a woman's health or save her life."). *See also Dictionary,* AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, https://tinyurl.com/47uxmxwa [https://perma.cc/38QX-GZE5] (last visited Mar. 3, 2023) (defining "ectopic pregnancy" as "a pregnancy in a place other than the uterus, usually in one of the fallopian tubes"; defining "gestational hypertension" as "high blood pressure that is diagnosed after 20 weeks of pregnancy").

22. The majority of this Comment was written before *Zurawski v. State of Texas* was filed. *See Center Sues Texas on Behalf of Women Denied Abortions After Facing Dangerous Pregnancy Complications*, CTR. FOR REPROD. RTS. (Mar. 7, 2023), https://tinyurl.com/m9s2y9fh [https://perma.cc/4QRM-MKUB] [hereinafter *Center Sues Texas*]. *Zurawski* challenges Texas's vague abortion ban and asks the state to clarify the scope of the ban's medical emergency exception. *See* Complaint at 85, Zurawski v. Texas, No. 0-1-GN-23-000968 (Dist. Ct. Travis Cnty. 2023). The case was brought by the Center for Reproductive Rights ("Center") on behalf of Texas obstetrician-gynecologists and 13 Texas women who were denied abortion care after facing severe and dangerous pregnancy complications. *See Center Sues Texas*, *supra*; *see also More Women Join Lawsuit Against Texas After Being Denied Abortion Care to Treat Dangerous Pregnancy Complications*, CTR. FOR REPROD. RTS. (May 22, 2023), https://tinyurl.com/3yyc4624 [https://perma.cc/9NRH-W3VB]. Under Texas's abortion ban, these women were denied abortions and their pregnancy conditions worsened, posing great risks to their fertility, health, and lives. *Id.* Similar to this Comment, the Center seeks to clarify Texas's medical emergency exception by arguing that physicians, in consultation with patients, should be allowed to exercise their judgment regarding what patients qualify for medical exceptions to abortion. *See* Complaint at 85, *Zurawski*, No. 0-1-GN-23-000968. On August 4, 2023, a Texas district judge issued an injunction blocking Texas's abortion bans as they apply to dangerous pregnancy complications, clarifying that doctors can use their medical judgment to determine when to provide abortion care in emergency situations. *Zurawski v. State of Texas*, CTR. FOR REPROD. RTS., https://tinyurl.com/2xpq34gw [https://perma.cc/8YP6-HUKX] [hereinafter *Zurawski* Article] (last visited Aug. 8, 2023). While *Zurawski* is essential litigation, this Comment will focus on finding rights and protection for providers through federal preemption of state statutes by way of EMTALA. *See* discussion *infra* Section II.B (arguing that EMTALA gives the federal government authority over emergency care as a matter of national health and safety). Still, the overlap in subject matter is undeniable and emphasizes the serious harm that abortion bans create. As of September 2023 when this Comment is in the final editing process, *Zurawski* is pending appeal, blocking the injunction from taking effect. *See Zurawski* Article, *supra*.

I. BACKGROUND

A. *Overview of the Emergency Medical Treatment and Labor Act*

EMTALA is a federal statute specific to screening, stabilizing, and transferring or accepting patients with emergency medical conditions, including patients in active labor, at a hospital emergency department.[23] EMTALA's protections ensure that people without the ability to pay are not denied care when they enter a hospital's emergency department with an emergent health condition.[24]

In 1986, Congress enacted EMTALA to prevent "patient dumping"—private hospitals denying treatment to low-income or uninsured patients and transferring them to another hospital because of their inability to pay.[25] At the time of enactment, an estimated 250,000 patients were "dumped" from emergency departments annually.[26] Under EMTALA, hospitals can no longer turn away individuals who come to an emergency department requesting examination or treatment.[27] If the physician determines an individual has an emergency medical condition, the physician must provide the necessary treatment required to stabilize the condition.[28]

EMTALA describes an "emergency medical condition" as a medical condition of such severity that the absence of immediate medical attention could reasonably result in (1) placing the health of the individual in serious jeopardy, (2) serious impairment to bodily

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23. *See* 42 U.S.C. § 1395dd.

24. *See id.* § 1395dd(h) (prohibiting delays in screening or stabilization).

25. *See* Tianna Mayere Lee, *An EMTALA Primer: The Impact of Changes in The Emergency Medicine Landscape on EMTALA Compliance and Enforcement*, 13 ANNALS. HEALTH L. 145, 146 (2004) (defining patient dumping as occurring "when poor or uninsured patients in need of emergency treatment are transferred from hospital to hospital before they are medically stable, solely or primarily because of their inability to afford medical services").

26. Timothy H. Bosler & Patrick M. Davis, *Is EMTALA a Defanged COBRA?*, 51 J. MO. BAR 165, 166 (1995) (discussing the large number of people impacted by patient dumping in the mid-1980s). EMTALA applies to all hospitals that receive Medicare funding—this encompasses almost 98 percent of all hospitals in the United States. *See* Joseph Zibulewsky, *The Emergency Medical Treatment and Active Labor Act (EMTALA): What It Is and What It Means for Physicians*, 14 BAYLOR U. MED. CTR. PROCS. 339, 340 (2001).

27. *See* 42 U.S.C. § 1395dd(a) (providing screening requirements for any individual that comes to an emergency department and requests examination or treatment for an emergency medical condition).

28. *See id.* § 1395dd(b) (providing the stabilizing requirements for a hospital that determines whether an individual has an emergency medical condition). The hospital may transfer an individual to another medical facility only when: (1) the individual or person acting on their behalf is legally informed and (2) the medical benefits of the transfer outweigh the risks. *See id.* § 1395dd(c) (restricting transfers until an individual is stabilized).

functions, or (3) serious dysfunction of any bodily organ or part.[29] An emergency medical condition is also one which may place the health of a pregnant person and fetus in serious jeopardy.[30] Further, an emergency medical condition exists for "a pregnant woman who is having contractions" when there is inadequate time to effect a safe transfer to another hospital before delivery, or when the transfer may pose a threat to the health or safety of the patient or the fetus.[31]

If a hospital or member of a hospital's emergency department staff fails to comply with EMTALA's standards, the hospital is subject to a civil monetary fine for each violation.[32] Any physician who negligently violates a requirement of EMTALA is personally subject to a civil monetary penalty for each violation.[33]

B. Conflict of Laws: State Abortion Bans and EMTALA

1. President Biden's Executive Action

Within hours of the *Dobbs* decision, states like Texas and Missouri enforced trigger bans[34] with provisions criminalizing any person who provides abortions except in case of a "medical emergency" or when there is a "risk of death . . . or substantial impairment of a major bodily function."[35] These statutes left physicians questioning exactly how life-threatening a pregnancy must be to end it legally.[36] As a result, physicians began delaying or refusing care out

29. *Id.* § 1395dd(e)(1).

30. *See id.* § 1395dd(e)(1)(A)(i) (defining emergency medical conditions).

31. *See id.* § 1395dd(e)(1)(B) (defining emergency medical conditions for a pregnant patient with contractions).

32. *See id.* § 1395dd (d)(1)(A) (outlining EMTALA enforcement measures for hospitals).

33. *See id.* § 1395dd (d)(1)(B)(i) (outlining EMTALA enforcement measures for physicians).

34. *See* TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2021) (prohibiting abortion unless there is a pregnancy-related, life-threatening condition that places the patient at risk of death or risk of substantial bodily impairment); MO. REV. STAT. § 188.017(2) (2019) (prohibiting abortion except in cases of medical emergency). Trigger bans are laws intended to ban abortion entirely if the Supreme Court overturned *Roe* or if a constitutional amendment prohibited abortion. *See After* Roe *Fell: Abortion State by State*, *supra* note 16.

35. *See* TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2021); MO. REV. STAT. § 188.017(2) (2023).

36. *See* Aria Bendix, *How Life-Threatening Must a Pregnancy Be to End It Legally?*, NBC NEWS (June 30, 2022, 1:57 PM), https://tinyurl.com/bddm2td4 [https://perma.cc/2ZH4-CSYL] (addressing the confusion doctors feel in determining what constitutes a medical emergency). Tina Reed, *Defining "Life-Threatening" Can Be Tricky in Abortion Law Exceptions*, AXIOS (June 28, 2022), https://tinyurl.com/488265u7 [https://perma.cc/T5NA-WG8E] (discussing how every pregnancy is different and medical exceptions in abortion laws fail patients' needs). The language in abortion bans and exceptions is "often incorrect, not clinically meaningful, and therefore confusing to those practicing medicine." *Id. See also* Schmidt, *supra* note 19

of fear that they would face legal repercussions.[37] In some instances, physicians who sought to provide care were prohibited from doing so by their hospital's lawyers.[38]

In response to the legal and medical confusion caused by *Dobbs*, the Biden Administration issued the Executive Order Securing Access to Reproductive and Other Healthcare Services.[39] The administration intended this order to safeguard access to reproductive healthcare services; protect patient privacy; promote safety and security for patients, abortion providers, and clinics; and implement federal efforts to protect reproductive rights.[40] Included in the effort to safeguard reproductive healthcare, President Biden enlisted the Secretary of the Department of Health and Human Services ("HHS") to, among other things, ensure all patients "have access to the full rights and protections for emergency medical care" including protections under EMTALA.[41] Pursuant to this order, the Centers for Medicare & Medicaid Services ("CMS"), a federal agency within HHS, issued guidance (the "Guidance") reminding hospitals of their existing obligation to comply with EMTALA.[42] The Guidance

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(arguing that exceptions in abortion bans that are not founded in evidence-based medicine are dangers to patients).

37. *See* Danielle Campoamor, *Mom Who Needed an Abortion Says She Was Told to 'Sit in the Parking Lot' Until Her Cancerous Pregnancy Got Worse*, TODAY (May 8, 2023, 5:12 PM), https://tinyurl.com/4rb7a4br [https://perma.cc/Y6HD-LZS8] (sharing the story of an Oklahoma mother who was told she could either travel to get an abortion or "sit in the parking lot and wait to get worse" when her pregnancy turned deadly); Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted.*, N.Y. TIMES (Jan. 21, 2023), https://tinyurl.com/y745fxed [https://perma.cc/6CZK-PD7W] (explaining that the exceptions within abortion bans are complex and difficult for physicians to navigate in practice); Nadine El-Bawab, *Fear, Confusion, Anxiety, Stress: Tennessee Doctors Describe Care Under Abortion Ban*, ABC NEWS (Sept. 16, 2022, 5:02 AM), https://tinyurl.com/5n7cu7zs [https://perma.cc/Y6XD-FBUK] (addressing the fear physicians feel regarding the lack of guidance as to what constitutes a legal abortion).

