Nos. 23-35440, 23-35450

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

STATE OF IDAHO,
Defendant-Appellant,

v.

MIKE MOYLE, Speaker of the Idaho House of Representatives, et al.,
Proposed Intervenor-Defendants, Movants-Appellants.

On Appeal from the United States District Court for the District of Idaho
Hon. B. Lynn Winmill, No. 1:22-cv-00329-BLW

BRIEF OF AMICUS CURIAE ETHICS AND PUBLIC POLICY CENTER IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, the Ethics and Public Policy Center (EPPC), is a nonprofit research institution dedicated to applying the Judeo-Christian moral tradition to critical issues of public policy, law, culture, and politics. EPPC works to promote a culture of life in law and policy and to defend the dignity of the human being from conception to natural death. EPPC scholars write and submit comments on federal agency rulemaking—including Department of Health and Human Services (HHS) rulemaking on conscience protections—and urge the executive branch to follow the law and protect human fetal life.

ARGUMENT

The Supreme Court remanded this case without a merits decision in large part because the United States had conceded at oral argument that (1) EMTALA could *never* require abortion in a mental health emergency and

[1] All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *Amicus* or its counsel contributed money that was intended to fund preparing or submitting the brief.

(2) EMTALA does not override federal conscience protections. *See Moyle v. United States*, 144 S. Ct. 2015, 2021 (2024) (Barrett, J., concurring); Tr. of Oral Arg. 76:16-78:5, 87:23–92:25, *Moyle v. United States*, 144 S. Ct. 2015, No. 23-726 (Apr. 24, 2024). The concessions, represented by the government for the first time at the Supreme Court, ring hollow for two reasons. First, they contradict the administration's past litigation positions. Second, the concessions are undermined by the administration's track record, through its enforcement and rulemaking activities, of working to undermine the federal right to refuse to participate in abortions.

The government's concessions further undercut its own argument that EMTALA requires particular procedures, such as abortion. The concessions only make sense if the Appellants are correct that EMTALA operates at a high level of generality: prohibiting Medicare-participating hospitals from turning away patients while leaving the particular treatments to physicians, consistent with state healthcare laws.

I. The United States' concession that EMTALA never requires an abortion for mental health emergencies rings hollow.

Idaho feared (and rightly so) that under the government's

interpretation of EMTALA, abortions would be authorized for mental health reasons. *See Moyle*, 144 S. Ct. at 2022 (Barrett, J., concurring). But during oral argument at the Supreme Court, the government asserted that EMTALA "never" requires abortions for mental health emergencies. Tr. of Oral Arg. 76:23-24. As explained below, abortions for "health" reasons is a catch-all term that functionally permits elective abortions, including for mental health reasons, and the government's assertion is inconsistent with other government actions that promote abortion for mental and other health reasons.

A. Abortion to preserve "health" is often used as a catch-all term that functionally allows abortion on demand, including for mental health reasons.

Exceptions that permit abortion "to preserve a woman's health" have a long track record of functionally allowing abortion on demand. This is especially the case because "health" is interpreted to include mental health. As explained in the *Psychiatric Times*,

> Psychiatry had a critical involvement in abortion before *Roe v Wade* in 1973. Prior to that time, most states allowed abortion if a woman's health or life was threatened. Although the "life of the mother" exception was typically invoked in cases of physical

> health, certifications of the need for abortion for psychiatric reasons became more common over time. Typically, psychiatrists certified that a woman would be imminently suicidal if she could not have an abortion. Before *Roe*, maternal mental health was one of the most common indications for an abortion; some labeled psychiatrists as gatekeepers of abortion.

Jacqueline Landess & Susan Hatters Friedman, *Abortion and the Psychiatrist: Practicing in Post-Dobbs America*, Psychiatric Times (Jan. 18, 2023), https://perma.cc/H9YH-6QA4. Under *Roe v. Wade*, states were required to allow abortions "necessary to preserve the life or health of the mother." 410 U.S. 113, 164 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). In *Roe*'s companion case, *Doe v. Bolton*, the Supreme Court construed a state law allowing abortion for the "health" of the mother to allow abortion "in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient" because "[a]ll these factors may relate to health." *Doe v. Bolton*, 410 U.S. 179, 192 (1973), *abrogated by Dobbs*, 597 U.S. 215. Read together, *Roe* functionally permitted abortion through all nine months of pregnancy so long as a mother could claim abortion was needed to preserve her health, broadly construed.

