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The Effort to Reinterpret EMTALA to Mandate Abortions

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In an Executive Order of July 8, 2022, President Biden said his Administration would expand its effort to promote abortion as this "is essential to justice, equality, and our health, safety, and progress as a Nation."[1]

Among other things, he called on the U.S. Department of Health and Human Services (HHS) to consider "updates" to past guidance requiring "emergency medical care" through the federal Emergency Medical Treatment and Active Labor Act ("EMTALA").[2,3] The Department accordingly issued new Guidance on July 11, insisting that hospitals receiving Medicare funds must allow their medical staff to provide abortions under "emergency medical conditions" even if those abortions violate state law. Hospitals not complying with this policy could lose their Medicare funds.[4]

The state of Texas filed suit against this Guidance, saying that its directives are not warranted by the EMTALA statute and could override the state's law against abortion. The Administration filed a Brief responding to Texas's claim.[5] At this writing a federal district court has granted a preliminary injunction against implementing the HHS Guidance in Texas.[6] The Administration has also filed its own suit against an Idaho law prohibiting most abortions.[7]

To understand this dispute, one must set aside some news outlets' misleading reports. Reuters, for example, has said: "EMTALA requires hospitals that accept Medicare funds to

[1] Executive Order 14076 of July 8, 2022: Protecting Access to Reproductive Healthcare Services. Available at https://www.federalregister.gov/documents/2022/07/13/2022-15138/protecting-access-to-reproductive-healthcare-services.

[2] 42 U.S.C. §1395dd. Available at https://www.govinfo.gov/content/pkg/USCODE-2010-title42/html/USCODE-2010-title42-chap7-subchapXVIII-partE-sec1395dd.htm.

[3] Vagianos, Alanna. "Biden Administration Clarifies Protections For Doctors Making Emergency Abortion Decisions." HuffPost. July 11, 2022. Available at https://www.huffpost.com/entry/biden-administration-protections-doctors-abortion_n_62cc76fde4b0451684663615.

[4] "Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss (UPDATED JULY 2022)." Centers for Medicare & Medicaid Services. Memo Ref. # QSO-22-22-Hospitals. July 11, 2022. Available at https://www.cms.gov/medicareprovider-enrollment-and-certificationsurveycertificationgeninfopolicy-and-memos-states-and/reinforcement-emtala-obligations-specific-patients-who-are-pregnant-or-are-experiencing-pregnancy-0.

[5] Defendants' Brief In Support Of Their Motion To Dismiss And In Opposition To Plaintiffs' Motion For Temporary Restraining Order And Preliminary Injunction, *State Of Texas v. Becerra*, No. 5:22-Cv-00185 (N.D. Tex. Aug. 15, 2022). Available at https://www.justice.gov/file/1526751/download. [Henceforth "Brief"].

[6] Howard, Rosanna. Jackson, Beth Anne. "Texas legal challenge to injunction guidance results in injunction win." Medical Journal- Houston. September 21, 2022. Available at https://mjhnews.com/texas-legal-challenge-to-emtala-guidance-results-in-injunction-win/.

[7] Boone, Rebecca. "Idaho can't enforce abortion ban in medical emergencies." *AP*. August 24, 2022. Available at https://apnews.com/article/abortion-health-texas-xavier-becerra-4ccc7296f015270b0dc66c64e975689c.

provide medical treatment to people that arrive with an emergency medical condition. That includes providing a woman an abortion if her life is in danger."[8]

This is wrong for two reasons. First, EMTALA says nothing about requiring an abortion. Second, that law's definition of an "emergency medical condition" is far broader than danger to the woman's life, so the Administration's abortion mandate is far more sweeping than Reuters claims. Concern about women's lives is not the reason for the Administration's attack on Idaho's law, which already exempts physicians from liability for performing an abortion in life-endangering situations. For the facts, we must look to the law itself.

What EMTALA Says

EMTALA was enacted in 1986. It responded to disturbing reports of some hospital emergency rooms refusing to treat patients in need, sometimes because of their inability to pay. Some of these patients were pregnant women, and some were refused care when they were beginning to go into labor. Congress therefore required that in such cases emergency room personnel should at least provide any needed stabilizing treatment to prevent the emergency medical condition from getting worse.

