

No. 23-10246

**IN THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

STATE OF TEXAS; AMERICAN ASSOCIATION OF PRO-LIFE
OBSTETRICIANS & GYNECOLOGISTS; CHRISTIAN MEDICAL &
DENTAL ASSOCIATIONS,

Plaintiffs-Appellees,

v.

XAVIER BECERRA; UNITED STATES DEPARTMENT OF HEALTH AND
HUMAN SERVICES; CENTERS FOR MEDICARE AND MEDICAID
SERVICES; KAREN L. TRITZ; DAVID R. WRIGHT,

Defendants-Appellants.

On Appeal from the United States District Court for
the Northern District of Texas

AMICUS BRIEF FOR LIFE LEGAL DEFENSE FOUNDATION

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CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case pursuant to Rule 28.2.1. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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(Neither AAPLOG nor CMDA have parent corporations nor are either owned by a publicly held corporation holding more than 10% of stock)

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INTEREST OF AMICUS¹

Amicus Life Legal Defense Foundation is a California non-profit 501(c)(3) public interest legal and educational organization that works to assist and support those who advocate in defense of life. Its mission is to give innocent and helpless human beings of any age, particularly unborn children, a trained and committed defense against the threat of death, and to support their advocates in the nation's courtrooms.

Amicus follows the science in recognizing that life begins at the moment of conception and does not end until natural death. It litigates cases to protect human life, from preborn babies targeted by a billion-dollar abortion industry to the elderly, disabled, and medically vulnerable denied life-sustaining care.

Amicus sees in the present case an opportunity for this Court to uphold an unborn child's right to emergency medical care according to the ordinary meaning of the words Congress chose to use in the text of the Emergency Medical Treatment and Labor Act (EMTALA) (42 U.S.C. § 1395dd) and the Born Alive Infant Protection Act (1 U.S.C. § 8).

¹ This brief was wholly authored by counsel for Amicus Life Legal Defense Foundation. No party or counsel for any party made any financial contribution toward the preparation or submission of the brief. No person other than amicus Life Legal Defense Foundation made any monetary contribution toward this brief's preparation or submission. The parties' counsel of record gave written consent for this amicus brief.

SUMMARY OF THE ARGUMENT

Appellants claim the July 2022 Guidance (ROA: 214-19) challenged in this matter simply interprets the legal obligations of hospitals and staff pursuant to Emergency Medical Treatment and Labor Act (“EMTALA”). However, fundamental maxims of statutory construction negate Appellants’ interpretation of the Guidance as requiring abortion.

First, the Guidance violates EMTALA’s express protections for the life and health of any “individual.” Using canons of construction for an undefined word, the ordinary meaning of “individual” means a member of the species *homo sapiens* and includes an unborn child, contrary to Appellants’ reliance upon the Born Alive Infant Protection Act of 2002 (“BAIPA”), which **does not exclude** an unborn child from rights afforded to an infant “born alive.”

Second, BAIPA expressly reserves rights for members of the species *homo sapiens* “at any point prior to being ‘born alive.’” 1 U.S.C. § 8(c).

Third, EMTALA expressly restricts preemption to any state or local “requirement” in direct conflict with any EMTALA “requirement.” The Guidance ignores the ordinary meaning of the word “requirement” by adding words that do not exist in EMTALA. Appellants incorrectly state that a state’s mere “definitions” or “laws” trigger preemption, whereas EMTALA refers to an affirmative state “requirement.” As Appellants acknowledge, Texas law regarding abortion creates

a “prohibition,” not a “requirement.” Appellants’ Opening Brief (“AOB”) at 12 (Texas abortion law “prohibits abortion” with some exceptions). EMTALA’s preemption clause is not triggered by a “prohibition” nor by a “definition” nor merely by a “state law,” unless it imposes a “requirement” in direct conflict with an EMTALA “requirement.”

ARGUMENT

I. EMTALA Must Be Construed Non-Discriminatorily Toward Pregnant-Women-Not-In-Labor to Avoid an Absurd and Cruel Result When an Unborn Child Potentially Faces a Medical Emergency.