The Supreme Court's post-*Roe* abortion jurisprudence continued to interpret *Roe* as requiring health exceptions throughout pregnancy. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 880 (1992) (explaining that "the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health"), *overruled by Dobbs*, 597 U.S. 215; *Stenberg v. Carhart*, 530 U.S. 914, 937–38 (2000) (requiring exception to state law banning partial-birth abortion where a doctor deems the specific procedure necessary to preserve the "life or health of the mother"), *overruled by Dobbs*, 597 U.S. 215.

Abortion advocates capitalized on these exceptions: an expansive concept of "health" became their ace in the hole. "Health," in practice, could encompass anything from emotional health to economic health. *See, e.g.*, *Doe*, 410 U.S. at 192; *United States v. Texas*, 566 F.Supp.3d 605, 621–22 nn.6–9 (W.D. Tex. 2021) (recounting federal government's medical expert's declaration advocating for abortion to ensure "psychological well-being," financial health, or to avoid normal risks associated with carrying a

pregnancy to term). In the case of an individual woman, financial, familial, emotional, psychological, and any other considerations impacting a woman's "well-being" can all "relate to health." *Doe*, 410 U.S. at 192.

Some courts went even further, using the "health" exception not only to permit abortions for specific women with specific health conditions, but to outright invalidate state abortion regulations. These courts argued that abortions must be permitted under *Roe* based on spurious claims that either abortion generally or particular abortion procedures specifically were safer for women than carrying their children to term and giving birth. *See, e.g.*, *Planned Parenthood of Mo. v. Danforth*, 428 U.S. 52, 78 (1976) (invalidating Missouri prohibition on abortion by saline amniocentesis because, among other things, it "would prohibit the use of a method . . . which is safer, with respect to maternal mortality, than even continuation of the pregnancy until normal childbirth"); *United States v. Texas*, 566 F.Supp.3d 605, 621 nn.4, 6 (W.D. Tex. 2021) (faulting Texas abortion law's medical emergency exception for failing to allow abortion to avert the risks associated with normal pregnancy and crediting medical expert testimony

that, "For many, maternal health concerns make abortion desirable and even necessary."). These claims, however, are deeply misleading and of course do not consider that abortion is always unsafe for the unborn child. *See, e.g.*, Am. Ass'n of Pro-Life Obstetricians & Gynecologists, *AAPLOG Committee Opinion: Maternal Mortality* at 3-4 (July 19, 2019), https://perma.cc/Q4J6-CSMR.

Consequently, in the abortion context, "health" historically and in practice is a term with an expansive meaning that encompasses mental health and can be applied (and, indeed, was applied under *Roe*) to require elective abortions throughout pregnancy.

B. The United States' actions, including interpreting EMTALA to require "health-saving abortions," reflect an expansive definition of "health" that includes mental health.

As this history makes clear, the government's efforts to smuggle a "health" exception into EMTALA would effectively force covered entities to permit abortion on demand, contrary to the Supreme Court's direction in *Dobbs*. That is precisely this administration's goal, as President Biden's Executive Order 14076, issued weeks after the *Dobbs* decision, makes clear.

That order directs federal agencies to take actions to protect "access to reproductive healthcare services." Exec. Order No. 14076, 87 Fed. Reg. 42,053 (July 8, 2022). HHS's implementation of the Executive Order included the government's re-interpretation of EMTALA. U.S. Dep't of Health & Human Servs., *Secretary's Report: Health Care Under Attack, An Action Plan to Protect and Strengthen Reproductive Care* at 2 (Aug. 26, 2022), https://perma.cc/79MN-ET8R (listing EMTALA's re-interpretation and enforcement among its flagship strategic efforts to revitalize *Roe* after *Dobbs*); U.S. Dep't of Health & Human Servs., *Report: Marking the 50th Anniversary of* Roe*: Biden-Harris Administration Efforts to Protect Reproductive Health Care* at 3 (Jan. 19, 2023), https://perma.cc/HUC4-4WBL (same).

Within weeks of the Supreme Court's decision in *Dobbs*, HHS's Centers for Medicare and Medicaid Services (CMS) issued new guidance claiming EMTALA could require physicians to perform or complete abortions "to prevent serious jeopardy to the patient's health" and could preempt state abortion laws protecting unborn children. Mem. from CMS, HHS, on Reinforcement of EMTALA Obligations Specific to Patients Who

Are Pregnant or Are Experiencing Pregnancy Loss (July 11, 2022) (rev. Aug. 25, 2022), https://perma.cc/ULJ4-F6VK. In a July 2022 letter to healthcare providers highlighting the EMTALA guidance, HHS Secretary Becerra asserted that EMTALA preempts any state law that "prohibits abortion and does not include exceptions for the life and health" of the mother. Letter from HHS Secretary Becerra to Health Care Providers (July 11, 2022), https://perma.cc/3MSF-JQHS.