Here is EMTALA's definition of an emergency medical condition:

> *(1) The term "emergency medical condition" means --*
>
> *(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—*
>
> *(i) placing the health of the individual (**or, with respect to a pregnant woman, the health of the woman or her unborn child**) in serious jeopardy,*
>
> *(ii) serious impairment to bodily functions, or*
>
> *(iii) serious dysfunction of any bodily organ or part; or*
>
> *(B) with respect to a pregnant woman who is having contractions—*
>
> *(i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or*

[8] Nandita, Rose. "Exclusive: New Biden abortion rights push addresses both men and women." *Reuters*. August 16, 2022. Available at https://www.reuters.com/world/us/exclusive-white-house-pushes-three-part-plan-abortion-rights-2022-08-16/.

> *(ii)* *that transfer may* ***pose a threat to the health or safety of the woman or the unborn child****.*[9]

Note that this definition is fairly broad, covering situations in which a pregnant woman *or* her "unborn child" may have a serious risk to "health." It also has two subparagraphs. The first covers the unborn child at any stage, and the second addresses the specific situation of a woman in labor. What they have in common is that both show equal concern for the health of woman and child.

EMTALA requires that in such situations the hospital seek to "stabilize" the condition of the patient having this problem (whether mother or unborn child), even if it will then effect a transfer to another facility for follow-up treatment. "To stabilize" an emergency medical condition means

> *to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), to deliver (including the placenta).*[10]

Twice more, this Act refers to "the unborn child" as a patient to be protected:

First, one reason why a hospital may transfer the patient(s) to another facility, despite a failure to "stabilize" all emergency medical conditions, is that medical personnel judge that

the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual and, in the case of labor, to ***the unborn child*** *from effecting the transfer.*[11]

Second, an "appropriate transfer" to another facility is defined in part as one

in which the transferring hospital provides the medical treatment within its capacity which minimizes the risks to the individual's health and, in the case of a woman in labor, ***the health of the unborn child****.*[12]

[9] 42 U.S.C. §1395dd (e)(1) (emphasis added).
[10] Id. at (e)(3).
[11] Id. at (c)(1)(A)(ii) (emphasis added).
[12] Id. at (c)(2)(A) (emphasis added).

These references are specifically concerned with the risk to the child of *transferring* a pregnant woman already in labor, a situation mentioned in the second part of EMTALA's definition of an "emergency medical condition." But concern for the unborn child's life and health in other situations, throughout the course of pregnancy, is required under the first part of the definition of "to stabilize."

Therefore, it is clear what a hospital emergency room must do in different scenarios.

If a pregnant woman arrives at the emergency room, and an initial screening indicates that she *and* her unborn child have emergency medical conditions, medical personnel must seek to prevent further harm to both patients.

If it is the unborn child that has such a condition, their duty is to prevent further harm to that child. This would apply, for example, if the child had been injured by an attempted abortion performed elsewhere.

If it is only the woman herself who has an emergency medical condition, they must seek to prevent further deterioration of her condition. Clearly *excluded* here is doing deliberate injury to the unborn child, as that would itself *create* an "emergency medical condition" for the child, something the Act cannot be construed to require or encourage. The Act's purpose is to alleviate those conditions, not cause them.

The Administration dismisses this reading of the Act, saying it would mean that Congress intended for EMTALA "to prohibit hospitals from performing only those abortions necessary to prevent a threat to the pregnant patient's life or health" (Brief, pp. 28-9). On the contrary, EMTALA does not "prohibit" abortions. Abortion is simply not a procedure EMTALA *requires*, as its requirements are aimed at serving the life and health of *both* mother and unborn child.

Finally, EMTALA itself states: "The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement **directly conflicts with** a requirement of this section."[13] Obviously, a state law protecting the unborn child from lethal harm does not conflict with a federal law requiring care for that child's life and health.

[13] Id. at (f) (emphasis added).