The district court below held that EMTALA’s definition of “emergency medical condition” includes the “health of the unborn child.” ROA: 934. This Court, however, may affirm the judgment on legal grounds other than those relied upon by the district court. *Springboards to Educ., Inc v. McAllen Indep. Sch. Dist.*, 62 F.4th 174, 178 (5th Cir. 2023). Thus, Amicus urges a finding that EMTALA’s use of the word “individual,” includes an “unborn child.” This construction eliminates any alleged ambiguity in the statute. *See* AOB:28, ¶B.

Appellants contend that, even after provisions concerning the “unborn child” were added to EMTALA in 1989, a hospital’s legal duties to pregnant-women-not-in-labor are still only “to the pregnant individual,” not to the unborn child or fetus. Although statutory terms should be interpreted according to their ordinary meaning,

Sebelius v. Cloer, 569 U.S. 369, 376 (2013), Appellants assert categorically that the word “individual,” as used in EMTALA, “does not include the fetus.” AOB:34.

Appellants’ position is both internally inconsistent and logically unsound.

First, elsewhere in their argument, Appellants themselves assume that the unborn child is an “individual” as that term is used in EMTALA. When constructing an argument around informed consent, Appellants construe the statute to mean that pregnant women will be “acting on behalf of the fetus,” i.e., the “individual,” in deciding whether to consent to or refuse treatment for the unborn child. AOB:42-43.

Second, with logic akin to the nineteenth century theory that an unborn child has no separate legal existence apart from his mother, Appellants attribute the same view to EMTALA in arguing against any duty toward the life or health of the unborn child unless “posing a threat to the pregnant woman herself.” *Id.* at 35.

However, the theory that an unborn child is without its own separate legal existence² was soundly rejected across the nation by mid-twentieth century courts. “Beginning with a decision in the District of Columbia in 1946, a rapid series of cases, many of them expressly overruling prior holdings, have brought about what was up till that time the most spectacular, abrupt reversal of a well settled rule in the whole history of the law of torts.”³ In 1890, Texas foreshadowed the change in tort

² Roden, *Prenatal Tort Law and the Personhood of the Unborn Child: A Separate Legal Existence*, 16 St. Thomas Law Rev. 207, 213-214 (2003).

³ *Id.* at 237, quoting W. Prosser, *The Handbook on the Law of Torts* §56 (3d Ed. 1964).

law when a son, born posthumously, was granted the right to sue for his father's wrongful death. *Nelson v. Galveston, H. & S.A. Railroad Co.*, 14 S.W. 1021 (Tex. 1890). In 1967, Texas recognized, under its wrongful death statute, a right to recover for a child who, after being born alive, subsequently died from injuries *in utero*. Roden at 245, *citing*, *Leal v. C.C. Pitts Sand & Gravel, Inc.*, 419 S.W. 2d 820 (Tex. 1967). Notably, for violations of EMTALA, "any individual" may obtain damages. 42 U.S.C. § 1395dd(d)(2)(A). Finding a child *in utero* to be an "individual" under EMTALA allows him to pursue a statutory cause of action for his own injuries sustained from violations of the statute.

Appellants' argument fails to note that EMTALA's 1989 amendment added the disjunctive word "or" in front of the phrase "unborn child," indicating the child's separate, individual and legal existence. The word "or" negates Appellants' argument that Congress merely expanded the conditions "for which a pregnant woman must be offered treatment as the [only] person to whom the statute's duties run." AOB:41 (brackets added). Notably, the amendment made no change to the words "emergency medical condition," but clearly referred to an unborn child as a separate individual. This reference is not contained in only one "talismanic" provision (AOB:33) in §1395dd(e)(1)(A)(i), but also in three additional provisions, (c)(1)(A)(ii), (c)(2)(A) and (e)(1)(B)(ii). Thus, as other courts have found regarding similar statutory amendments, Congress added the phrase "unborn child" to

EMTALA because it regarded the child as a separate individual in regard to emergency room care.⁴