38. *See* Walker, *supra* note 37 (discussing hospital lawyers who consider the potential liability for providing abortion care).

39. *See* Exec. Order No. 14,076, 87 Fed. Reg. 42053 (July 8, 2022) (outlining policy initiatives to protect reproductive healthcare).

40. *See* Press Release, White House, Fact Sheet: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services (July 8, 2022), https://tinyurl.com/55rhx8e5 [https://perma.cc/HPB5-2RN8] (announcing the Biden Administration's policy initiatives to protect reproductive healthcare).

41. *Id.* Other HHS duties in the order included: (1) protect access to medication abortion; (2) protect access to contraception; (3) launch public education efforts; and (4) convene volunteer lawyers. *Id.* HHS's mission is "to enhance the health and well-being of all Americans by providing for effective health and human services and by fostering sound, sustained advances in the sciences underlying medicine, public health, and social services." *About HHS*, DEP'T HEALTH & HUM. SERVICES, https://tinyurl.com/yc7t5xb2 [https://perma.cc/7D7X-47F4] (last visited Aug. 26, 2023).

42. *See generally* Memorandum from Dirs., Quality, Safety & Oversight Grp. and Surv. & Operations Grp. to State Surv. Agency Dirs., Reinforcement of

clarified that EMTALA preempts any directly conflicting state law and instructed that if a physician believes that abortion is the stabilizing treatment necessary to resolve a patient's emergency condition, the physician must provide that treatment.[43]

2. *Texas and Idaho Lawsuits Challenging EMTALA Guidelines*

It did not take long for Texas to respond with legal action. Three days after CMS published the Guidance, Texas filed suit against the Biden Administration and HHS claiming the Guidance went beyond the scope of EMTALA and infringed on sovereign state authority.[44] Texas argued the Guidance exceeded statutory authority, altered EMTALA's requirements, and violated the Tenth Amendment.[45] In response, HHS defended its executive right to administer rules and maintained the Guidance did not contain new policy, but instead restated EMTALA's text.[46] The District Court for the Northern District of Texas granted a preliminary injunction to halt the enforcement of EMTALA for emergency abortion care in Texas on August 23, 2022.[47] The court held that the Guidance was an impermissible statement of policy changing a legal standard.[48] The Northern District of Texas reasoned the Guidance misconstrued EMTALA's preemption provision and found EMTALA does not preempt Texas law without explicit provisions to the contrary.[49]

However, on August 2, 2022, while the Texas lawsuit was underway, the United States filed a similar suit in Idaho declaring Idaho's total abortion ban invalid and preempted by EMTALA.[50] Idaho's ban prohibited abortion unless there was a risk of death, thus making it impossible for physicians to comply with state law and EMTALA's stabilizing requirements.[51] Idaho argued the Department of Justice's ("DOJ") efforts to enjoin the statute were inconsistent with

EMTALA Obligations Specific to Patients who are Pregnant or are Experiencing Pregnancy Loss, CTRS. MEDICARE & MEDICAID SERVS. (July 11, 2022), https://tinyurl.com/4kx6uk95 [https://perma.cc/EHS5-GQTB] [hereinafter Memorandum from Dirs. on EMTALA Obligations].

43. *See id.* at 1.

44. *See* Texas v. Becerra, 623 F. Supp. 3d 696, 708–710 (N.D. Tex. 2022).

45. *See* Complaint at 12–18, *Becerra*, 623 F. Supp. 3d 696 (No. 5:22-CV-185-H).

46. *See Becerra*, 623 F. Supp. 3d at 720.

47. *See id.* at 739–40.

48. *See id.* at 724–25 (claiming the Guidance is an impermissible interpretation of EMTALA).

49. *See id.* at 726–27.

50. *See* Complaint at 1–3, United States v. Idaho, 623 F. Supp. 3d 1096 (D. Idaho 2022) (No. 1:22-cv-00329-BLW).

51. *See* IDAHO CODE § 18-622(3) (West 2020) (listing the limited defenses for a physician who provided an abortion); 42 U.S.C. § 1395dd(b) (mandating stabilizing treatment for a patient with an emergency medical condition).

EMTALA's preemption provision, but the court was not persuaded.[52] The District Court for the District of Idaho granted a preliminary injunction that temporarily blocked the Idaho total abortion ban.[53] Unlike the Texas court, the District of Idaho found Congress intended to displace conflicting state law through EMTALA's express preemption provision.[54] The court reasoned that EMTALA demands physicians provide stabilizing treatment, including abortion care, and the Idaho law makes stabilizing treatment a crime.[55] The DOJ suit in Idaho was an intentional and strategic response to the Texas suit.[56] Now, Texas would not have the last word on EMTALA—or so the DOJ thought.[57]

After the District Court for the District of Idaho enjoined the Idaho abortion ban, Idaho enforced its six-week pre-viability gestational ban on abortion.[58] On January 5, 2023, the Supreme Court of Idaho acknowledged the federal injunction stopping the total abortion ban, but determined the holding did not apply to its six-week ban.[59] The Supreme Court of Idaho held the narrow emergency medical exception in the six-week ban is not subject to EMTALA's guidelines.[60]

One thing is clear in this knot of mixed rulings: physicians do not have appropriate legal guidance to confidently provide emergency abortion care without fear of prosecution or other penalties.[61]

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52. *See United States v. Idaho*, 623 F. Supp. 3d at 1108 (rejecting the State's argument that the preemption challenge is facial).

53. *See id.* at 1117.

54. *See id.* at 1108–09.

55. *See id.* at 1112–15.

56. *See* Ian Millhiser, *The DOJ is Suing to Make Sure Women Who Need Medically Necessary Abortions Can Actually Get Them*, Vox (Aug. 3, 2022, 12:40 PM), https://tinyurl.com/bb2x2hx9 [https://perma.cc/ZR26-HG4R] (discussing impact of the Idaho lawsuit).

57. *See id*.

58. *See* Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1158 (Idaho 2023) (explaining that the six-week ban is in effect in Idaho after the Total Ban was enjoined). A pre-viability gestational ban prohibits abortion before viability—the point at which the fetus could survive outside the uterus. *See After* Roe *Fell: Abortion State by State*, *supra* note 16. Gestational age is counted in weeks either from the last menstrual cycle or from fertilization. *See id.*

59. *See Planned Parenthood Great Nw.*, 522 P.3d at 1206.

60. *See id.; see also* discussion *infra* Section II.B.2 (discussing the conflict between Idaho abortion laws and EMTALA).

61. *See* Emily Baumagertner, *Doctors in Abortion-Ban States Fear Prosecution for Treating Patients with Life-Threatening Pregnancies*, L.A. TIMES (July 29, 2022, 2:00 AM), https://tinyurl.com/2cjwawrt [https://perma.cc/EZ9Q-UTB8] (explaining that doctors are delaying care due to the bureaucracy of the new legal landscape); Schmidt, *supra* note 19 (discussing how doctors are consulting legal teams before they make medical decisions); Taladrid, *supra* note 19 (discussing the fear of criminalization among Texas physicians). *See also supra* note 22 and accompanying text

C. Legal Implications for Abortion Providers

Most state abortion bans include narrow exceptions that outline when a physician may provide an abortion in a medical emergency.[62] These exceptions allow anti-abortion legislators to allege they are being rational and care about the life of the pregnant person.[63] However, the medical exceptions in state abortion bans are nothing but performative distractions.[64] In one provision, physicians are told if they provide an abortion they will face fines and felony charges.[65] In the next provision, physicians are told they can provide abortions in a medical emergency, but medical emergency has no substantive definition in the statute's text.[66] A medical emergency to one physician could be an "illegal" abortion to another.[67] The fear physicians feel is well-founded. Abortion providers have historically been targeted

(discussing *Zurawski v. State of Texas* and the current litigation in Texas to clarify the emergency medical exceptions in state abortion statutes).

62. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2021) (prohibiting abortion unless there is a pregnancy-related, life-threatening condition that places the patient at risk of death or risk of substantial bodily impairment); MO. REV. STAT. § 188.017(2) (2019) (prohibiting abortion except in cases of medical emergency).

63. *See* John McCormack, *American Abortion Laws Do Not Require Delaying Treatment for a Mother's Life-Threatening Condition*, NAT'L REV. (Aug. 1, 2022, 12:04 PM), https://tinyurl.com/4dnsnc74 [https://perma.cc/4A8S-BDQE] (alleging that abortion exceptions do not pose medical dangers to patients).

64. *See* Walker, *supra* note 37 (explaining that the exceptions within abortion bans are complex and in practice the exceptions are difficult for physicians to navigate).

65. *See* TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2021) (prohibiting abortion unless there is a life-threatening condition); TEX. HEALTH & SAFETY CODE ANN. § 170A.004 (West 2021) (creating felony charges for violators); TEX. HEALTH & SAFETY CODE ANN. § 170A.005 (West 2021) (creating a civil penalty of not less than $100,000 for violators).

66. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 170A.001 (West 2021) (medical emergency is not defined in Texas's abortion ban). *But see* MO. REV. STAT. § 188.015 (defining medical emergency as a "condition which, based on reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate [an] immediate abortion . . . to avert [death] or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman"). While the Missouri statute defines medical emergency, the definition is stricter than the requirements that physicians follow under EMTALA. *See supra* text accompanying notes 28–29. Additionally, while Missouri defined "medical emergency," pregnant patients in Missouri with emergent medical conditions were still denied life-saving abortion care by Missouri physicians. *See infra* note 186 and accompanying text.