The Administration's Misuse of EMTALA

The Administration argues that EMTALA must encompass abortion as a "stabilizing" treatment because, if Congress wanted to exclude abortion, "it knew how to say so" (Brief, p. 27).

But that claim is absurd. Abortion is not "stabilizing" even for the mother, as it radically changes her situation rather than maintaining the status quo. Even live *delivery* is not described as a "stabilizing" treatment, unless the woman is already in labor and delay may harm her *or her unborn child*. And destroying the child is emphatically not stabilizing for the child. Everything in EMTALA reflects an understanding that both mother and child are patients deserving care.

If anything, solely excluding abortion would have failed to address other or lesser harms to the unborn child that may arise from failure to address his or her emergency medical condition. Congress did indeed know how to say that the unborn child merits care and concern, and it did so. The Act was then signed into law by President Ronald Reagan, the only president ever to publish a book while in office – and his book held that the unborn child deserves the same care and protection as other human beings.[14]

The Biden administration nonetheless claims that HHS's new Guidance, requiring hospitals to include abortion among "stabilizing" treatments, "merely restates 'what [the] statute has always meant'" ever since President Reagan signed it (Brief, p. 33). But the only evidence the Administration cites for that claim is… itself. Its Brief cites the Administration's own "Guidance" of 2021, reminding hospitals of their responsibilities under EMTALA (Brief, pp. 7-8, 34), and its State Operations Manual of 2019 on the process for enforcement (p. 6). And *neither* of these documents even mentions "abortion" or "termination of pregnancy" (except that the 2021 Guidance was later amended in October 2022 to note that a federal district court in Texas has ruled *against* the Administration's novel interpretation of July 2022).[15]

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[14] Ronald Reagan, *Abortion and the Conscience of a Nation* (Thomas Nelson Publishers 1984). His essay first appeared as a 1983 article in the Human Life Review. Available at https://humanlifereview.com/abortion-and-the-conscience-of-the-nation-ronald-reagan-the-10th-anniversary-of-the-supreme-court-decision-in-roe-v-wade-is-a-good-time-for-us-to-pause-and-reflect-our-nationwide-policy-of-abortion-o/.

[15] The Administration's 2021 Guidance mentions "dilation and curettage (D&C)" once, as a possible "stabilizing" treatment. 2021 Guidance (Memo Ref. # QSO-21-22-Hospitals, with October 3, 2022 revisions by CMS in red) available at https://www.cms.gov/files/document/qso-21-22-hospital-revised.pdf. But this procedure has uses that do not kill an unborn child -- and that same sentence of the Guidance cites one of them, a need to address "complications of pregnancy loss." The 2021 document cites no other procedure that could be used for abortion. This passing mention of a procedure that may or may not have anything to do with abortion, in a five-page document devoted entirely to "EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss," needed "updating" in July 2022 to claim that EMTALA has "always" required abortions. See

The Administration also presents no evidence that any hospital has been penalized for violating EMTALA because it failed to perform an abortion, before or after any previous Guidance. That is no surprise, as even this Administration seems not to have explicitly alleged such a requirement until July 2022.

In effect, the Administration's position seems to be that the recent demise of abortion as a constitutional "right" has somehow created a new federal *obligation* to treat abortion as standard health care that did not even exist under *Roe*.

Its Brief even admits that the July 2022 Guidance has no force of law in itself. If it did have such force, the Administration would be subject to a legal challenge for not obeying the requirements of the Administrative Procedure Act regarding the preparation, allowance for public comments, etc. for substantive regulations.[16] So the Administration insists that the mandate for abortion arises *only* from the text of EMTALA itself – and as noted above, that claim is false.[17]

Violating Other Federal Laws

As the state of Texas points out in its complaint, the Administration's policy not only misrepresents EMTALA itself – it also *violates* other longstanding federal laws protecting physicians, hospitals, and other health care entities from being discriminated against because they do not provide, refer for, or pay for abortions. On this point, as well, the Administration's attempt at rebuttal is misguided.[18]

The first of these laws, enacted in the wake of the Supreme Court's *Roe v. Wade* decision, was the Church amendment – named for its sponsor, Senator Frank Church (D-ID). The Administration cites one subsection of this law: An entity receiving federal funds under various laws, including the Public Health Service Act, may not discriminate against a health care professional in employment, staff privileges, etc., "because he performed or assisted in the performance of a lawful sterilization procedure or abortion" (or refused to do so) based

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footnote 4 for July 2022 Guidance update. See also State Operations Manual available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/som107ap_v_emerg.pdf.