Other recent actions by federal agencies, including the U.S. Department of Justice (DOJ), also reflect a broad concept of health-related abortion that includes abortion for mental health reasons. For example, not long after HHS issued its EMTALA guidance, the U.S. Department of Veterans Affairs (VA) claimed "good cause" post-*Dobbs* to issue an interim final rule (IFR) providing abortion benefits to veterans and certain beneficiaries. Reproductive Health Services, 87 Fed. Reg. 55,287 (Sept. 9, 2022). Previously, consistent with Congressional direction that the VA cannot provide abortion benefits, *see* Veterans Health Care Act of 1992, Public Law 102-585, 106 Stat. 4943, the VA excluded all abortion and

abortion counseling benefits. 87 Fed. Reg. at 55,289. In the IFR, however, the VA claimed that the abortion prohibition was "effectively overt[aken]" and added abortion and abortion counseling benefits by creating exceptions to the abortion exclusion where needed for the mother's "life or health." *Id.* at 52,289, 52,291. The IFR provided a list of examples of mental health conditions that could make an abortion health-related. *Id.* at 55,291.

DOJ was well aware of the VA's rule and position on mental health at the Supreme Court oral argument in this case. The DOJ's Office for Legal Counsel issued an opinion rubberstamping the IFR as "a lawful exercise of VA's authority." Intergovernmental Immunity for the Dep't of Veterans Affs. and Its Emps. When Providing Certain Abortion Servs., 46 Op. O.L.C. ___ , *slip op.* at 10 (Sept. 21, 2022), https://perma.cc/T5S2-38U9. The DOJ also defended against a lawsuit challenging the IFR brought by a VA nurse who did not want to be forced to perform abortions in violation of her religious beliefs and conscience rights. *Carter v. McDonough*, No. 22-1275 (W.D. Tex.).

The final rule, issued in March 2024 (only a month before the Supreme Court's oral argument in this case) doubled down on the VA's

position: it explained that "[b]oth physical and mental health are included in the meaning of the term 'health'" and contemplated that abortions could be provided for mental health reasons "consistent with established standards of care." Reproductive Health Services, 89 Fed. Reg. 15,451, 15,465–66 (Mar. 4, 2024).

C. The United States' reliance on "standard of practice" demonstrates its mental health concession is hollow in reality.

The government's new litigation position that EMTALA does not require abortions in mental health emergencies is premised on its claim that "accepted standards of practice" do not presently prescribe them. *See* Tr. of Oral Arg. 78:3-5. However, as Justice Alito, joined by Justice Thomas, pointed out in his dissent, this position "appears to be inconsistent" with certain medical associations that "endorse abortion for mental-health reasons as an accepted standard of practice." *Moyle*, 144 S. Ct. at 2040 (Alito, J., dissenting). Indeed, the American Psychiatric Association and the American Psychological Association claim abortion is a "mental health imperative." *See, e.g.*, Am. Psychiatric Ass'n, *Position Statement on Abortion and Women's Reproductive Healthcare Rights* (Mar. 2023),

https://perma.cc/YL2P-JN8E ("Freedom to act to interrupt pregnancy must be considered a mental health imperative with major social and mental health implications."); Am. Psychological Ass'n, *APA Resolution Affirming and Building on APA's History of Support for Reproductive Rights* (Feb. 2022), https://perma.cc/HWU7-3FS3?type=image (identifying abortion as a "mental health" issue); *see also* Zara Abrams, *The Facts About Abortion and Mental Health*, Am. Psychological Ass'n Monitor on Psychology (June 23, 2022), https://perma.cc/X6RY-B23H.

