# Update: Texas Sues Over EMTALA Guidance, Setting Up Showdown Regarding Abortion Care in Emergency Settings

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**UPDATED:** After filing this lawsuit, Texas filed an amended complaint that adds American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) and the Christian Medical and Dental Association (CDMA) as additional plaintiffs. The amended complaint also pleads additional facts and includes an additional count for violation of the Religious Freedom Restoration Act and the Free Exercise Clause of the First Amendment. The plaintiffs then filed a motion for a temporary restraining order (TRO) and for a preliminary injunction, seeking to enjoin the DOJ from enforcing its recent EMTALA guidance.

The DOJ filed an opposition, arguing, among other things, that EMTALA does not require hospitals and physicians to do anything contrary to Texas law. In addition, the DOJ filed a motion to dismiss the amended complaint, arguing that the court lacks jurisdiction over the plaintiffs claims. In particular, the DOJ argued that the plaintiffs have failed to establish standing to bring the instant case and that Texas cannot evade the APA's limitations on judicial review. The Court heard oral argument on Texas' motions on August 18, 2022.

On August 23, 2022, the U.S. District Court for the Northern District of Texas ruled in the state's favor, denying the DOJ's motion to dismiss and issuing a preliminary injunction that prevents the federal government from enforcing its EMTALA guidance in Texas or against members of AAPLOG and CDMA, the suit's other plaintiffs. The court ruled that the plaintiffs had a "substantial likelihood of success" on their claims that the guidance exceeded HHS's authority under federal law. According to the court, the guidance "goes well beyond EMTALA's text, which protects both mothers and unborn children, is silent as to abortion, and preempts state law only when the two directly conflict."

Although the litigation remains ongoing, for now, the Biden Administration may not enforce its EMTALA guidance within Texas or against AAPLOG and CMDA members. Hooper, Lundy & Bookman's Reproductive Health Practice Group is monitoring developments in this case closely and will continue to share updates.


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**July 15, 2022:** On Monday, July 11th, the U.S. Department of Health & Human Services ("HHS") issued a letter to health care providers, as well as revised guidance to hospitals reinforcing its position regarding the obligations imposed under the federal Emergency Medical Treatment and Labor Act ("EMTALA") in the context of clinically necessary abortion services provided to stabilize an emergency medical condition. The documents were issued in light of the recent U.S. Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*, which reversed *Roe v. Wade* and eliminated the right to an abortion under the U.S. Constitution.

For Medicare-participating hospitals with an emergency department, EMTALA generally requires that the hospital provide an appropriate medical screening examination to determine whether an individual has an emergency medical condition, stabilizing treatment within the hospital's capability and capacity if the patient is determined to have an emergency medical condition, and, if the hospital cannot stabilize the emergency medical condition, it must arrange for an appropriate transfer to another facility for stabilizing treatment. HHS's letter to physicians and other providers states the agency's position that EMTALA "protects [providers'] clinical judgment and the action that [they] take to provide stabilizing treatment to [their] pregnant patients, regardless of the restrictions in the state where [they] practice." The guidance to hospitals[1] further expands on this position and states that, "If a physician believes that a pregnant patient presenting at an emergency department is experiencing an emergency medical condition as defined by EMTALA, and that abortion is the stabilizing treatment necessary to resolve that condition, the physician must provide that treatment." The guidance document makes clear, however, that it is being issued to "remind hospitals of their existing obligation to comply with EMTALA and does not contain new policy."

The guidance documents also point to language in the EMTALA statute that provides for preemption of any State or local law requirement to the extent that the requirement directly conflicts with EMTALA, stating that "A physician's professional and legal duty to provide stabilizing medical treatment to a patient who presents to the emergency department and is found to have an emergency medical condition preempts any directly conflicting state law or mandate that might otherwise prohibit such treatment." Further, the guidance states that EMTALA's preemption language could potentially be utilized by individual physicians as a defense to a "state enforcement action, in a federal suit seeking to enjoin threatened enforcement, or, when a physician has been disciplined for refusing to transfer an individual who had not received the stabilizing care the physician determined was appropriate, under the statute's retaliation provision."

Texas's Attorney General responded quickly, filing a lawsuit on Thursday, July 14th against HHS Secretary Xavier Becerra and other Biden Administration officials that characterizes the guidance as an "attempt to use federal law to transform every emergency room in the country into a walk-in abortion clinic." The complaint cites various statutory and Constitutional limitations on HHS's authority and asserts that the guidance violates them, and raises procedural challenges to the guidance as well. At the time this client alert went to press, the Texas Attorney General had not issued any policy statements regarding enforcement of state law against health care providers providing emergency services in reliance on the guidance issued by HHS this week.

[1] The July 11, 2022 guidance (QSO-22-22-Hospitals) revised previously issued guidance from the agency that was released in response to Texas' passage of SB 8. *See* HHS Secretary Xavier Becerra Announces Actions to Protect Patients and Providers in Response to Texas' SB 8; QSO-21-22-Hospitals (Sept. 27, 2021).

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*Hooper, Lundy & Bookman, P.C. is monitoring developments closely as federal agencies issue further guidance and states enact new laws in response to the Supreme Court's decision in Dobbs. We have launched a new Reproductive Health practice group to assist providers seeking to understand their legal obligations as the legal landscape shifts rapidly. Please reach out to Alicia Macklin, Stephanie Gross or Sandi Krul in Los Angeles, Andrea Frey or Katrina Pagonis in San Francisco or any other member of our Hooper, Lundy, and Bookman team.*

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