[16] 5 U.S.C. §§ 551–559.

[17] The Administration insists that its policy is *not* an "abortion mandate." Rather, "EMTALA's requirements… apply equally to *all* types of stabilizing care… that is, no reasonably necessary treatments are excluded, including pregnancy termination" (Brief, p. 12). But this means that in various circumstances, going far beyond risk to the mother's life, this is an abortion requirement or mandate – a mandate that overrides state laws against abortion.

[18] For a compilation of these laws, see USCCB Secretariat for Pro-Life Activities, "Current Federal Laws Protecting Conscience Rights" (August 2022). Available at https://www.usccb.org/resources/federal-conscience-laws-fact-sheet.pdf.

on that person's moral or religious views.[19] The Administration suggests that because EMTALA renders certain abortions "lawful" regardless of state law, hospitals must allow abortions on their premises whenever a member of the medical staff says it will address the mother's "emergency medical condition" (Brief, p. 7).

But this misreads the Church amendment. That law also says that receipt of those federal funds does *not* authorize any court or public official to require a health care entity such as a hospital to "make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions."[20] The law's ban on discriminating against a health professional who has performed abortions refers to participation in the past, in other places, or under the aegis of other employment.

The Brief makes a more sweeping claim: This and all *other* federal laws protecting conscience rights on abortion, or forbidding governmental discrimination against health care entities that do not provide abortions, contain an unstated *exception* for "emergency" abortions (pp. 26-7).

Here the Administration's own argument comes back to haunt it. If Congress had wanted to carve out such an exception, "it knew how to say so." Longstanding laws against federal abortion funding such as the Hyde amendment show that Congress knows exactly how to write such exceptions when it wishes to do so.

In that context, the Church amendment is not at all unclear when it protects a hospital's objection to providing "any" abortion. Similarly, the major federal law against "discrimination on the basis of sex" in educational institutions states: "Nothing in this chapter shall be construed to require or prohibit **any** person, or public or private entity, to provide or pay for **any** benefit or service, including the use of facilities, related to an abortion."[21]

In case there were any remaining doubt on this point, the Medicare program itself – of which EMTALA is a part – has its own protections for health care entities wishing to participate in the Medicare+Choice and Medicare Advantage programs. These programs often provide savings for enrollees agreeing to access their health care through a local provider network; this raises the question whether HHS would exclude an entity from such networks because it does not provide abortions eligible for Medicare funding. The provision answering this question states:

[19] 42 U.S.C. §300a-7(c).
[20] 42 U.S.C. §300a-7(b).
[21] 20 U.S.C. §1688 (emphasis added). This provision was enacted as part of the Civil Rights Restoration Act in 1988, two years after enactment of EMTALA.

> *None of the funds appropriated by this Act (including funds appropriated to any trust fund) may be used to carry out the Medicare Advantage program if the Secretary denies participation in such program to an otherwise eligible entity (including a Provider Sponsored Organization) because the entity informs the Secretary that it will not provide, pay for, provide coverage of, or provide referrals for abortions…*[22]

Note that if HHS violates the conscience protection in this law, HHS is prohibited from funding the Medicare Advantage program at all. This provision was first enacted in 1998 as part of the Labor/HHS appropriations act, and remains in law today. In 1998 and at present, Medicare has funded abortion only when the mother's life is endangered or in cases of rape or incest. Protecting health care entities from forced involvement in *those* abortions is *the* reason for the provision. The health care entity remains responsible for informing an enrollee "where to obtain information about all Medicare covered services."