Moreover, Appellants argue: “By expressly creating a duty only to individuals with respect to screening, stabilization, and transfer, Congress did not also extend those duties to the ‘unborn.’” AOB:34; *id.* at 17 (“Nor does it create separate and equivalent statutory obligations to both a pregnant individual and her ‘unborn child.’”) However, Appellants’ argument that hospitals have no independent duty to an unborn child unless his or her condition threatens the mother’s health would turn pregnant-women-not-in-labor into a disfavored class of people as to whom federally-funded hospitals may freely engage in “dumping.” As the district court correctly found, “The primary purpose of EMTALA is ‘to prevent ‘patient dumping,’ which is the practice of refusing to treat patients who are unable to pay.’ *Marshall ex rel. Marshall v. E. Carroll Par. Hosp. Serv. Dist.*, 134 F.3d 319, 322 (5th Cir. 1998) (collecting cases).” (ROA:934)

EMTALA’s language establishes the legal rights of “any individual,” including situations where “a request is made **on the individual’s behalf** for examination or treatment” 42 U.S.C. § 1395dd(a) (emphasis added). Correctly

⁴ See e.g. *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787 (S.D. 1996) (holding that state’s 1984 amendment to its wrongful death statute, by adding the phrase “unborn child,” broadened the statute to include a cause of action for the child’s death in the womb); *66 Federal Credit Union v. Tucker*, 853 So.2d 104 (Ky. 2003) (holding that the word “person” in wrongful death statute includes a fetus who is “quick” in the womb).

construed, EMTALA authorizes a pregnant woman, who is not in labor but who is nevertheless concerned about the condition of her unborn child --- after, for example, noticing that the movements in her womb have stopped, or after suffering some trauma to her abdomen --- to seek help at an emergency room “on behalf of” an “individual,” *i.e.*, her unborn child who is feared to be facing an “emergency medical condition.” *Id.* at (e)(1)(A).

Appellants argue that care can be denied if an unborn child’s condition is not a threat to the mother. By a convoluted construction of EMTALA, they ask this Court to hold that Congress intended to create a loophole allowing hospitals to “dump” a specific segment of the population, namely, pregnant-women-not-in-labor.

Appellants’ discriminatory construction against this group of patients cannot be countenanced for a number of reasons, including this Court’s recognition of “the well-established maxim that statutes should be construed to avoid an absurd result.” *Martinez v. Mukasey*, 519 F.3d 532, 544 (5th Cir. 2008). An absurd result would follow if a federal statute prohibiting the dumping of “any individual” excluded the dumping of pregnant-women-not-in-labor who seek care on behalf of an unborn child.

To avoid the above-described absurdity, the word “individual” should be interpreted in accord with another maxim, *i.e.*, that words used in a statute are given

their ordinary meaning in the absence of persuasive reasons to the contrary. *Banks v. Chicago Grain Trimmers*, 390 U.S. 459, 465 (1968). The ordinary connotation of the word “individual” refers to a human being, commonly known as a “member of the species *homo sapiens*.” Many years ago, this basic fact was recognized:

However one answers the metaphysical or theological question whether a fetus is a ‘human being’ ... one must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* and distinguishes an individual member of that species from all others, and second, there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being.”

Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 792 (1986) (White, J., dissenting), *overruled*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *overruled*, *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022); *see also, e.g.*, Alaska Stat. § 09.55.585 (2018) & § 11.81.900 (2018) (defining “unborn child” as a member of the species *homo sapiens*, at any stage of development, who is carried in the womb); Fla Stat. § 775.021(5)(e) (2018) (defining “unborn child” as “a member of the species *homo sapiens* at any state of development, who is carried in the womb”); Kan. Stat. § 60-1901(c)(Supp. 2016) (defining “unborn child” as “a living individual organism of the species *homo sapiens*, *in utero*, at any stage of gestation from fertilization to birth.”).

II. The Born Alive Infant Protection Act, 1 U.S.C. § 8(a), Does Not Preclude Construing “Individual” in EMTALA to Encompass the Unborn.

Appellants attempt to bolster their argument that the word “individual,” in EMTALA, does not include an unborn child by citing the Born Alive Infant Protection Act (which Appellants more blandly identify as section 8 of the Dictionary Act). AOB:34. The first paragraph of BAIPA, 1 U.S.C. § 8(a), declares something most people (but unfortunately not all) would view as an obvious fact regarding children born alive following an attempted abortion, *i.e.*, that a born-alive infant of the **species homo sapiens** is included within the meaning of the words “person, human being, child and individual” so as to receive the benefits of federal laws. The section provides:

- (a) In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United State, the words “person”, “human being”, “child”, and “individual”, shall include every infant member of the species homo sapiens who is born alive at any stage of development.