67. *See* Baumagertner, *supra* note 61 (explaining why doctors fear prosecution for treating patients with life-threatening pregnancies); Taladrid, *supra* note 19 ("[Physicians are] trying to reconcile abortion-law language with the daily urgencies of women they're encountering on gurneys in emergency-room cubicles.").

by law enforcement for providing abortion care and face significant violence from the public for their service.[68]

1. *Legitimate Fear of Criminalization and Violence*

For most of the 20th Century, abortion care was criminalized throughout the United States.[69] But of course, people still had abortions.[70] People in need of abortions sought care from unlicensed professionals or self-managed abortions at home with household objects or drugs.[71] Before *Roe*'s protections, some physicians saw it as their duty to provide abortions.[72] Often, their careers and personal lives suffered as a result.[73]

For example, in 1970, obstetrician and gynecologist Dr. Jane E. Hodgson went to federal court seeking permission to provide a medically necessary abortion, but the judge did not authorize the procedure.[74] Dr. Hodgson performed the abortion and was later arrested,

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68. *See generally* Leslie J. Reagan, *"About to Meet Her Maker": Women, Doctors, Dying Declarations, and the State's Investigation of Abortion, Chicago 1867–1940*, 77 J. AM. HIST. 1240 (1991) (discussing law enforcement procedures and tactics that targeted abortion providers before *Roe*); NAT'L ABORTION FED'N, 2021 VIOLENCE & DISRUPTION STATISTICS (2022) [hereinafter NAF] (reporting on violence against abortion providers).

69. *See* LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE* 3 (Yale L. Sch. 2012) (discussing the landscape of reproductive rights prior to *Roe*).

70. *See* Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE. L. J. 2011, 2036 (2011) (citing a 1960 medical journal article by the medical director of Planned Parenthood that estimated there were 200,000 to 1.2 million unsafe abortions annually in the United States).

71. *See "She's Not Free": Doctors Reflect On a Pre-*Roe *World*, NAT'L WOMEN'S L. CTR 2 (Aug. 2018), https://tinyurl.com/ye233kxe [https://perma.cc/XVX7-WUHW] (describing the "disastrous results" from unlicensed physicians and the methods used to induce an abortion, from inserting crochet hooks in the cervix to forcing soap solution through the cervical canal with a syringe).

72. *See generally* CAROLE E. JOFFE, DOCTORS OF CONSCIENCE: THE STRUGGLE TO PROVIDE ABORTION BEFORE AND AFTER *ROE V. WADE* (1996) (sharing stories of physicians who provided abortions before it was legal because they saw it as their ethical duty). Further, Dr. George Loutrell Timanus was a highly respected physician who performed abortions openly in his private Baltimore office from the 1920s through the 1950s. *See* LESLIE J. REAGAN, DANGEROUS PREGNANCIES: MOTHERS, DISABILITIES, AND ABORTION IN MODERN AMERICA 131 (2010). Patients were often referred to Dr. Timanus by physicians who believed a patient would benefit from an abortion but did not want to perform one themselves. *Id*. In 1950, police raided his office and arrested Dr. Timanus, his patients, and his staff; all physicians on-site were subject to criminal and monetary penalties. *Id*. at 132; Adams v. State, 200 Md. 133, 137 (Md. 1952).

73. *See* JOFFE, *supra* note 72, at 153 ("[I]f practitioners who combined abortion work with other activities suffered a certain chilly reception from colleagues, the ostracism felt by those who chose full time abortion work is even more evident.").

74. *See* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 429–30 (1994) (recounting the prosecution of Dr. Jane Hodgson). Dr. Hodgson knew her patient needed and wanted an abortion; this

convicted, and sentenced to 30 days in jail and one year of probation.[75] Dr. Hodgson appealed her case.[76] While her appeal was pending, the Supreme Court decided *Roe*.[77]

In the affidavit Dr. Hodgson filed in support of her motion to dismiss the indictment, she swore she was aware of the existing criminal abortion law.[78] Dr. Hodgson argued the state law permitting abortion only when it may save the life of a pregnant patient "prevents her from practicing medicine in the highest standards of the medical practice" and the "law directly results in tragic personal and societal injury of devastating and shocking proportion."[79] Dr. Hodgson recognized physicians were placed in a conflicting position: follow the existing law or fulfill their obligation to their patients and profession.[80] Fifty years later, physicians are placed in this same conflicting position.

The violence against abortion providers is so pervasive and successful as a means of restricting abortion access that Congress developed protections specifically for providers and clinics.[81] In 1994, Congress enacted the Freedom of Access to Clinic Entrances ("FACE") Act to address the escalating violence committed against abortion clinics, their staff, and patients.[82] The FACE Act recognized the interstate campaign of violence and destructive conduct aimed at abortion providers across the nation.[83]

However, federal protection does not change the reality that abortion providers are not safe where they work.[84] In 2021, clinic staff

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patient had German measles—a disease with a high likelihood of serious injury to a fetus. *See* GREENHOUSE & SIEGEL, *supra* note 69, at 19. At the time, state law only permitted abortion to save a pregnant patient's life. *Id.*

75. *See* GARROW, *supra* note 74, at 430.

76. *See id.*

77. *See* GREENHOUSE & SIEGEL, *supra* note 69, at 19 (recounting the prosecution of Dr. Jane Hodgson).

78. *See id.* at 22.

79. *See id.*

80. *See id.*

81. *See* NAF, *supra* note 68, at 14. Since 1977, there have been 11 murders, 26 attempted murders, 491 incidents of assault or battery, and 4 kidnappings committed against abortion providers. *Id*.

82. *See* 18 U.S.C. § 248 (creating federal protections for access to facilities that provide reproductive health care services).

83. *See id.*

84. *See* NAF, *supra* note 68, at 2 (reporting incidents of violence and disruption at abortion clinics in America). It is worth noting that individuals interviewed outside the Capitol on January 6, 2021 cited their anti-abortion views as the reason they travelled to Washington, D.C. to attack the Capitol building. *See* Bobby Ross Jr. & Hamil R. Harris, *Flags, Faith and Fury*, CHRISTIAN CHRONICLE (Jan. 13, 2021), https://tinyurl.com/43ynfjek [https://perma.cc/QX9U-NG9U]. In addition, John Brockhoeft, a man convicted of planning to bomb an abortion clinic in 1988 and set fire to another clinic in 1991, was among the Capitol rioters on January 6, 2021.

reports of stalking increased 600 percent and incidents of assault and battery against clinic staff and volunteers increased 128 percent compared to the previous year.[85] In *Whole Woman's Health v. Hellerstedt*,[86] the Supreme Court recognized that abortion clinics in Waco, San Angelo, and Midland no longer operate because Planned Parenthood of Greater Texas was unable to find physicians willing to provide abortions due to the hostility that providers face in those communities.[87] Hostility and violence against abortion providers directly impacts the care that patients receive.

2. *Providing Care in an Increasingly Hostile Society*

The compounding realities of criminalization and violence would make even the most overzealous patient advocate pause before providing an abortion under new abortion laws.[88] Physicians are left with an impossible choice: do they uphold their professional duty to provide care, thus risking felony charges and potential violence, or do they follow the law, thus risking the life of their patient?[89]

Texas abortion provider and advocate Dr. Ghazaleh Moayedi remembers working at a hospital that would not provide a lifesaving abortion due to confusion on state restrictions:

> I was consulted on a case of a person who was 22 weeks pregnant with triplets. She already had children and this was a wanted pregnancy; she was not seeking an abortion. But she started to have serious pregnancy complications. She needed an abortion to save her life, and as she became sicker, she begged the hospital providers for one. But that hospital wouldn't perform an abortion.

See Carter Sherman, *This Convicted Planned Parenthood Bomber Was at the Capitol 'Fighting' for Trump,* VICE NEWS (Jan. 14, 2021, 3:30 PM), https://tinyurl.com/y36m9ns4 [https://perma.cc/CP6W-Y5Q4].

85. *See* NAF, *supra* note 68, at 2, 4 (reporting incidents of stalking and assault and battery at abortion clinics in America).

86. Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016).

87. *See id.* at 612 (discussing clinic closures in Texas due to hostility against providers).

88. *See* Baumagertner, *supra* note 61 (explaining why doctors fear prosecution for treating patients with life-threatening pregnancies); Kate Zernike, *Medical Impact of* Roe *Reversal Goes Well Beyond Abortion Clinics, Doctors Say*, N.Y. TIMES (Sept. 10, 2022), https://tinyurl.com/8zy6t8wx [https://perma.cc/UA64-S5BX] ("[H]ospitals are routinely refusing or delaying care."); El-Bawab, *supra* note 37 (addressing the fear physicians feel without guidance as to what constitutes a legal abortion).

89. *See* Selena Simmons-Duffin, *For Doctors, Abortion Restrictions Create an 'Impossible Choice' When Providing Care*, NPR (June 24, 2022, 4:26 PM), https://tinyurl.com/4t5jrcm3 [https://perma.cc/G252-9SPM] (interviewing doctors who say abortion bans make them feel like they have to "deprioritize" their patients).

> Weeks later, the woman woke up in the ICU. She had lost all three babies and her limbs. The reason was tragic, but simple: She wasn't given a lifesaving abortion when she needed it. There were many reasons for that, but they all hinge on the restrictions on abortion in Texas at the time, which meant both that physicians lacked training in how to provide abortions and that physicians were confused about when those restrictions applied.[90]

There is no other area of healthcare where a physician must wait for the patient to get worse before they can provide life-saving care.[91] There is never a defining moment when a physician knows the time for emergency care is upon them.[92] Instead, physicians should be able to use their training and judgment without political intervention. Without federal protection for emergency abortion care, there is no guarantee that physicians in hostile states can treat patients with the quality of care that they need.[93]

II. ANALYSIS

A. *Emergency Abortion Care is a Protected Area of National Concern*

1. *Congress Wrote EMTALA in Response to a National Crisis Over Emergency Care*

When EMTALA was enacted in 1986, there was national concern that the hospital emergency department structure had become ineffective due to a shocking number of people denied care in emergency departments—about 250,000 patients annually.[94] Congressional reports from 1986 expressed "growing concern" around inadequate emergency services, specifically for people with lower incomes and the uninsured.[95] "Dumping" patients who could not afford to pay

90. *See* Brief for Abortion Care Network et al. as Amici Curiae Supporting Respondents at 35, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (interviewing Dr. Ghazaleh Moayedi).

91. *See* TDC Group, *Treating Medical Emergencies in the Post-*Roe *Landscape*, YOUTUBE (Nov. 17, 2022), https://tinyurl.com/23p6b5qu [https://perma.cc/8NVS-7HPZ] (explaining the challenges OB/GYNs face treating medical emergencies in the legal landscape after Dobbs).

92. *See id.*

93. *See* Harris Meyer, *Patients and Doctors Navigate Conflicting Abortion and Emergency Care Laws*, SCI. AM. (Aug. 9, 2022), https://tinyurl.com/yc3ay46k [https://perma.cc/D9UV-U3WU] (noting that there are no safety guarantees for patients or physicians in states hostile to abortion).

94. *See* Bosler & Davis, *supra* note 26.