More broadly, a provision of the Balanced Budget Act of 1997 arises from that Act's ban on a health care entity's limiting the kind of advice one of its health professionals may provide to patients:

> *Subparagraph (A) [prohibiting interference with provider advice to enrollees] shall not be construed as requiring a Medicare+Choice plan to provide, reimburse for, or provide coverage of a counseling or referral service if the Medicare + Choice organization offering the plan… objects to the provision of such service on moral or religious grounds…*

The entity is required to inform enrollees of its policy regarding such counseling and referral services.[23]

Moreover, beginning with the Coats-Snowe amendment in 1996, federal conscience laws on abortion – increasingly seen by Congress as nondiscrimination laws – have not specified that a health care entity may only object to abortion on moral or religious grounds.[24] Rather, abortion itself is seen as the kind of procedure it would be unjust for governmental

[22] The current provision is Sec. 209 of Title II of Division H (Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act) of the Consolidated Appropriations Act, 2022, Pub. L. No. 117-103. This act is continued in effect until Dec. 16, 2022 by Secs. 101 (8) and 106 of Division A of the Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023.
[23] Sec. 4704(b)(3)(B) of the Balanced Budget Act of 1997 [Pub. L. No. 105-33], codified as 42 U.S.C. §1395w-22(j)(3)(B) (Conscience protection).
[24] 42 U.S.C. §238n. This provision was enacted in response to efforts by some medical accrediting organizations to require health care entities, including ob/gyn residency programs or their enrollees, to be involved in abortion or abortion training.

bodies to *require* individual or institutional health care providers to be involved in, under threat of denying them benefits granted to other providers.

The most comprehensive of these measures is the Weldon amendment, enacted as part of Labor/HHS appropriations acts every year since 2004. It is named for its sponsor, Dr. Dave Weldon (R-FL):

> *(1) None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.*
>
> *(2) In this subsection, the term "health care entity" includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.*[25]

Thus, if HHS attempts to discriminate against any of these health care entities because they do not provide or refer for an abortion -- for example, by denying them Medicare funds -- it is HHS that can lose its federal funds. This law's protection is not limited to health care entities citing a moral or religious objection.

The Brief tries to claim that laws like the Weldon amendment have been interpreted in the past to be overridden by EMTALA. This claim misrepresents a statement by the Obama administration.

In 2011, that Administration proposed a regulation for enforcement of Weldon and other federal conscience laws. It rescinded much of the Bush administration's lengthier and more detailed regulation. But it also reaffirmed its commitment to full enforcement of the conscience laws, and provided that complaints about violations should be submitted to the HHS Office for Civil Rights.

In public comments on the draft regulation, abortion advocates argued that the conscience laws sometimes conflict with EMTALA, and the regulation should state that these laws are nullified when that occurs. The Biden administration says that HHS accepted this argument in 2011 and acknowledged that "EMTALA may require abortion care in appropriate

[25] The current provision is Sec. 507(d) of Title V of Division H (Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act) of the Consolidated Appropriations Act, 2022, Pub. L. No. 117-103. See footnote 22 above.

circumstances" (Brief, p. 34). But the opposite is true. In fact, the Obama administration responded:

> *The conscience laws and the other federal statutes have operated side by side often for many decades. As repeals by implication are disfavored and laws are meant to be read in harmony, the Department fully intends to continue to* ***enforce all the laws it has been charged with administering*** *…. [E]ntities must continue to comply with their… EMTALA… obligations,* ***as well as the federal health care provider conscience protection statutes****.*[26]

In short, EMTALA and these exceptionless conscience laws had never been in conflict but are "in harmony" with each other. EMTALA requires emergency treatment (for mother and unborn child) in certain circumstances, and under the conscience laws the government cannot insist that the treatment must be an abortion.

The Administration also cites three federal district court opinions that it claims show that the federal conscience laws do not "override" EMTALA. But that claim ignores the position defended here and affirmed by the Obama administration, that there is no "overriding" because there is no conflict.

