No. 23-1076

In the Supreme Court of the United States

XAVIER BECERRA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

MATTHEW S. BOWMAN
JOHN J. BURSCH
JAMES A. CAMPBELL
Alliance Defending Freedom
440 First Street NW, Ste. 600
Washington, D.C. 20001

Counsel for American Association of Pro-Life Obstetricians & Gynecologists and Christian Medical and Dental Associations

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

AARON L. NIELSON
Solicitor General

LANORA C. PETTIT
Principal Deputy Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Lanora.Pettit@oag.texas.gov
(512) 936-1700

Counsel for Texas

QUESTION PRESENTED

This is not *Moyle 2.0*. The United States has *not* sued Texas claiming that the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd, preempts Texas law for failing to include a health-of-the-mother exception to Texas's general ban on abortion—perhaps because Texas law has such an exception. Rather, Texas and two private organizations have sued the Department of Health and Human Services (HHS) claiming that *it* violated the Medicare and Administrative Procedure Acts when, without so much as notice and an opportunity to comment, it issued a memorandum declaring, for the first time, that EMTALA requires a specific medical procedure (abortion) under circumstances that neither federal nor state law contemplate. In a single-paragraph argument, the federal government asks this Court to adjudicate a question that was never presented below, on a theory that has never been litigated, regarding a claim that has never been pled. The question presented by this case is instead:

Whether HHS's memorandum violates: (a) the Medicare Act by adopting a "policy statement" without providing appropriate notice and comment, 42 U.S.C. § 1395hh(a)(2), or (b) the APA by imposing new legal obligations without statutory authorization.

CORPORATE DISCLOSURE STATEMENT

Respondents American Association of Pro-Life Obstetricians & Gynecologists and Christian Medical & Dental Associations have no parent corporations, and no publicly held corporation owns 10% or more of the stock of any of them.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

INTRODUCTION

This is not the case the federal government says it is. Equating this litigation (at 6) with "*Moyle v. United States*, cert. granted, No. 23-726, and *Idaho v. United States*, cert. granted, No. 23-727 (oral argument [then] scheduled for Apr. 24, 2024)," the petition misunderstands Respondents' complaint and the legal basis upon which the Fifth Circuit ruled. That is, in a mere 116-word argument section, the United States has erased two years of litigation history and transformed this case from one about whether the executive branch complied with administrative-law requirements to one about whether the State of Texas has complied with constitutional demands. Though Respondents agree with the United States that the vital issues raised in *Moyle* should be resolved as expeditiously as possible, this is not the case in which to do so for two primary reasons.

First, unlike *Moyle*, the federal government never sued Texas on the theory that EMTALA preempts state law—perhaps because Texas law expressly allows termination of a pregnancy where necessary to prevent the "substantial impairment of a major bodily function." *State v. Zurawski*, 690 S.W.3d 644, 664 (Tex. 2024) (quoting Tex. Health & Safety Code § 170A.002(b)(2)). Instead, Respondents sued *HHS* on the theory that its 2022 guidance regarding abortions (the "Memorandum") went further than either EMTALA or state law allow, violating the Medicare Act and the APA in the process. Applying settled law, the Fifth Circuit agreed and held that the Memorandum was a "statement[] of policy that establish[es] or change[s] a legal standard" and is thus "subject to notice and comment under the Medicare Act," or is substantively unlawful. Pet.App.27a (citing *Azar v. Allina Health Servs.*, 587 U.S. 566, 568 (2019)).

Because the federal government skipped notice and comment in its rush to limit the effect of *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), the Memorandum cannot stand. By filing a bare-bones petition that addresses a *different* topic, the federal government has waived any objection to this analysis, tacitly conceding that the Fifth Circuit's actual ruling is uncertworthy. For good reason: The decision conflicts with neither precedent from this Court nor an on-point case from another court of appeals. *See* Sup. Ct. R. 10, 14.1(h).

Second, due to the government's litigation choices (*i.e.*, failing to challenge the lower courts' Medicare Act and APA rulings), this Court must treat the Memorandum as creating a new rule of federal law without authorization from Congress. Accordingly, this case is an improper vehicle to assess whether EMTALA "preempts state law" where abortion is supposedly "required to stabilize an emergency medical condition that would otherwise threaten serious harm to the pregnant woman's health." *Contra* Pet. (I).