But even if the government's assertion is true that no standards of care *presently* require abortion as a treatment for a mental health emergency, medical standards can and do change. Nothing prevents the creation of a standard of care *tomorrow* that prescribes abortion as a treatment for mental health emergencies. As noted above, the American Psychiatric Association and the American Psychological Association already claim abortion is necessary for mental health, and recent publications advocate for the same position. *See, e.g.*, A. Alban Foulser & Sophie Arkin, *The Importance of Mental Health Exceptions in Abortion Restrictions*, Psychology Today (March

27, 2023) (criticizing restrictions on mental-health-related abortion as impeding the treatment of "psychiatric emergency"). It does not appear that anything would stop the government from citing these or similar statements after litigation in this case is over to advance the administration's post-*Dobbs* abortion agenda and require abortion for mental health emergencies under EMTALA. That is precisely what the Department of Veterans Affairs did in its recent "Reproductive Health Services" rule, where it cited a press release from the American College of Obstetricians and Gynecologists to support is claim that abortion can be "the only medical intervention that can preserve a patient's health." 87 Fed. Reg. at 55,291 & n.13 (citing Am. Coll. of Obstetricians & Gynecologists, *Abortion Can Be Medically Necessary* (Sept. 25, 2019), https://perma.cc/W66R-C3V4.

Finally, allowing the government to use standards of care to *limit* its exposure in this case would tacitly authorize it to invoke standards of care to *expand* the scope of EMTALA down the road. Validating the government's concession contingent on standards of care would effectively

authorize the government to use EMTALA to federalize medical standards. Given that EMTALA only applies to hospitals that participate in Medicare, granting the government such broad discretion is arguably prohibited by 42 U.S.C. § 1395, which prohibits the government from using Medicare to "exercise any supervision or control over the practice of medicine or the manner in which medical services are provided."

II. The United States' reliance on federal conscience protections rings hollow given the administration's pattern of refusing to honor these same rights.

The administration's affirmation that EMTALA does not override federal conscience protections for healthcare providers is not the meaningful concession it seems. Because conscience protection laws do not contain a private right of action, these rights only exist on paper unless HHS is willing to enforce them. And the government, especially under the current administration, has a clear track record of undermining, not honoring, healthcare providers' conscience rights.

A. Federal conscience protections depend on federal enforcement.

At the outset, it is critical to understand that none of the major three federal laws that protect healthcare institutions' and professionals'

conscience rights regarding abortion include a private right of action.

First, the Weldon Amendment, which has been part of every HHS appropriations act since 2005, prohibits any federal agency or program or any state or local government that receives such funds from discriminating against healthcare institutions or professionals for declining to "provide, pay for, provide coverage of, or provide referrals for abortions." *See, e.g.*, Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. D, sec. 209. However, this prohibition is not coupled with any means for aggrieved healthcare institutions or professionals to initiate legal action to vindicate their rights.

Second, the Church Amendments likewise provide explicit protections for healthcare professionals who object to providing abortions. 42 U.S.C. § 300a-7. Courts have consistently held that the Church Amendments do not provide a private right of action. *See, e.g.*, *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 698–99 (2d Cir. 2010); *Vermont All. for Ethical Healthcare, Inc. v. Hoser*, 274 F.Supp.3d 227, 240 (D. Vt. 2017); *Hellwege v. Tampa Fam. Health Ctrs.*, 103 F. Supp. 3d 1303, 1311–12 (M.D. Fla.

2015).

Finally, the Coats-Snowe Amendment prohibits the federal government and any state or local government receiving federal financial assistance from discriminating against health care entities that refuse to perform abortions, provide abortion training, or make referrals for such activities. 42 U.S.C. § 238n. Again, like the Weldon Amendment and the Church Amendments, the law does not confer a private right of action. *See Nat'l Inst. of Fam. & Life Advocs. v. Rauner*, 2017 WL 11570803, at *3 (N.D. Ill. July 19, 2017).

Under each law, healthcare institutions or professionals whose rights are violated have only one recourse: they can file a complaint with HHS. *See* U.S. Dep't of Health & Human Servs, *How to File a Conscience or Religious Freedom Complaint* (last updated Mar. 17, 2020), https://perma.cc/2QH8-FMZD.

B. The United States' failure to enforce conscience protections demonstrates that its conscience concession is hollow in practice.

In light of the above, the government's concession that EMTALA

does not override federal protections for pro-life healthcare institutions and professionals is only meaningful if HHS actually takes steps to vindicate these federal civil rights. Unfortunately, HHS's recent track record demonstrates that this administration has little interest in enforcing the conscience protection laws.