1 U.S.C. § 8(a) (emphasis added).

Significantly, by merely clarifying that any infant “born alive” **is** within the meaning of certain statutory words (whether or not an abortion was attempted), Congress deliberately **did not exclude** any legal rights of an infant prior to birth because the statute explicitly states it does not alter any such rights. It provides:

- (c) Nothing in this section shall be construed to affirm, **deny**, expand, or contract any legal status or **legal right applicable to any member of**

the species homo sapiens at any point prior to being “born alive” as defined in this section.

1 U.S.C. § 8(c) (emphasis added).

Appellants’ argument is without merit in suggesting that paragraph (a) should be construed to mean that only “born alive infants” are within EMTALA’s meaning of the word “individuals.” As just noted, section 8(a) simply attempts to settle disputes over whether the listed words include born alive infants in various parts of federal law. But section 8(c) makes clear that the statute does not alter any rights prior to birth as are applicable to members of the species *homo sapiens*. Appellants offer no rationale, other than an incorrect reading of BAIPA, to exclude an unborn child from the meaning of “individual.” Accordingly, EMTALA should be construed so that an “unborn child” is included in the ordinary meaning of the word “individual” to avoid the absurd result described above and to afford a child injured *in utero* the right to seek damages under EMTALA.

III. EMTALA Pre-Empts Only Directly Conflicting State Law “Requirements,” Not Prohibitions.

EMTALA provides:

The provisions of this section do not preempt any State or local law **requirement**, except to the extent that the **requirement** directly conflicts with a **requirement** of this section.”

42 U.S.C. § 1395dd(f) (emphasis added).

The ordinary meaning of the word “requirement” means “something that must be done.” *Black’s Law Dictionary* (10th ed. 2014); *see also Public Citizen v. Nuclear Regulatory Commission*, 901 F.2d 147, 156 (D.C. Cir. 1990) (holding that agency’s statutory duty to provide training “requirements” was not satisfied by instead issuing “non-mandatory regulatory guidance”). In contrast to a requirement, Texas’s abortion statute creates a prohibition, meaning a rule or law that forbids something. *American Heritage Dictionary of the English Language* (5th ed.).

Obviously, Texas’s statute forbidding certain abortions is not a “requirement” of “something that must be done.” Accordingly, such a prohibition is not within the meaning of the text in §1395dd(f). Said another way, EMTALA does not preempt “prohibitions” by state or local law, as Congress has done in other important contexts. *See e.g.*, 15 U.S.C. § 1334(b) (“No requirement **or prohibition** based on smoking and health shall be imposed under State law with respect to the advertising and promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.”) (Emphasis added).

Each word, or the absence of words, in statutes is presumed to have an intentional significance: “Hornbook canons of statutory construction require that every word in a statute be interpreted to have meaning, and Congress’s use and withholding of terms within a statute is taken to be intentional.” *Cham. of Comm. v. United States Dep’t of Labor.*, 885 F.3d 360, 381 (5th Cir. 2018). The distinction

between legal “requirements” and “prohibitions” is also recognized in jurisprudence. *See e.g., United States v. Texas*, No. 22-58, 599 U.S. _ slip op. at 12 (June 23, 2023) (“Moreover, the Federal Judiciary of course routinely decides justiciable cases involving statutory **requirements or prohibitions** on the Executive.”) (Emphasis added).