95. *See* Thomas A. Gionis et al., *The Intentional Tort of Patient Dumping: A New State Cause of Action to Address the Shortcomings of the Federal Emergency Medical Treatment and Active Labor Act (EMTALA)*, 52 AM. U. L. REV. 173, 182 n.35 (2002) (referencing the House Judiciary Committee Report from 1986 on EMTALA).

resulted in an increase in patient morbidity and mortality.[96] The congressional record shows Congress believed patient dumping increased after the Medicare prospective payment system for hospitals became effective.[97] Congress responded with EMTALA to assure "pressures for greater hospital efficiency [were not] construed as license to ignore traditional community responsibility and loosen historic standards."[98] The cultural backdrop against which EMTALA was enacted is written in the statute and legislative history: Congress responded to a national crisis by setting federal standards for emergency care, thus promoting domestic health, safety, and the economy. Since 1986, EMTALA has controlled the regulatory landscape over emergency department care. The national struggle to access abortion care requires EMTALA continue to control emergency department standards.[99]

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96. *See Equal Access to Health Care: Patient Dumping: Hearing Before the Subcomm. of the Comm. on Gov't Operations*, 100th Cong. 163 (1987) [hereinafter *Patient Dumping Hearing*]. For example, in 1986, Dr. David Ansell testified at a congressional hearing on Patient Dumping and said that patients in Chicago who were "dumped" had a mortality rate almost three times that of non-transferred patients. *See id.* Dr. Ansell's written testimony further stated almost one out of every ten medical transfers died. *See id.*

97. *See* Gionis et al., *supra* note 95 (referencing the House Ways and Means Committee Report from 1986 on EMTALA); *Patient Dumping Hearing*, *supra* note 96, at 327 (explaining the responsibilities of Medicare-participating hospitals that created the need for EMTALA). In 1983, Congress altered how Medicare was financed; under the new prospective payment system, a hospital earned a predetermined sum after a patient was diagnosed. *See* Karen I. Treiger, *Preventing Patient Dumping: Sharpening the COBRA's Fangs.*, 61 N.Y.U. L. REV. 1186, 1194 (1986). If care exceeded the sum, the hospital had to absorb the cost. *See id.* Additionally, between 1981 and 1985, federal defunding cut over one million people from Medicaid. *See id.*

98. *See* H.R. REP. NO. 99-241, pt. 2, at 27 (1985). *See also* Brooks v. Md. Gen. Hosp., 996 F.2d 708, 714–15 (4th Cir. 1993) ("[Congress] expressed the expectation that [EMTALA] was filling a gap in the state law and imposing a limited duty on hospitals with emergency rooms to provide emergency care to all individuals who come there."). The congressional intent was to prevent hospital emergency departments from turning away lower-income and uninsured people, but the statute applies to any individual regardless of their financial status. *See* Gionis et al., *supra* note 95, at 183. *See also Patient Dumping Hearing*, *supra* note 96, at 2 (establishing that patient dumping may involve discrimination on the basis of poverty, race, ethnicity, or appearance).

99. *See also* Ikra Kafayat, *How COVID-19 Put the Spotlight on the EMTALA*, 38 TOURO L. REV. 357, 360 (2022). The federal regulatory scheme within EMTALA was essential during the height of the COVID-19 pandemic. *See id.* The influx of patients during the pandemic created a need for deviations to standard emergency department practices. *See* Heather L. Brown, *Emergency Care EMTALA Alterations During the COVID-19 Pandemic in the United States*, 47 J. EMERGENCY NURSING 321, 321 (2020). HHS and CMS waived two EMTALA guidelines to provide regulatory flexibility so that physicians could meet their needs: (1) individuals could be redirected to on- or off-site locations for mandated medical screening, and (2) individuals who were not fully stabilized could be transferred. *See id.* at 322–23. The

2. *EMTALA's Preemption Provision and Plain Meaning Prevents States from Restricting Emergency Abortion Care*

Congressional intent is the "ultimate touchstone" when analyzing federal preemption.[100] A preemption conflict arises when Congress encroaches in an area traditionally occupied by the state, like matters related to health and safety.[101] There is "no one crystal clear distinctly marked formula" to determine if state law is preempted.[102] Instead, when state police powers are implicated, courts have consistently resolved a preemption issue by considering whether the statute plainly violates a constitutional right or "encroaches upon the exercise of some authority delegated to the United States for the attainment of objects of national concern."[103] While abortion bans are rationalized on the basis that states have a legitimate interest in "preservation of prenatal life" and "maternal health and safety," the conflict between EMTALA and state law poses a critical threat to national health and safety.[104] The narrow medical exceptions within state abortion laws prove EMTALA is still desperately needed and the federal concern for emergency patient care cannot be erased.

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unprecedented toll on the U.S. healthcare system during the pandemic required federal intervention. *See id.* As EMTALA establishes federal standards in emergency medicine, the statute rose to the challenge in the face of a public health emergency. *See id.*

100. *See* Env't Encapsulating Corp. v. New York, 855 F.2d 48, 53 (2d Cir. 1988) ("In analyzing any claim of federal preemption, 'the purpose of Congress is the ultimate touchstone.'").

101. Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 719 (1985) ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern.").

102. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

103. *Id.* at 75 (Stone, J., dissenting) (arguing that the judiciary should not assume preemption is appropriate unless the statute concerns a right of the federal government or an object of national concern). *See also* Freightliner Corp. v. Myrick, 514 U.S. 280, 287–88 (1995) ("[A] federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law. . . . The [reasonable inference] that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption."); Arizona v. United States, 567 U.S. 387, 441 (2012) (ALITO, J., dissenting) ("Because state police powers are implicated here, our precedents require us to presume that federal law does not displace state law unless Congress' intent to do so is clear and manifest."); *Env't Encapsulating Corp*., 855 F.2d at 53 ("The historic police powers of the states are not to be found preempted unless that was the clear and manifest purpose of Congress.") (internal quotations omitted). *See also* Gionis et al., *supra* note 95, at 228 n.318 ("When Congress expressly defines a statute's preemptive reach, and the statute provides 'a reliable indicium of congressional intent' . . . Congress did not intend to preempt matters beyond that reach.").

104. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) ("A law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.'") (quoting Heller v. Doe, 509 U.S. 312, 319 (1993).

Federal law creates the floor that states may not legislate below.[105] While states may afford greater rights, preemption is a powerful tool to displace state law that conflicts with or provides fewer rights than federal law.[106] EMTALA's preemption provision provides, a "state or local law requirement" is preempted "to the extent that the requirement directly conflicts" with the statute.[107] Therefore, any state law that prevents a physician from providing care that EMTALA otherwise requires is explicitly prohibited.[108] EMTALA only preempts state or local laws that directly conflict with the statute, so state laws requiring care beyond EMTALA's mandates may be upheld.[109] Allowing states to provide separate and limited options of emergency care for pregnant patients is fundamentally at odds with EMTALA's guarantee of providing—not prohibiting—stabilization.[110]

Further, under EMTALA an "emergency medical condition" is a condition where the absence of immediate medical attention could reasonably place a patient's health in jeopardy, impair bodily function, or cause dysfunction to any organ.[111] If an individual comes to a hospital with an emergency medical condition, an emergency department must provide stabilizing treatment.[112] Stabilization is contextual and based on the emergency medical condition and the risks

105. *See* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986) ("[T]he Fourteenth Amendment fully applied the provisions of the Federal Bill of Rights to the states, thereby creating a federal floor of protection and that the Constitution and Fourteenth Amendment allow diversity only above and beyond this federal constitutional floor.").

106. *See* Elizabeth Y. McCuskey, *Body of Preemption: Health Law Traditions and the Presumption Against Preemption*, 89 TEMP. L. REV. 95, 102 (2016) (discussing the preemption doctrine's authority set by the Supremacy Clause). Preemption may also displace local law. *See id. See also* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 285 (1987) ("Congress intended the [Pregnancy Discrimination Act] to be 'a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.'").

107. 42 U.S.C. § 1395dd(f).

108. *See In re* Baby "K", 16 F.3d 590, 597 (4th Cir. 1994) ("EMTALA does not provide an exception for stabilizing treatment physicians . . . deem medically or ethically inappropriate.").

109. *See* Defendants' Motion to Dismiss at 5, Texas v. Becerra, 623 F. Supp. 3d 696 (N.D. Tex. 2022) (No. 5:22-CV-185-H) [hereinafter *Becerra* Motion to Dismiss] (referencing the congressional record from 1986)*; see also* Brennan, *supra* note 105 (explaining that states may not afford fewer rights than the federal government).

110. *See, e.g.*, *Becerra* Motion to Dismiss, *supra* note 109, at 10 ("EMTALA's text leaves that balancing to the pregnant patient—who may decide, after weighing the risks and benefits, whether to accept or refuse the treatment.").

111. *See* 42 U.S.C. § 1395dd(e)(1)(A) (defining emergency medical conditions).

112. *See id. See also* § 1395dd(e)(1)(B) (defining emergency medical conditions for pregnant patients).

associated with transferring a patient.[113] The statutory definition of "stabilize" requires a flexible, objective standard of reasonableness that depends on the circumstances and allows physicians to make rapid decisions.[114] There is no separate rule for the circumstances surrounding active labor or pregnancy.[115] EMTALA's statutory language and legislative history show Congress intentionally excluded any exceptions to the duty to provide stabilizing treatment, especially for pregnant patients.[116]

Statutory interpretation favors a presumption against ineffectiveness; a textually permissible interpretation of a statute should not obstruct the document's purpose.[117] The plain meaning and legislative history of EMTALA offer no reason to depart from the understanding that emergency treatment includes abortion as stabilizing care.[118] At the most basic level, EMTALA's text demands hospitals and physicians screen and stabilize a patient with an emergency medical condition when they come to an emergency department.[119] Congress enacted EMTALA to address the increasing number of

113. *See* Cherkuri v. Shalala, 175 F.3d 446, 449–50 (6th Cir. 1999) ("[Stabilization] depends on the risks associated with the transfer and requires the transferring physician, faced with an emergency, to make a fast on-the-spot risk analysis.").

114. *See id.* at 451, 453 (noting that the stabilization requirement under EMTALA is objective and requires 'on-the-spot' analysis); *Becerra* Motion to Dismiss, *supra* note 109, at 11–12 (arguing that EMTALA's requirements apply equally to all types of stabilizing care).