For instance, earlier this year, HHS issued a new rule on conscience rights that rescinded substantive regulations, including definitions, enforcement procedures, and explanations, implementing the conscience protection statutes. Safeguarding the Rights of Conscience as Protected by Federal Statutes, 89 Fed. Reg. 2,078 (Jan. 11, 2024) (rescinding HHS's 2019 conscience rule, 84 Fed. Reg. 23,170). As *Amicus* explained in its comment to HHS on the proposed rule:

> HHS's proposed rule would eliminate the robust enforcement mechanisms in the 2019 Rule, including its assurance, certification, and compliance requirements. HHS claims its proposal will reduce confusion and provide clarity. But it would delete definitions of key terms, explanations of applicable requirements and prohibitions for each conscience protection law, and the detailed enforcement scheme, making its proposal arbitrary and capricious. HHS also claims the authority to balance conscience rights against other interests, even though the conscience protection laws passed by Congress provide for

> no such balancing. In short, HHS's proposed rule—coupled with the Biden-Becerra HHS's abysmal track record on protecting conscience and religious freedom rights—undercuts the Department's assertions that it takes these rights seriously.

Ethics & Public Policy Center Scholars, *Comment Opposing HHS's Proposed Rule "Safeguarding the Rights of Conscience as Protected by Federal Statutes"* at 1-2 (Mar. 6, 2023), https://perma.cc/S9QE-9G7E. The final rule persisted in subordinating conscience rights to other laws that the government interprets as requiring abortion, including EMTALA specifically. *See* 89 Fed. Reg. at 2,088.

Tellingly, HHS's list of actions on its webpage for "Conscience and Religious Nondiscrimination" contains no actions to enforce conscience protection laws since 2020.[2] Instead, over the past four years, HHS has acted to undermine those rights by withdrawing notices of violation of conscience rights, dismissing lawsuits to enforce conscience rights, and narrowly construing conscience protections. For example, a July 2021 letter informed the University of Vermont Medical Center that HHS was

[2] https://perma.cc/ET2B-RY2Z.

withdrawing a notice of violation of a nurse's conscience rights.[3] In 2019, HHS's Office for Civil Rights (OCR) found that the hospital had violated the Church Amendments by forcing the nurse to participate in an abortion over her known conscience objection.[4] In 2020, after the hospital refused to change its policies to comply with the law, DOJ sued the hospital in federal court. *See United States v. Univ. of Vt. Med Ctr.*, No. 20-213 (D. Vt.). In its July 2021 letter, HHS explained that it was rescinding the notice of violation because it believed a healthcare professional could be forced to participate in procedures against her will in some circumstances, such as when her conscience objection poses an "undue hardship" to her employer.[5]

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[3] Letter from HHS OCR to Univ. of Vt. Med. Ctr. (July 30, 2021), https://perma.cc/GUE3-9FJE).

[4] Letter from HHS OCR to Univ. of Vt. Med. Ctr. (Aug. 28, 2019), https://perma.cc/9LL7-5DDU.

[5] Letter from HHS OCR, *supra* n.3. The Church Amendments contain no such "undue hardship" exception. This language is from Title VII, which requires that employers "reasonably accommodate" their employee's religious beliefs, observances, or practices, unless the accommodation poses an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Notably, the Title VII "undue hardship" standard that HHS's letter cited as qualifying statutory conscience protections under the Church Amendments was applied for decades to justify overriding an

Concurrent with HHS's letter, DOJ dismissed the lawsuit. Notice of Dismissal Without Prejudice, *United States v. Univ. of Vt. Med Ctr.*, No. 20-213 (D. Vt. July 30, 2021).

Also in 2021, HHS withdrew two notices of violation against California (and then-California Attorney General and current-HHS Secretary Becerra) for violating federal conscience rights by forcing nuns and others to provide health insurance coverage of abortion.[6] In 2020, HHS had issued a disallowance of state Medicaid funds (one of the enforcement tools available to HHS under the federal conscience laws) after finding California in violation of the Weldon Amendment.[7] In 2021, HHS adopted

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employee's religious objections if the employer could show it imposed more than a *de minimis* burden. *See Groff v. Dejoy*, 600 U.S. 447, 466 (2023). The Supreme Court overruled that standard last year, *id.* at 468–69, but at the time HHS rescinded the UVMC violation, little more than mild inconvenience could justify overriding healthcare professionals' religious objections under Title VII. As a result, HHS's 2021 letter reflects an interpretation that effectively gutted conscience protections by conflating the Church Amendments and Title VII and subordinating conscience rights to the most minor of countervailing interests.

[6] HHS OCR, Notice of Violation—OCR Transaction Nos. 17-274771 & 17-283890 (Jan. 24, 2020), https://perma.cc/494X-HT7M.