Appellants never identified a specific state “requirement” supposedly in direct conflict with an EMTALA “requirement.” Rather, Appellants’ arguments, and the Guidance itself, add words which the statute does not contain. The Guidance incorrectly states that preemption is triggered, not by a state “requirement,” but by merely “definitions” or “laws.” ROA:218. Appellants also substitute their own choice of words such as “state abortion restriction” (AOB:45) and “any state law” for EMTALA’s word “requirement.” Appellants wrongly declare that the Guidance merely “reiterates that **any state law** barring the provision of abortion care when it constitutes the necessary stabilizing medical treatment directly conflicts with EMTALA and is preempted.” AOB:17 (emphasis added). Appellants also wrongly declare that the Guidance is a reminder that “abortion care” cannot be excluded “irrespective of any **state laws** or mandates that [might] apply.” *Id.* at 28 (emphasis added). All of these instances illustrate Appellants’ substitutions for the word “requirement,” the word actually passed by Congress in EMTALA.

“When a federal law contains an express preemption clause, we focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ preemptive intent.” *Chamber of Commerce v. Whiting*, 563 U.S. 582, 594 (2011). Under EMTALA, preemption is only triggered when “something that must be done” under Texas law “directly conflicts” with “something that must be done” under EMTALA. Inasmuch as Texas’s law “prohibits abortion” with some exceptions (AOB:12), it is not an affirmative “requirement” by the state. EMTALA’s preemption language pursuant to 42 U.S.C. § 1395dd(f) is simply not triggered in the case at bar.

Congress is aware of the difference between state law prohibitions versus state law requirements. Yet it chose not to fashion EMTALA into a comprehensive preemption scheme. In fact, Congress expressly fashioned EMTALA as a “no preemption” statute, subject to the very narrow exception for a state “requirement” that directly conflicts with a specific requirement of EMTALA. Appellants point to no **affirmative state requirement** directly conflicting with an EMTALA requirement.⁵

⁵ Having failed to identify in the district court (or in their opening brief) any “requirement” of Texas law in direct conflict with EMTALA, they have waived the right to do so now.

CONCLUSION

For the reasons set forth above, Amicus respectfully urges the Court to uphold the district court's judgment.

Dated: July 6, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 3065 words, excluding parts of the brief exempted by Rule 32(f), and also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) by being prepared in proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman. As permitted under Fifth Circuit Rule 32.1, footnotes appear in 12-point font.

/s/Rebecca R. Messall
Rebecca R. Messall

STATEMENT UNDER FED. R. APP. 29(a)(4)(E)

No counsel for a party authored this brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparation or submission of the brief; and no person other than the amicus curiae or its counsel contributed money that was intended to fund preparing or submitting the brief.

CERTIFICATE OF SERVICE

I certify that on July 6, 2023, the foregoing document was filed with the Clerk of the Court using the CM/ECF system, causing it to be served on all counsel of record.

/s/Rebecca R. Messall
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No. 23-10246 State of Texas v. Becerra
USDC No. 5:22-CV-185

Dear Ms. Messall,

We filed your brief. However, you must make the following corrections within the next 14 days.

You need to correct or add:

The cover of the brief must identify the party being supported. The cover must also state whether the brief supports affirmance or reversal.

Note: Once you have prepared your sufficient brief, you must electronically file your 'Proposed Sufficient Brief' by selecting from the Briefs category the event, Proposed Sufficient Brief, via the electronic filing system. Please do not send paper copies of the brief until requested to do so by the clerk's office. The brief is not sufficient until final review by the clerk's office. If the brief is in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient brief filing has been accepted and no further corrections are necessary. The certificate of service/proof of service on your proposed sufficient brief **MUST** be dated on the actual date that service is being made. Also, if your brief is sealed, this event automatically seals/restricts any attached documents, therefore you may still use this event to submit a sufficient brief.

Sincerely,

LYLE W. CAYCE, Clerk

Renee Mc Donough

By: _____
Renee S. McDonough, Deputy Clerk
504-310-7673

cc:

Mr. Adam B. Aukland-Peck
Mr. Ryan L. Bangert
Ms. Sara Baumgardner
Ms. Julie Marie Blake
Mr. Matthew Scott Bowman
Mr. John J. Bursch
Mr. Nicholas S. Crown
Mr. Jeffrey B. Dubner
Ms. Karli Eisenberg
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Ms. Amy Snow Hilton
Mr. Christopher D. Hilton
Ms. Rachel Neil
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Ms. Skye Lynn Perryman
Mr. Michael S. Raab
Ms. Shannon Rose Selden
Ms. Natalie Deyo Thompson