115. *See* Burditt v. U.S. Dep't of Health & Human Servs., 934 F.2d 1362, 1370 (5th Cir. 1991) ("[A] woman in labor is entitled to EMTALA's treatment and transfer protections upon a showing of possible threat; it does not require proof of a reasonable medical probability that any threat will come to fruition.").

116. *See In re* Baby "K," 16 F.3d 590, 596 (4th Cir. 1994) ("[Court research did not reveal] any statutory language or legislative history evincing a Congressional intent to create an exception to the duty to provide stabilizing treatment when the required treatment would exceed the prevailing standard of medical care."); *see also Becerra* Motion to Dismiss, *supra* note 109, at 26 ("Nothing in EMTALA creates a different rule for circumstances in which the treatment results in termination of a pregnancy.").

117. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 70 (West 2012) (outlining the canons of statutory interpretation).

118. *See In re Baby "K"*, 16 F.3d at 596. In *In re Baby "K"*, a hospital argued it did not owe a duty to provide care to an infant other than warmth, nutrition, and hydration. *Id.* The court found that EMTALA's text provided a duty to stabilize and that the hospital could not prove they were exempt from EMTALA without express evidence of legislative intent. *Id. See also* Ritten v. Lapeer Reg'l Med. Ctr., 611 F. Supp. 2d 696, 715–16 (E.D. Mich. 2009) (finding EMTALA requirements extend to all physicians who reasonably believe a patient is suffering an emergency medical condition, regardless of the procedure that is required); Morin v. E. Me. Med. Ctr., 779 F. Supp. 2d 166, 184–85 (D. Me. 2011) (finding that a distinction between viable and non-viable pregnancies in EMTALA's text would contradict the plain language of the statute).

119. *See* 42 U.S.C. § 1395dd(a)–(b) (providing the screening and stabilization requirements for emergency departments).

hospital emergency departments refusing to accept or treat patients with emergency conditions if the patient did not have insurance.[120] EMTALA was a means of pressuring hospitals to take responsibility for the community they serve or risk fines and a potential loss of federal funding.[121] Excluding emergency abortion care would undermine EMTALA's intent to prohibit emergency departments from refusing services to patients.[122]

Further, when Congress chooses not to include any exceptions to a broad rule, the broad rule is applied.[123] Congress does not lack experience when it comes to including abortion exceptions in legislation.[124] For example, the Hyde Amendment has banned federal funding for abortion care for over 45 years, and the Church Amendment protects physicians who object to providing abortions based on religious or moral convictions.[125] For an anti-abortion legislating body like Congress, the exclusion of an abortion restriction in EMTALA is as good as an abortion endorsement. EMTALA's requirements apply equally to all types of stabilizing treatment for emergency medical conditions. There is no interpretation of EMTALA where excluding abortion care furthers the statute's purpose to protect patient health and to establish emergency department physicians' duty to screen and stabilize.

120. *See* Thomas L. Stricker Jr., *Emergency Medical Treatment & Active Labor Act: Denial of Emergency Medical Care Because of Improper Economic Motives*, 67 NOTRE DAME L. REV. 1121, 1121 n.3 (1992) (detailing the legislative history behind EMTALA).

121. *See id.;* 42 U.S.C. § 1395dd(d) (outlining enforcement mechanisms for EMTALA).

122. *See* discussion *supra* Section II.A.1 (explaining that Congress passed EMTALA in response to patient dumping—hospitals refusing emergency care services to patients who could not afford treatment).

123. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1736 (2020) ("[W]hen Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule."); *see also Becerra* Motion to Dismiss, *supra* note 109, at 11 (referencing *Bostock*).

124. *See Historical Abortion Law Timeline: 1850 to Today*, PLANNED PARENTHOOD ACTION FUND, https://tinyurl.com/59uc4z5j [https://perma.cc/37PF-JTLF] (last visited Feb. 16, 2023) (outlining the history of federal abortion legislation in the United States); *see also Legislative History of the Federal Abortion Ban*, CTR. FOR REPROD. RTS. (Nov. 4, 2009), https://tinyurl.com/y8h2eymz [https://perma.cc/9J7L-LUY8] (discussing the history of the Partial-Birth Abortion Ban, a 2003 federal law that criminalized a safe method for second trimester abortions).

125. *See The Hyde Amendment: A Discriminatory Ban on Insurance Coverage of Abortion,* GUTTMACHER INST. (May 2021), https://tinyurl.com/2p9ysyux [https://perma.cc/25D6-PE7X]; *see also* 42 U.S.C. § 300a-7.

B. Federal Protection for Emergency Care Cannot Coexist with State Abortion Bans

Without EMTALA, physicians in states hostile to abortion must prepare to forego years of training and medical judgment to satisfy the preference of non-expert state legislators and judges.[126] Guidance from HHS reminding hospitals of their existing obligation to provide emergency abortion care led to split district court interpretations of EMTALA's scope.[127] The abortion statutes in Texas and Idaho serve as examples of how abortion statutes that triage emergency care encroach into a protected area of federal law and risk the health of patients. An examination of these statutes shows how limited medical exceptions in abortion laws violate EMTALA's purpose and plain language.

1. Texas's Abortion Ban Violates EMTALA

One of Texas's abortion bans prohibits abortion and enforces civil and criminal penalties.[128] One of the few exceptions to the abortion ban exists when a patient has a life-threatening physical condition arising from a pregnancy that creates a risk of death or poses a serious risk of substantial impairment of a major bodily function.[129] If an exception is met, a physician may exercise "reasonable medical judgment" to provide an abortion.[130] However, the statute notes that

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126. *See* Brief for Appellant at 62–69, All. for Hippocratic Med. v. FDA, 2023 WL 2913725 (5th Cir. Apr. 12, 2023) (No. 23-10362) (arguing that the district court abused its discretion by suspending the FDA's approval of mifepristone, one of the two drugs most commonly used in medication abortion).

127. *See generally* Memorandum from Dirs. on EMTALA Obligations, *supra* note 42; discussion *supra* Section I.B.2 (discussing the EMTALA lawsuits in Texas and Idaho); *see also* David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 76–77 (2023) (explaining that the EMTALA cases from Texas and Idaho will likely be appealed and lead to a split between the Fifth and Ninth Circuits).

128. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 170A.001–.007 (West 2021); H.B. 1280, 87th Leg., Reg. Sess. (Tex. 2021) (stating that the ban will take effect 30 days after the issuance of a Supreme Court decision overruling *Roe v. Wade*). The criminal charge for providing an abortion is a first degree felony and the civil penalty is a fine of not less than $100,000. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 170A.004–.005 (West 2021). The statute does not define "emergency" and cites a separate section of the Health and Safety Code to define abortion. *See* TEX. HEALTH & SAFETY CODE ANN. § 170A.001 (West 2021). In addition to this law, Texas has two state laws banning abortion: a six-week abortion ban that authorizes a private civil right of action against any person who provides an abortion or "aids and abets" in seeking an abortion, and a pre-*Roe* criminal ban that several courts have determined to be implicitly repealed. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 171.207–211 (Tex. 2023); *Becerra*, 623 F. Supp. 3d at 705.

129. *See* TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2021) (outlining exceptions to prohibited abortions in Texas).

130. *See id.*

in this scenario, the abortion must provide the best opportunity for the "unborn child to survive."[131]

Here, Texas limits the exceptions in the abortion ban to physical conditions that are "aggravated, caused by, or arising from a pregnancy."[132] Where EMTALA does not question the underlying cause of an individual's medical condition, emergency abortions in Texas are conditional upon the emergency arising from pregnancy.[133] A pregnant person can experience various health issues that are not caused by their pregnancy, such as cancer, heart disease, or renal disease.[134] Further, Texas's emergency standards require greater severity than EMTALA. Emergency conditions in the Texas statute are those that threaten life or pose "a serious risk of *substantial* impairment of a *major* bodily function."[135] EMTALA requires emergency care when the absence of immediate medical attention *could* result in health jeopardy, impairment to bodily functions, or disfunction of a bodily organ.[136] In addition, while EMTALA protects conditions which may cause serious dysfunction of a bodily organ or part; the Texas statute does not.[137] Finally, Texas physicians who use their "reasonable medical judgment" to provide an abortion must do so in a

131. *Id.* Under Texas's abortion law, a physician must provide the best opportunity for live birth, unless, under their reasonable medical judgment, they believe this would create a greater risk of death or substantial impairment of a major bodily function to the patient. *Id.*

132. *Id.*

133. *Compare* Cleland v. Bronson Health Care Grp., 917 F.2d 266, 268–69 (6th Cir. 1990) (holding that EMTALA applies to emergency medical conditions "within the actual knowledge of the doctors on duty or of those doctors who would have been provided to any paying patient"), *with* TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2021) (prohibiting abortion unless there is a pregnancy-related, life-threatening condition that places the patient at risk of death or risk of substantial bodily impairment).

134. *See* Reuters Fact Check, *supra* note 21 (discussing serious underlying health conditions where abortion may be the most effective treatment).

135. *Id.* (emphasis added). EMTALA allows for emergency care when the absence of immediate medical attention *could* result in health jeopardy, impairment to bodily functions, or disfunction of a bodily organ. *See* 42 U.S.C. §§ 1395dd(a), (e)(1). Additionally, EMTALA protects conditions which may cause serious dysfunction of a bodily organ or part, while the Texas statute does not. *See* 42 U.S.C. §§ 1395dd(a)–(b), (e)(1)(A); TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2021). *See also* discussion *supra* Section I.C.2 (citing Dr. Moayedi's experience consulting for a Texas hospital that would not provide an emergency abortion; the patient lost the triplet pregnancy and her limbs).

136. *See* 42 U.S.C. § 1395dd(e)(1)(A) (defining emergency medical condition) (emphasis added).