That is, though this Court should have deep concerns about HHS's apparent view that, in the name of preemption, it can authorize itself to pay private parties to violate state law, the question is ultimately irrelevant to the outcome of this case. Because the United States has waived any challenge to the Fifth Circuit's holding that the Memorandum never *became* federal law, by definition, the Memorandum did not preempt state law.

The Court should deny the petition.

STATEMENT

I. Statutory Background

A. EMTALA

Congress enacted EMTALA "in response to a growing concern that hospitals were dumping patients who could not pay by either turning them away from their emergency rooms or transferring them before their emergency conditions were stabilized." *Miller v. Med. Ctr. of Sw. La.*, 22 F.3d 626, 628 (5th Cir. 1994); *accord Moyle v. United States*, 144 S Ct. 2015, 2030-31 (2024) (Alito, J., dissenting). Congress thus used EMTALA to "fill a lacuna in traditional state tort law by imposing on hospitals a legal duty (that the common law did not recognize) to provide emergency care to all." *Hardy v. N.Y. City Health & Hosp. Corp.*, 164 F.3d 789, 792-93 (2d Cir. 1999).

1. EMTALA requires hospitals with emergency departments to "provide" "any individual" who asks for examination or treatment with "an appropriate medical screening examination within the capability of the hospital's emergency department . . . to determine whether" the individual has an "emergency medical condition." 42 U.S.C. § 1395dd(a). The statute defines "emergency medical condition" as "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[.]

Id. § 1395dd(e)(1)(A). In the case of a pregnant woman having contractions, an "emergency medical condition" also includes situations in which a transfer of the pregnant woman "may pose a threat to the health or safety of the woman or the unborn child." *Id.* § 1395dd(e)(1)(B)(ii).

If a hospital determines that a patient has an emergency medical condition, the hospital must provide either for "such further medical examination and such treatment as may be required to stabilize the medical condition" or "for transfer of the individual to another medical facility." *Id.* § 1395dd(b)(1); *see id.* § 1395dd(c)(1); 42 C.F.R. § 489.24(d)(2)(i). To "stabilize" 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." 42 U.S.C. § 1395dd(e)(3)(A); *see id.* § 1395dd(e)(3)(B) (defining "stabilized" similarly). Transfers cannot occur without a physician certifying expected benefits of the transfer to "the individual and, in the case of labor, to the unborn child." *Id.* § 1395dd(c)(1)(A)(ii). And no transfer is considered "appropriate" unless it "minimizes the risks to the individual's health and, in the case of a woman in labor, the health of the unborn child." *Id.* § 1395dd(c)(2)(A).

2. EMTALA does *not* impose "a national standard of care" and is not meant to "improve the overall standard of medical care." *Eberhardt v. City of Los Angeles*, 62 F.3d 1253, 1258 (9th Cir. 1995); *accord Brooks v. Md. Gen. Hosp., Inc.*, 996 F.2d 708, 710 (4th Cir. 1993). Nor did Congress "intend[] [EMTALA] to be used as a federal malpractice statute." *Marshall ex rel. Marshall v.*

E. Carroll Parish Hosp. Serv. Dist., 134 F.3d 319, 322 (5th Cir. 1998). Instead, the law conditions the receipt of federal funding on compliance with the statute and threatens statutory penalties if a hospital does not abide by it. 42 U.S.C. § 1395dd(d).

Thus, "a treating physician's failure to . . . order" a particular "procedure[] may constitute negligence or malpractice," but it "cannot support an EMTALA claim." *Marshall*, 134 F.3d at 323. Instead, for decades, it has been understood that EMTALA's "essence" is to require that when a hospital offers a treatment or procedure, it must "be administered even-handedly." *Correa v. Hosp. S.F.*, 69 F.3d 1184, 1192 (1st Cir. 1995), *cert denied*, 517 U.S. 1136 (1996); *see also, e.g.*, *Marshall*, 134 F.3d at 323-24 (explaining that a hospital violates EMTALA if it "treat[s] [one patient] differently from other patients"); *Williams v. Birkeness*, 34 F.3d 695, 697 (8th Cir. 1994) (explaining that EMTALA plaintiffs must show that the hospital treated the plaintiff "differently from other patients"). By contrast, state law regarding a provider's scope of medical practice governs what procedures the hospital may offer. *E.g.*, CCH, Medicare and Medicaid Guide, Letter No. 2039 at 3 (July 16, 2019), 2019 WL 3324286; *accord* 42 C.F.R. § 410.20(b).