For example, the Brief quotes a federal district judge in New York as saying that "the sponsors of each of the Church, Coats-Snowe, and Weldon Amendments did *not* intend for these to require providers, in an emergency, to be obliged to accommodate an objecting employee" (Brief, p. 27). But that decision was about an aspect of the Bush administration's now-rescinded conscience *regulation*, and a claim that the underlying *statutes* conflict with EMTALA was rebuffed even by the Obama administration. Actually, the Church amendment *does* require such accommodation for an employee refusing to perform an abortion, as noted above. The other two laws cited by the court ban *governmental* discrimination against health care providers (both hospitals *and* employees) that decline involvement in abortion, so are not pertinent to the court's claim about providers accommodating their employees.

In fact, the Brief elsewhere argues that under EMTALA medical *employees* must be free to decide that an abortion is the best "stabilizing treatment" for the woman, and the *hospital* must then allow the abortion. This is virtually the opposite of the situation cited by the New York judge, about a hospital being required to accommodate an employee's *objection* to abortion (pp. 28, 30, 31). By nonetheless citing this New York judge, the Brief seems to argue that hospitals *are* required to accommodate the abortion decisions of their staff

[26] Department of Health and Human Services, "Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws," 76 *Fed. Reg.* 9968-77 (Feb. 23, 2011), at 9973, 9974 (emphasis added).

physicians, but *only* if the physician's decision is *for* abortion. No federal law supports such a claim.[27]

One organization that most likely had urged the Obama administration to carve out an exception to the conscience laws was the American Civil Liberties Union. The ACLU has urged the federal government to invoke EMTALA to require performance of abortions, even at Catholic hospitals, for many years -- and until July 2022, has never succeeded.[28]

Interestingly, the ACLU itself has long recognized that laws like the Weldon amendment have *no* stated or implicit exception permitting a federal abortion mandate in some circumstances. For example, the organization urged Congress not to retain the Weldon amendment in the Labor/HHS appropriations bill for Fiscal Year 2006, writing:

> *The federal refusal clause, also known as the Weldon Amendment, would allow virtually any health care entity to refuse to provide, cover, pay for, or even refer patients for abortions* ***even when such actions are otherwise legally mandated****. Laws requiring the provision of abortion services tend to apply only in extreme circumstances, such as when a pregnancy is the result of rape or incest or when a woman's life or health is threatened by a pregnancy. The Weldon Amendment would allow health insurance companies, health plans, hospitals, providers, and others to ignore these laws with impunity.*[29]

Congress responded by *retaining* the Weldon amendment without change, and it has done so every year to the present day – just as it has retained the Medicare Advantage provision protecting a right to object to exactly the abortions cited by the ACLU.

When the Biden Administration was besieged by abortion advocates in July for not doing enough to respond to the Supreme Court's *Dobbs* decision, groups like the ACLU most likely insisted that the Administration try to enforce their own idiosyncratic interpretation of

[27] This New York decision ignored EMTALA's repeated references to protecting the unborn child and was rendered moot by the Biden administration's rescission of the regulation. The Brief nonetheless claims that "other courts have held similarly." But the only case it quotes is one in which a federal judge in Michigan required the state to fund Medicaid abortions in cases of rape and incest because the federal Hyde amendment had been amended to fund them in this matching-grant program. That case has no relevance here.

[28] ACLU's Second Letter to Centers for Medicare and Medicaid Services Regarding Denial of Reproductive Health Care at Religious Hospitals. December 22, 2010. Available at https://www.aclu.org/letter/aclus-second-letter-centers-medicare-and-medicaid-services-regarding-denial-reproductive.

[29] ACLU Letter To The House Of Representatives Urging Opposition To Extending The Federal Refusal Clause And Appropriation Of Money For Abstinence-Only-Until Marriage Programs (emphasis added). Available at https://www.aclu.org/letter/aclu-letter-house-representatives-urging-opposition-extending-federal-refusal-clause-and.

EMTALA – a demand rejected by Congress and even past Democratic administrations.[30] But even the ACLU has declared that a central claim in the Administration's Brief, that federal conscience laws like Weldon have an unstated "EMTALA exception," is false.