137. *Compare* 42 U.S.C. §§ 1395dd(e)(1)(A)(ii)–(iii) (defining emergency medical conditions as those that may cause serious impairment to bodily functions or serious dysfunction of any bodily organ or part), *with* TEX. HEALTH & SAFETY CODE ANN. § 170A.002(b)(2) (West 2021) (allowing abortion only if one faces a life-threatening physical condition arising from a pregnancy or if one faces serious risk of substantial impairment of a major bodily function).

manner that "provides the best opportunity for the unborn child to survive."[138] Not only does this requirement conflict with a physician's duty to ensure the most *appropriate* care is provided to the patient, the requirement conflicts with science, medicine, and the state's very own definition of "abortion."[139]

Texas's statute defines abortion as the act or "intent to cause the death of an unborn child".[140] The exception to this definition clarifies an act is *not* an abortion when the intent is to "save the life or preserve the health of an unborn child."[141] The American College of Obstetrics and Gynecology defines abortion as "an intervention to end a pregnancy so that it does not result in a live birth."[142] Texas's criminal abortion ban tells physicians they may not provide emergency abortion care except in the most extreme circumstances, and still, in that circumstance, the physician should provide an abortion in a manner that "provides the best opportunity for the unborn child to survive."[143] This creates an oxymoronic situation where an abortion is not an abortion but is an abortion. The statute is impossible to follow and medically inaccurate.[144]

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138. TEX. HEALTH & SAFETY CODE ANN. § 170A.002(b)(3) (West 2021).

139. *See* AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, CODE OF PROFESSIONAL ETHICS OF THE AMERICAN COLLEGE OF THE OBSTETRICIANS AND GYNECOLOGISTS 2 (2018), https://tinyurl.com/yum46u6a [https://perma.cc/BCY2-33F7]. The American College of Obstetricians and Gynecologists ("ACOG") Code of Professional Ethics says the "welfare of the patient must form the basis of all medical judgments" and the obstetrician–gynecologist should "serve as the patient's advocate and exercise all reasonable means to ensure that the most *appropriate* care is provided." *Id.* (emphasis added). *See also* TEX. HEALTH & SAFETY CODE ANN. § 245.002(1) (West 2023) (defining abortion); *Dictionary, supra* note 21 (defining abortion). ACOG is the "premier professional membership organization for obstetrician-gynecologists," and it advocates against efforts that impede access to abortion care. *See About Us*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, https://tinyurl.com/2k56j7fc [https://perma.cc/BTQ5-UNS7] (last visited July 17, 2023); *Abortion Policy*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, https://tinyurl.com/2xc9jrc2 [https://perma.cc/4K66-ELYU] (last visited Feb. 19, 2023).

140. TEX. HEALTH & SAFETY CODE ANN. §§ 245.002(1)(A)–(C) (West 2023).

141. *Id.*

142. *Dictionary, supra* note 21 (defining abortion).

143. TEX. HEALTH & SAFETY CODE ANN. § 170A.002(b)(3) (West 2021).

144. *Compare* TEX. PENAL CODE ANN. § 1.07(a)(26) (West 2023) (defining "individual" as "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth"), *with* Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice,* 39 AM. J. L. & MED. 573, 574 (2013) (addressing the fact that philosophers, scientists, and theologians cannot agree on when life begins, thus, defining personhood has profound implications for the law). *See also* Rachel Benson Gold, *The Implications of Defining When a Woman Is Pregnant*, GUTTMACHER REP'T ON PUB. POL'Y. 9 (May 2005), https://tinyurl.com/bdf22j6y [https://perma.cc/25NY-AU4N] (suggesting that the anti-abortion movement's interest in life beginning at conception stems from an interest in banning contraception).

When a physician decides that abortion is the necessary care required, time is of the essence.[145] Texas's abortion ban requires delaying treatment or forcing a less effective form of stabilization for a fetus that may not be viable or safe for the patient to deliver.[146] Conversely, EMTALA ensures patients receive competent healthcare in fast-paced emergency environments by providing the standard of care and services required by physicians.[147] Under the pressure of a medical emergency, physicians do not have time to consider the judicial or legislative guidelines they must work within. A physician who relies on their "medical judgment" does not need to engage in statutory analysis before stabilizing their patient.[148]

2. *Idaho's Abortion Laws Violate EMTALA*

The legal conflict in Texas's abortion ban is similar to the conflict created by Idaho's total ban and six-week ban. The total abortion ban ("Total Ban") criminalizes all abortions.[149] Instead of exceptions, there are only "legally justified abortions through affirmative defenses to prosecution."[150] A physician could be "charged, arrested, and confined until trial" even if they acted on a reported rape or acted to save the life of the patient (the only affirmative defenses that exist under the Total Ban).[151] Physicians are left to their "good faith medical judgment" and the "facts known" if they act to save the life of the patient.[152] In stark contrast to EMTALA, under Idaho law, preventing death is the only emergency where a physician may act.[153]

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145. *See* Schmidt, *supra* note 19 (explaining that doctors who wait for patients to get "sick enough" increase the risk of harm); Greer Donley et al., *The Legal and Medical Necessity of Abortion Care Amid the COVID-19 Pandemic*, 7 J. L. BIOSCIENCES 1, 11 (2020) (discussing how delays in abortion care can eliminate the option of a less invasive medication abortion and increase the risk of medical complications by necessitating a more complex procedure later in the pregnancy).

146. *See* TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2021) (listing the limited exceptions for abortion in Texas).

147. *See* 42 U.S.C. §§ 1395dd(a)–(b) (providing screening and stabilizing requirements for emergency departments and physicians).

148. *See also* discussion *supra* note 22 and accompanying text (discussing *Zurawski v. State of Texas* and the current litigation in Texas to clarify the emergency medical exceptions in state abortion statutes).

149. *See* IDAHO CODE § 18-622(1) (2020) (criminalizing abortion in Idaho).

150. Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1152–53 (Idaho 2023).

151. IDAHO CODE § 18-622(3) (2020).

152. IDAHO CODE § 18-622(3)(a)(ii) (2021). Like the Texas law, the Total Ban also includes language that requires physicians to provide abortions in a manner that provides "the best opportunity for the unborn child to survive." IDAHO CODE § 18-622(3)(a)(iii) (2021); *see* discussion *supra* Section II.B.1.

153. *Compare* IDAHO CODE § 18-622(3)(a)(ii) (2021) ("The physician determined . . . that the abortion was necessary to *prevent the death* of the pregnant woman.") (emphasis added), *with* 42 U.S.C. § 1395dd(b)(1)(A) ("[T]he hospital

After the Total Ban was enjoined in *United States v. Idaho*, Idaho enforced a six-week gestational ban on abortion.[154] The six-week abortion ban enforces civil and criminal penalties on physicians who provide abortions after "the presence of any fetal heartbeat, except in the case of a medical emergency."[155] The six-week ban says a medical emergency exists when, in the physician's "reasonable medical judgment," an abortion is necessary to avert death or "serious risk of *substantial and irreversible* impairment of a *major* bodily function."[156] Read plainly, if a patient is not reasonably facing death, their medical emergency must place them at: (1) serious risk of (2) substantial and (3) irreversible impairment of a (4) major bodily function.[157] In *Planned Parenthood Great Northwest v. State*,[158] the Supreme Court of Idaho determined there was no conflict between this language in the six-week ban and EMTALA because the statutes use "substantially similar" language.[159] The court reasoned that the phrases in the six-week ban, like "serious risk" and "major bodily function", were on track with EMTALA's definition of an emergency medical condition.[160] In addition to the fact that the six-week ban is far more narrow than EMTALA, there are grave consequences if irreversible impairment is the new standard for pregnant patients seeking emergency care.[161] Physicians should take measures to prevent irreversible impairment, not wait for patients to reach that point before treatment starts.

[must provide] . . . medical examination and such treatment as may be required to *stabilize* the medical condition.") (emphasis added).

154. *See Planned Parenthood Great Nw.*, 522 P.3d at 1197. During the pendency of the federal suit, the six-week ban was enforced in Idaho. *See id.*

155. IDAHO CODE § 18-8803 (2021). These so-called "heartbeat" bans are misleading and medically inaccurate; while the heart is developing around six weeks, the embryo does not have a fully formed heart. *See* Roni Caryn Rabin, *Abortion Opponents Hear a 'Heartbeat.' Most Experts Hear Something Else*, N.Y. TIMES (Feb. 14, 2022), https://tinyurl.com/36v58npb [https://perma.cc/M4DQ-PF5Q]. Experts note the "heartbeat" sound is "electrical currents being sent through cells." *Id.*

156. IDAHO CODE § 18-8803 (2021) (emphasis added).

157. *Id.*

158. Planned Parenthood Great Nw. v. State, 522 P.3d 1132 (Idaho 2023).

159. *Id.* at 1207.

160. *See id.* at 1207–08. EMTALA defines an emergency medical condition as a condition where absence of medical attention could result in: (1) placing the health of the individual in serious jeopardy, (2) serious impairment to bodily functions, or (3) serious dysfunction of any bodily organ or part. *See* 42 U.S.C. §§ 1395dd(e)(1)(A)(i)–(iii).

161. *See generally* Terri-Ann Thompson & Jane Seymour, *Evaluating Priorities: Measuring Women's and Children's Health and Well-Being Against Abortion Restrictions in the States*, IBIS REPROD. HEALTH & CTR. FOR REPROD. RTS. (Aug. 1, 2017), https://tinyurl.com/mr2daseb [https://perma.cc/RX36-9Y2A] (finding that denials of abortion create physical health impairments).

3. *EMTALA is Essential for Physicians and Patients*

The patchwork landscape of abortion laws in the United States is growing a divide in the country and feeding medical uncertainty for physicians and patients. Imagine a road trip from Pocahontas County, West Virginia to Salem County, New Jersey: One would start in West Virginia, where abortion is prohibited, then drive through Virginia, where abortion is allowed until the second trimester, and Maryland, where there are express statutory protections for abortion.[162] Finally, the trip ends in New Jersey, where the State's highest court recognizes the right to abortion in the state constitution.[163] In under 350 miles, one can experience the entire spectrum of abortion laws in the United States.[164] Put simply, it is a problem that a pregnant person is promised emergency abortion care in one state and in another state they cannot be so sure.[165] The consequences of limiting abortion care in the emergency room are devastating for patients and the physicians who serve them.[166]

Those who are most impacted by abortion bans are more likely to rely on emergency departments for care.[167] Emergency departments

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162. *See* W. VA. CODE § 16-2R-3 (2023); VA. CODE ANN. § 18.2-73 (West 2023); MD. CODE ANN., HEALTH-GEN. § 20-103(a) (LexisNexis 2023); *see also After* Roe *Fell: Abortion State by State*, *supra* note 16.

163. *See generally* Planned Parenthood v. Farmer, 220 F.3d 127 (3d Cir. 2000) (recognizing the right to abortion within the New Jersey State Constitution).

164. *See* Driving Directions from Pocahontas County, W.Va. to Salem County, N.J., GOOGLE MAPS, https://tinyurl.com/2agwy2pk [https://perma.cc/C268-YUYZ] (showing that the distance between Pocahontas County, W.Va. and Salem County, N.J. is approximately 340 miles).