B. Texas law

Texas law defines the appropriate scope of practice for Texas-licensed physicians in various ways to protect human life both before and after birth. As relevant here, the Human Life Protection Act (HLPA) generally forbids any "person" from "knowingly perform[ing], induc[ing], or attempt[ing] an abortion." Tex. Health & Safety Code § 170A.002(a). A person who does so commits a felony, *id.* § 170A.004, with a penalty of two years to life in prison, Tex. Penal Code §§ 12.32-12.33, and may be subject to "a civil penalty of not less than $100,000 for each violation," Tex. Health & Safety Code § 170A.005.

The HLPA, however, has exceptions. It prohibits, for example, "the imposition of criminal, civil, or administrative liability or penalties on a pregnant female on whom an abortion is performed, induced, or attempted." *Id.* § 170A.003. More pertinent here, its abortion prohibition "does not apply" when, among other things, the mother "has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places [her] at risk of death *or* poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced." *Id.* § 170A.002(b)(2) (emphasis added). Moreover, under Texas law, "[a]n act is not an abortion if the act is done with the intent to: (A) save the life or preserve the health of an unborn child; (B) remove a dead, unborn child whose death was caused by spontaneous abortion; or (C) remove an ectopic pregnancy." *Id.* § 245.002(1); *see id.* § 170A.001(1) ("In this chapter . . . '[a]bortion' has the meaning assigned by Section 245.002."). *Contra* Administrative Complaint at 4-6, *Thurman v. Ascension Seton Williamson Hospital*, (U.S. Dep't Health & Hum. Servs. Aug. 6, 2024), https://perma.cc/2RRJ-U7HZ (implying that Texas law is still somehow responsible for physicians' failure to treat ectopic pregnancies).

In addition to the HLPA, Texas has criminal laws penalizing abortion that predate *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs*, 597 U.S. 215. *See* Tex. Rev. Civ. Stat. arts. 4512.1-4512.4, 4512.6. Texas law also protects the conscience rights of physicians to object to performing or participating in abortions. Tex. Occ. Code § 103.001; *see also Zurawski*, 690 S.W.3d at 654 (listing various provisions of Texas law related to abortion); *id.*

at 662-66 (explaining the meaning of a subset of those laws).

II. The Memorandum

A. The day this Court issued its decision in *Dobbs*, President Biden announced his intent to undermine the Court's decision and the right of States like Texas to protect unborn life.[1] *See Moyle*, 144 S. Ct. at 2027 (Alito, J., dissenting). Barely two weeks later, the Centers for Medicare and Medicaid Services (CMS) at HHS issued the Memorandum, titled "Reinforcement of EMTALA Obligations Specific to Patients Who are Pregnant or are Experiencing Pregnancy Loss," to all state survey agency directors. Pet.App.123a-135a. The Secretary also issued a letter to medical providers describing the Memorandum, Pet.App.136a-139a (the "Letter"), and assuring those providers that EMTALA "protects [their] clinical judgment . . . regardless of the restrictions in the state where [they] practice," Pet.App.136a.

B. The Memorandum insists that if "a pregnant patient presenting at an emergency department is experiencing an emergency medical condition as defined by EMTALA, and . . . abortion is the stabilizing treatment necessary to resolve that condition, the physician must provide that treatment." Pet.App.125a (emphasis omitted). Although the United States narrowed its position significantly before this Court,[2] the Memorandum

[1] *See Remarks by President Biden on the Supreme Court Decision to Overturn Roe v. Wade*, The White House (June 24, 2022), https://perma.cc/7HAK-7U8M.