The Administration also gratuitously cites a provision of the Affordable Care Act (ACA) stating that "[n]othing in this Act shall be construed to relieve any health care provider from providing emergency services as required by State or Federal law, including section 1867 of the Social Security Act (popularly known as 'EMTALA.')" (Brief, p. 26, citing 42 §18023(d)). But no one has claimed that it is the ACA that the Administration's policy violates. In any case, that same section of the ACA states: "Nothing in this Act shall be construed to have any effect on Federal laws regarding— (i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion."[31] So laws like the Church, Coats/Snowe, and Weldon amendments, the Medicare conscience provision, and EMTALA itself all remain untouched by the ACA.

Finally, the Administration even attempts to cite Dr. Weldon in support of its claim (Brief, p. 34).

In 2005, responding to a complaint by the California attorney general that his amendment conflicted with laws on "emergency" abortions, Dr. Weldon acknowledged that EMTALA requires stabilizing treatment for a pregnant woman with an emergency medical condition. But he also said that California's complaint

> *fails to point to even one example of a single case supporting the assertion that the Hyde-Weldon amendment would somehow interfere with the State's desire to see abortion services offered as an emergency medical service. The complaint offers no specific case where an emergency situation required an abortion in which a health care provider refused on grounds of conscience. Why? Because it does not happen…. The question I have for the California Attorney General is: Prior to my amendment, was California compelling non-willing providers to perform emergency abortions? If no, then the Attorney General has nothing to fear from my amendment because that is all it addresses.*[32]

[30] Trudo, Hanna. Manchester, Julia. "Biden moves on abortion haven't quieted progressive anger." *The Hill*. July 3, 2022. Available at https://thehill.com/homenews/administration/3544260-biden-moves-on-abortion-havent-quieted-progressive-anger/.
[31] 42 U.S.C. §18023 (c)(2)(A).
[32] 151 *Cong. Rec.* H177 (Jan. 25, 2005) (statement of Rep. Weldon). Also see footnote 33 below.

Dr. Weldon was emphasizing that his amendment does not forbid any abortion a State wishes to allow, but only prevents governments from "compelling non-willing providers" to be involved. Such compulsion is exactly what the new Biden policy attempts.

His further point was that there is no conflict between conscience protection and protection of women's lives, that such conflict "does not happen." The same point has been made by many medical experts. For example, in 2011 and 2016, when Congress considered proposals for incorporating the Weldon amendment into the Affordable Care Act or enacting its policy as permanent law, four medical experts with many decades' experience in high-risk obstetrics and emergency medicine wrote to affirm that there is no need for an exception in conscience laws on abortion in order to serve women's life and health.[33]

Conclusion

In its Brief, the Biden administration claims that its misuse of EMTALA to force hospitals to provide abortions "is entirely consistent with—and, in fact, flows directly from—EMTALA's text, and does not conflict with other law" (p. 3). These claims are false. The Administration policy is unsupported by the language and history of EMTALA itself, and explicitly forbidden by other equally authoritative federal laws. The claim that EMTALA conflicts with, and overrides, federal nondiscrimination laws on abortion was even rejected by the previous Democratic administration.

If the Department of Health and Human Services threatens a hospital with denial of federal funds for not providing abortions, it is the Department itself that risks losing its federal funds. The current Administration is playing a dangerous game by taking its obsession with abortion as "health care" to this extreme.

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[33] 157 *Cong. Rec.* H6877-8 (Oct. 13, 2011) (statement of Rep. Harris); 162 Cong. Rec. H4848-9 (July 13, 2016) (statement of Rep. Fleming). Rep. Fleming also incorporated into the record a written declaration by Dr. Weldon, then retired from Congress. He strongly objected to efforts to misinterpret the broad scope of his amendment, saying that "my amendment stops ALL discrimination against entities that do not provide, pay for, provide coverage of, or refer for abortion." Id. at H4848 (emphasis in original). Also see the sources cited in USCCB Secretariat for Pro-Life Activities, "Conscience Protection on Abortion: No Threat to Life" (Feb. 14, 2018). Available at https://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/Federal-Conscience-Protection-on-Abortion-No-Threat-to-Life-CTformats.pdf.