[7] *Id.*

a new, narrower interpretation of what qualifies as a "health care entity" entitled to conscience protections to justify withdrawing the notices of violations.[8] In 2023, HHS closed federal investigations into whether Illinois' abortion insurance coverage requirements violated the Weldon Amendment on similar grounds.[9]

Consistently, HHS's September 2021 guidance on the Church Amendments focused on explaining protections for "health care personnel who perform or assist in the performance of a lawful abortion." Off. Civ. Rts., U.S. Dep't of Health & Human Servs., *Guidance on Nondiscrimination Protections Under the Church Amendments* (Sept. 17, 2021), https://perma.cc/WRT8-G87L. The guidance provided four examples of personnel participating in lawful abortions; no examples are provided of health-care personnel who refuse to perform abortions.[10] *Id.*

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[8] Letter from HHS OCR to the Hon. Rob Bonta (Aug. 13, 2021), https://perma.cc/L6QJ-ADPP.
[9] Letter from HHS OCR to Att'y Gen. Raoul (Feb. 17, 2023), https://perma.cc/J5AZ-7LG3.
[10] Notably, the guidance relies on pre-*Dobbs* abortion cases to define "lawful abortion," which HHS has yet to update in the over two years since

Within this context, the United States began expansively interpreting and enforcing EMTALA to mandate abortion even when prohibited by state law, while simultaneously deprioritizing enforcement of conscience protections and subordinating them in word and in deed to a policy of expanding "abortion access." Conscience protections mean little if the federal government will not enforce them. When this lack of enforcement for conscience protections is combined with an overly broad interpretation of EMTALA, *see, e.g.*, U.S. Dep't of Health & Human Servs., *Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss* at 1 (July 11, 2022), the message to healthcare providers who conscientiously object to performing abortions is clear.

The government's concession at the Supreme Court does not change these practical realities. As Judge Ho explained, "There's a simple reason why our court—unlike the Supreme Court—was uncomfortable trusting federal conscience laws to protect doctors: The Government has taken

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the *Dobbs* decision. *See generally* Dep't of Health & Human Servs., Conscience Protections, https://perma.cc/ET2B-RY2Z (listing past actions on conscience protections).

precisely the opposite position on federal conscience laws in other cases and in other courts—including ours." *See All. for Hippocratic Med. v. FDA*, No. 23-10362, *slip op.* at 4-5 (5th Cir. Sept. 16, 2024) (Ho, J., concurring) HHS's regulatory and enforcement actions repeatedly demonstrate it believes that EMTALA and conscience protections are in tension and, if push comes to shove, it will enforce EMTALA to override healthcare providers' conscientious objections to participating in abortion.

III. The United States' concessions undercut its argument that EMTALA requires specific procedures, such as abortion.

The United States argues that EMTALA requires specific procedures, such as abortion. But this claim is undercut by its concessions.

First, regarding the government's concession that EMTALA never requires an abortion for mental health emergencies, EMTALA cannot simultaneously (1) never require abortion to treat to mental health emergencies, and (2) require whatever specific procedures the government deems necessary under a standard of care in a particular case. The concession cannot be true unless EMTALA does *not* require hospitals and other emergency healthcare providers to follow specific treatment

protocols deemed necessary by the federal government. Second, regarding the government's concession that EMTALA is subject to federal healthcare conscience protections, EMTALA likewise cannot be simultaneously (1) conceded away not to implicate or override conscience objections and (2) require specific procedures by both hospitals and "any physician" as the government contents. Ultimately, the only way to reconcile the government's concession is if EMTALA operates at a high level to prevent patient dumping but does not prescribe particular procedures as Appellants assert.

These irreconcilable litigation positions further demonstrate that the governments' concessions ring hollow and were made in an effort to avoid an adverse ruling at the Supreme Court.

CONCLUSION

For the foregoing reasons, the Court should reverse and vacate the injunction.

September 20, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Circuit Rules 29-2(c)(3) and 32-1, I certify that according to the word count feature of the word processing program used to prepare this brief, this brief contains 4,283 words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure Rule 32(f) and Circuit Rule 32-1, and complies with the typeface requirements and length limits of Federal Rule of Appellate Procedure Rule 32(a) and Circuit Rule 29-2(c)(3).

Dated: September 20, 2024 */s/ Lea E. Patterson*

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing brief on September 20, 2024, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Dated: September 20, 2024. */s/ Lea E. Patterson*