165. *See* Reuters Fact Check, *supra* note 21. For example, preeclampsia is a pregnancy complication that involves developing high blood pressure and organ damage; abortion may be recommended to preserve the health of the pregnant patient. *See id.* Because preeclampsia may not immediately cause death or impair a major bodily function, a patient in a state with limited emergency abortion exceptions may have to wait until their condition becomes substantially harmful before they can get an abortion. *See id.*; *see also* TEX. HEALTH & SAFETY CODE ANN. § 170A.002(b)(2) (West 2021) (allowing abortions only when there is a serious risk of death or substantial impairment of a major bodily function). If abortion exceptions were bound by EMTALA, the patient would be free to make the abortion decision that is best for them because EMTALA recognizes an emergency condition may cause "serious dysfunction of any bodily part or organ," and therefore care should not be delayed until more harmful conditions arise. *See* 42 U.S.C. § 1395dd(e)(1) (defining emergency medical conditions).

166. *See, e.g.*, Ed Kilgore, *In Tennessee, Even Abortion to Save a Woman's Life May Be Illegal*, N.Y. MAG. (Feb. 28, 2023), https://tinyurl.com/htn4kxjw [https://perma.cc/H7JM-UCWJ] (discussing the struggle physicians face while advocating for their patients in states hostile to abortion).

167. *See* Jake Horton, *Who Could Be Most Affected by US Abortion Changes?*, BBC (May 3, 2022), https://tinyurl.com/2p9a96nu [https://perma.cc/V2EL-8A3L] (acknowledging limited abortion access disproportionately impacts younger, poorer women, especially Black and Hispanic women); Lyndsey S. Benson et al., *Early*

often act as healthcare providers of last resort for people from rural areas, people with lower incomes, and people from marginalized communities who traditionally struggle to access healthcare.[168] Access to healthcare for rural residents can be complicated by factors such as lack of insurance or the need to travel long distances to receive treatment.[169] Also, Black and Latinx patients are less likely to receive prenatal care in the first trimester of pregnancy, and are more likely to experience pregnancy-related death.[170] Members of these communities are more likely to experience health emergencies while pregnant and to require the care that EMTALA affords. Emergency departments play a vital role for those who are socioeconomically vulnerable.[171] Stripping EMTALA requirements from emergency departments will abandon these communities, especially in the South where rapid obstetric clinic closure has created the highest level of reliance on emergency department care for early pregnancy loss and obstetric care.[172]

Further, vague laws test physicians who must determine when an obstetric emergency is worthy of abortion care within a law's statutory text.[173] The "good faith" or "reasonable medical judgment"

Pregnancy Loss in the Emergency Department, 2006–2016, 6 J. AM. COLL. EMERGENCY PHYSICIANS 1, 2 (2021) (acknowledging the increase in emergency department use in the past ten years by marginalized communities, like Black women and people with low incomes).

168. *See* Benson et al., *supra* note 167.

169. *See* AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, *Health Disparities in Rural Women* 2 (Feb. 2016), https://tinyurl.com/2pkmjx4r [https://perma.cc/CC5K-EZCL] (discussing obstetric health issues that women in rural areas experience). Less than half of rural residents live within a 30-minute drive of a hospital that offers prenatal services, and maternal mortality is 9 percent higher in rural areas in the United States compared to urban areas. *See id. See also* Peter T. Mekt et al., *Urban-Rural Difference in Pregnancy Related-Deaths, United States, 2011–2016,* 225 AM. J. OBSTETRICS & GYNECOLOGY 183, 183 (2021) (identifying that the likelihood of maternal mortality and morbidity is nine percent higher in rural areas due to greater access to care in urban areas).

170. *See* Benson et al., *supra* note 167, at 6. Women of color are also more likely to experience early pregnancy loss compared to white women. *See id.* This racial disparity in health is "likely resulting from cumulative stressors of racism, social determinants of health, and increased environmental and occupational exposures." *Id.*

171. *See id.* at 7 ("[T]he United States has seen a steady increased use of [emergency departments], underscoring the vital role they play in caring for those who are socioeconomically vulnerable.").

172. *See id*. (finding that the South has the highest proportion of emergency department visits among regions in the United States; the author attributes this to obstetric unit closures which has been exacerbated by abortion restrictions).

173. *See* Selena Simmons-Duffin, *Doctors Weren't Considered in* Dobbs, *But Now They're on Abortion's Legal Front Lines*, NPR (July 3, 2022, 5:01 AM), https://tinyurl.com/34era3bk [https://perma.cc/P8KA-U4LK] (explaining that doctors do not know how to define the laws that are consistently changing); *see also* Selena Simmons-Duffin, *Doctors Who Want To Defy Abortion Laws Say It's Too Risky,* NPR (Nov. 23, 2022, 5:01 AM), https://tinyurl.com/25vr2wec [https://perma.

standards within abortion bans have yet to be been formally interpreted against a physician's action.[174] A physician would have to be prosecuted and a patient would have to be injured or die for the medical community to learn what the state truly considers bad faith or an unreasonable determination that a pregnant patient needs an abortion.[175] On the other hand, EMTALA has over 30 years of federal jurisprudence interpreting the stabilization requirement to afford physicians the freedom to treat without waiting for a specific criterion of emergency to develop.[176] Nevertheless, physicians in states hostile to abortion are stuck between a rock and a hard place: face fines for violating EMTALA or face fines, loss of license, and criminal penalties for violating state law.[177] Ultimately, the stress of these mental gymnastics serves as a deterrent to abortion care and, in the long run, deters young physicians from entering the obstetric field.[178]

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cc/52KA-VTDF] (explaining that physicians interpret health in line with medical needs, not the law).

174. *See* Simmons-Duffin, *supra* note 173 (explaining that physicians are more likely to deny abortions than provide abortions in violation of state law).

175. *But see* Zurawski v. Texas, 0-1-GN-23-000968 (Dist. Ct. Travis Cnty. 2023). *Zurawski* asks the court to clarify the scope of Texas's medical emergency exception under its state abortion bans. *See Zurawski* Article, *supra* note 22. While no physicians were prosecuted in *Zurawski*, the plaintiffs include over a dozen Texas women who experienced pregnancy complications and were denied essential abortion care. *See id.* The denials of abortion care in *Zurawski* took place after *Texas v. Becerra*, where the court held EMTALA does not preempt Texas law. *See* Texas v. Becerra, 623 F. Supp. 3d 696, 696 (N.D. Tex. 2022).

176. *See, e.g.*, Roberts v. Galen of Va., Inc., 525 U.S. 249, 253 (1999) (holding that improper motive is not required when stabilization is at issue); Burditt v. U.S. Dep't of Health & Human Servs., 934 F.2d 1362, 1362 (5th Cir. 1991) (rejecting a motive requirement for an EMTALA violation); Brooker v. Desert Hosp. Corp., 947 F.2d 412, 414–15 (9th Cir. 1991) (holding EMTALA applies to all patients denied emergency medical care); Gatewood v. Washington Healthcare Corp., 933 F.2d 1037, 1041 (D.C. Cir. 1991) (holding motive is irrelevant to show an EMTALA violation); Cleland v. Bronson Health Care Grp., 917 F.2d 266, 268 (6th Cir. 1990) (holding EMTALA applies to all conditions within the actual knowledge of the doctors on duty or doctors who would have been provided to any paying patient). *See also* Jack E. Karns, *Hospital Screening Procedures and the Emergency Medical Treatment and Active Labor Act (EMTALA): Proof of "Improper Intent" Not Necessary in Failure to Stabilize Cases*, 9 WIDENER J. PUB. L. 355, 357 (2000) (arguing that the purpose of EMTALA is to give all patients comparable care and that EMTALA does not create either a statutory duty of care or a standard of care for physicians).

177. *See* 42 U.S.C. § 1395dd(d)(1) (explaining the civil penalties for individual physicians under EMTALA); *see, e.g.*, TEX. HEALTH & SAFETY CODE ANN. §§ 170A.004–.005 (West 20211) (explaining the penalties for providing an abortion in Texas).

178. *See* Joy Powers & Cait Flynn, *Wisconsin's OBGYN Shortage May Worsen with Abortion Law*, WUWM (Nov. 7, 2022, 2:06 PM), https://tinyurl.com/48j9wyr7 [https://perma.cc/RDJ7-MJPZ] (explaining the nexus between criminal abortion bans and physicians who do not want to work in hostile states).

Finally, a pregnant patient experiencing a health emergency in need of abortion care should not have to wait until they fear imminent death to come to the emergency room. Pregnant people are entitled to the same quality of competent care as everyone else. Under EMTALA, a pregnant person experiencing an emergency health condition must be stabilized whether they are experiencing pregnancy related pelvic pain or complications from a self-managed abortion. This principle is supported by the American College of Emergency Physicians' Code of Ethics, which states, "[e]mergency physicians shall embrace patient welfare as their primary professional responsibility" and "respond promptly and expertly, without prejudice or partiality, to the need for emergency medical care."[179] Physicians must be able to provide abortions without fear of prosecution under state law. To protect the role of emergency physicians, the public interest, and abortion as essential, time-sensitive healthcare, EMTALA must preempt state abortion bans with limited medical exceptions.

EMTALA was enacted in response to national concern for emergency room functions. The nation has every reason to be concerned again. Pregnancy, labor, and childbirth pose substantial risk of medical complications and life-threatening conditions.[180] Approximately 700 people die from pregnancy-related complications in the United States every year.[181] If states have no obligation to meet a minimum standard of care, this number will certainly increase. It is in the best interest of all patients for physicians to provide care based on their medical judgment and the patient's individualized needs. This type

179. AM. COLL. EMERGENCY PHYSICIANS, CODE OF ETHICS FOR EMERGENCY PHYSICIANS 4 (2017), https://tinyurl.com/yjb8smx7 [https://perma.cc/JR7K-EDUD]; *see* Brief for Med. & Pub. Health Societies as Amici for Defendant at 15, *Becerra*, 623 F. Supp. 3d 696 (No. 5:22-CV-185-H) (discussing the ethical duties of physicians).

180. *See Healthy Women, Healthy Pregnancies, Healthy Futures: Action Plan to Improve Maternal Health in America*, DEP'T HEALTH & HUM. SERVS. 17 (2019), https://tinyurl.com/2cffj2y9 [https://perma.cc/LE2E-K2KH] (analyzing the maternal mortality crisis in the United States). Approximately two-thirds of all pregnancy-related deaths are preventable, with hemorrhage, severe hypertension, and infection being the most common preventable causes of death. *See id.* This Comment does not explore the mental and emotional toll that pregnancy, labor, and childbirth can impose on a person, but these are legitimate concerns that can exacerbate physical conditions. *See Stress and Pregnancy*, MARCH OF DIMES, https://tinyurl.com/3k27duyv [https://perma.cc/798A-7FWF] (last visited Feb. 19, 2023) (explaining the connection between mental and pregnancy health). *See also* Natasha Rappazzo, *Aligning Pregnancy-Related Medicaid Coverage Extensions and Medicaid Doula Coverage to Improve Maternal Health*, NAT'L HEALTH L. PROGRAM (Aug. 3, 2023), https://tinyurl.com/2yeqgrca [https://perma.cc/UD6F-YHRF] (discussing policies to address the maternal health crisis in the United States).

181. *See Pregnancy-Related Deaths in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 16, 2022), https://tinyurl.com/5n7ts49e [https://perma.cc/Y4X8-2H45] (reporting that 700 people die annually from pregnancy-related causes).

of care is impossible when individualized needs are exchanged for the state legislature's list of approved treatments, and when medical judgment is skewed by the threat of criminal punishment. The foundation of medical ethics teaches physicians to "do no harm."[182] It is objectively harmful to delay or deny emergency abortion care because of the risk or unknown implication of a state statute.[183] In order for physicians to protect themselves, their patients, and public health, it is essential that all emergency exception provisions and exceptions in state abortion bans are preempted by EMTALA.

CONCLUSION

Ensuring emergency abortion care is protected within the scope of EMTALA is just scratching the surface of federal actions necessary to defend this critical aspect of healthcare. EMTALA is an essential piece of health legislation that provides a foundation for Congress to build upon and achieve abortion-positive policy. EMTALA safeguards emergency healthcare services for the most marginalized communities and marks emergency healthcare services as the federal government's regulatory territory. Because ensuring adequate standards of emergency care is the federal government's responsibility, states limiting abortion to only the narrowest medical exceptions must stand down. States may not use their own anti-abortion definitions to decide what constitutes a medical emergency. Currently, many state laws are inconsistent, inadequate, and do not protect patients or physicians.[184] Certifying federal protections for emergency care will allow physicians to provide abortions without fear of persecution. Instead of wondering what their state's statute says about emergency abortion care, physicians can provide stabilizing care based on their medical judgment. Lawmakers must not wait until the courts in Texas or Idaho determine EMTALA's scope. Now is the time for bold action. Congress and HHS should act to prevent EMTALA's deterioration and to ensure EMTALA protects abortion in all emergency situations.

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182. *See* Basil Varkey, *Principles of Clinical Ethics and Their Application to Practice*, 30 MED. PRINCIPLES & PRAC. 17, 18 (2021) (defining nonmaleficence as the obligation of a physician not to harm the patient).

183. El-Bawab, *supra* note 37 (addressing the fear physicians feel without guidance as to what constitutes a legal abortion).

184. *See generally* IDAHO CODE § 18-622 (2021) (criminalizing abortion in all circumstances except when a patient may die); TEX. HEALTH & SAFETY CODE ANN. §§ 170A.004–170A.005 (West 2021) (creating criminal and civil penalties for providing abortions).

The Guidance shared in July 2022 reminded hospitals of their existing obligation to comply with EMTALA.[185] Now EMTALA should be enforced against hospitals preventing physicians from providing care.[186] HHS should promulgate a process to inform physicians and patients of their right to report EMTALA violations. To ensure compliance, Congress should offer legal protection for physicians who provide emergency abortions in states with criminal and or civil penalties. Such protection may include legislation to shield physicians from being sued, fired, or prosecuted for providing emergency abortion care. Similar protections already exist in conscience clauses which protect physicians' rights to deny care based on moral or religious purposes.[187] Reminding hospitals of their legal obligation is not enough. Physicians should be encouraged to continue providing abortion care in line with their ethical duties.

Finally, while this Comment argues a physician must be able to provide emergency abortion care under EMTALA, it must be asked: at what point does agency return to the pregnant person? Abortion is time-sensitive, essential healthcare. Forcing a person to remain pregnant when they do not want to be is a cruel intrusion into their body, life, and future.[188]

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185. *See* Memorandum from Dirs. on EMTALA Obligations, *supra* note 42.

186. *See* Walker, *supra* note 37 (discussing a hospital in Ohio that would not allow a physician to provide an abortion because the lawyer did not believe the patient's condition was sufficiently severe). *See also* Cohen et al., *supra* note 127, at 77 (arguing that HHS should enforce EMTALA against hospitals accused of denying care). In April 2023, after the majority of this Comment was written, HHS enforced EMTALA for an abortion-seeking patient for the first time since *Dobbs*. *See* Amanda Seitz, *Feds: Hospitals That Denied Emergency Abortion Broke the Law*, AP NEWS (May 1, 2023, 6:52 PM) https://tinyurl.com/m7re9uzb [https://perma.cc/MPA4-CVV5]. Two hospitals, one in Missouri and one in Kansas, refused to provide an abortion for a patient whose early labor put her at risk of losing her uterus. *Id.* After waiting months for justice, HHS said the hospitals overrode physician judgment and denied necessary emergency abortion care. *Abortion Bans End Standard Pregnancy Care in Large Swaths of the United States*, CONTRACEPTIVE TECH. UPDATE (July 1, 2023), https://tinyurl.com/yc2kbpp6 [https://perma.cc/9AAQ-STJ7]. While it is important that EMTALA was finally enforced against hospitals that were denying care, the federal government must continue acting against denials of care.

187. *See* Dov Fox, *Medical Disobedience*, 136 HARV. L. REV. 1030, 1030, 1038 (2023) (explaining shielding in conscience laws); *see also* 42 U.S.C. § 300a-7(b)(2)(A) (protecting the conscience rights of individuals and entities that object to performing or assisting in abortion or sterilization procedures if doing so would be contrary to the provider's religious or moral beliefs).

188. *See* DIANA GREENE FOSTER, THE TURNAWAY STUDY 136–38 (2020). Participants of The Turnaway Study who were denied an abortion reported that they suffered financial burdens, scaled back their life plans, and ended up in unhealthy relationships. *See id.* The Turnaway Study was a ten-year study that followed thousands of women to examine the effect on their lives after receiving or having been denied an abortion. *See id.* The Turnaway Study shows "unwanted pregnancies

All abortions are medically necessary emergencies worthy of a physician's time and care under EMTALA.[189] If someone is pregnant and they do not want to be, but their state is forcing them to remain pregnant, that is an emergency. That is a crisis. The inquiry must end there. Banning abortion or limiting the circumstances when one may get an abortion deprives pregnant people of their autonomy and, in turn, limits their ability to participate equally in society.[190]

Ultimately, the consequences of banning abortion go beyond national health and safety. People who have abortions contribute to the economy, are employed in essential careers, and participate in all aspects of social life.[191] Forcing parenthood restricts one's ability to secure economic independence, achieve career aspirations, seek higher education, and maintain healthy relationships.[192]

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carried to term have profound effects on women's immediate and long-term physical health, their economic security, and the well-being of their families." *See id.* at 147.

189. *See* Julie C. Suk, *A World Without* Roe*: The Constitutional Future of Unwanted Pregnancy*, 64 WM. & MARY L. REV. 443, 516 (2022) (arguing that humane and reasonable constructions of "serious physical or bodily injury" exceptions would permit abortions depending on a person's socio-economic situation). Social determinants of health, such as food insecurity, housing instability, and exposure to occupational hazards and pollution, take a "measurable physical toll, independent of the mental toll, during pregnancy." *See id.*

190. *See id*. at 521 ("[A] woman who continues a pregnancy, wanted or unwanted, bears an unequal burden for a pregnancy that a man has played an equal part in begetting and from which society and the state will benefit."); Yvonne Lingren, Dobbs v. Jackson Women's Health *and the Post-*Roe *Landscape*, 35 J. AM. ACAD. MATRIMONIAL L. 235, 242 (2023) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."); Paula A. Monopoli, *The Future of Reproductive Right: Situating* Dobbs, 14 CONLAWNOW 45, 60 (2023) ("[T]he expectation of reproductive control is integral to many women's identity and their place in the Nation. That expectation helps define a woman as an equal citizen, with all the rights, privileges, and obligations that status entails.").

191. *See Abortion Is a Common Experience for U.S. Women, Despite Dramatic Declines in Rates*, GUTTMACHER INST. (Oct. 19, 2017), https://tinyurl.com/2rmmp8x4 [https://perma.cc/7LPU-J3XZ] (highlighting that abortion is a common experience that one in four women will experience in their life). *See also* Brief for Advocates for Youth Inc. et al. as Amici Curiae Supporting Respondents at i–ii, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (listing how Americans have relied on abortions to define their place in society and participate equally in economic and social life).

192. *See generally* Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOCIO. 5 (2007) (finding that mothers suffer substantial wage discrimination in the workplace); Anna Bernstein & Kelly M. Jones, *The Economic Effects of Abortion Access: A Review of the Evidence*, INST. FOR WOMEN'S POL'Y RSCH. 5 (July 18, 2019), https://tinyurl.com/5n7r52xm [https://perma.cc/G7EC-KGFF] (finding that access to abortion increased women's participation in the workforce); *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting*, NAT'L WOMEN'S L. CTR. 7–16 (Apr. 17, 2017), https://tinyurl.com/bdcrv273 [https://perma.cc/QJ5G-K7KU] (discussing the barriers to success that young mothers feel while attending school); Elizabeth Miller et al., *Reproductive Coercion: Connecting*

The ability to control what happens to your body is the most basic guarantee of freedom the United States can offer. Abortion is a fundamental right, and without protection, the United States is on a path of serious detriment to health, equality, and liberty.

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the Dots Between Partner Violence and Unintended Pregnancy, 81 CONTRACEPTION 457, 457 (2010) (noting that unintended pregnancy occurs more often in abusive relationships). Additionally, barriers to access abortion routinely fall heaviest on Black women, people of color, and other marginalized communities due to systems of discrimination and injustice. *See* Fuentes, *supra* note 15 (analyzing the impact of *Dobbs* on Black, Indigenous, and Latinx communities who face greater harm due to systemic racism and economic injustice).