[2] *E.g.*, Br. for Respondents 7, *Moyle v. United States*, 144 S. Ct. 2015 (U.S. Mar. 21, 2024) (No. 23-726) (listing four conditions when EMTALA putatively requires an abortion); *see generally id.* (using the term "narrow" eleven times to describe the United States'

specifically states that "[e]mergency medical conditions involving pregnant patients may include, *but are not limited to*, ectopic pregnancy, complications of pregnancy loss, or emergent hypertensive disorders, such as preeclampsia with severe features." Pet.App.124a (emphasis added), 131a. The only express limit in the Memorandum is that "[t]he determination of an emergency medical condition is the responsibility of the examining physician." Pet.App.124a; *see also* Pet.App.128a. Notably, CMS has not modified the Memorandum to reflect its *post hoc* litigation statements in this Court. And the United States flatly rejected Idaho's request that the district court injunction in *Moyle* be amended to incorporate those concessions. As a result, *no* affected doctor or hospital has been directed to abide by the oral-argument concessions.

Consistent with the accompanying Letter, *e.g.*, Pet.App.137a, the Memorandum asserts that the "obligation[]" to provide an "abortion" applies regardless of any contrary state law. For example, it says that "[a] physician's professional and legal duty to provide stabilizing medical treatment to a patient who presents under EMTALA 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 or prevent such treatment." Pet.App.124a-125a (emphasis omitted). It also expressly states that "[a] hospital cannot cite State law or practice as a basis for transfer" and that physicians are not

position). It is admittedly unclear whether the United States intends to stand behind that concession in *this* case, but that is an issue that needs to be ironed out in the first instance in district court should the United States seek some form of relief from the existing judgment. *Cf. Moyle*, 144 S. Ct. at 2017 (Kagan, J., concurring).

"shielded from liability for erroneously complying with state laws that prohibit services such as abortion." Pet.App.130a.

C. From its issuance, HHS has treated the Memorandum as binding. Indeed, the Memorandum itself threatens both hospitals and physicians with nearly $120,000 civil monetary penalties "for refusing to provide" abortions. Pet.App.133a. It contains no discussion of how religious or moral exemptions, for doctors or hospitals, might apply to its abortion requirement, and it has not been amended to reflect the administration's oral-argument concessions about such protections.

The Memorandum also instructs "individual physicians" who seek to perform an abortion that they can "enforce[]" EMTALA's "preemption of state law . . . in a variety of ways, potentially including 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." Pet.App.132a-133a. And it purports to authorize private lawsuits. Pet.App.133a; *accord* Administrative Complaint, *supra* (seeming to take HHS up on its offer).

Perhaps the most notable example of how HHS treats the Memorandum as binding is *Moyle* itself, in which the federal government sued the State of Idaho on the theory that, as interpreted by the Memorandum, "EMTALA trumps laws like Idaho's, which allow abortions only to preserve the life of the pregnant woman." *Moyle*, 144 S. Ct. at 2027 (Alito, J., dissenting). Specifically, the government's complaint cited the Memorandum when it asserted that in "some pregnancy-related emergency medical conditions," EMTALA, as the Memorandum has construed it, permits "a physician [to] determine that the necessary stabilizing treatment" is "an 'abortion' under Idaho law." Complaint at ¶24, *United States v. Idaho*, No. 1:22-cv-00329 (D. Idaho Aug. 2, 2022); *accord Moyle*, 144 S. Ct. at 2019 (Barrett, J., concurring) (citing the Memorandum to describe the Government's argument); *Moyle*, 144 S. Ct. at 2027 (Alito, J., dissenting) (same). Under those circumstances, EMTALA—again, as interpreted by the Memorandum—"requires the hospital to provide" an abortion. Complaint, *supra*, at ¶24.

As this Court is well aware, that case took several procedural turns before finding its way to this Court. *Moyle*, 144 S. Ct. at 2017 (Kagan, J., concurring). While it was here, the federal government asked the Court to consider the same question presented that it offers in *this* case—which Respondents agree requires the Court's prompt resolution. *Compare* Pet. (I), *with* Br. for Respondent (I), *Moyle v. United States*, Nos. 23-726, 23-727 (U.S. Mar. 21, 2024). Due to the procedural complexities of *Moyle*, however, the Court ultimately dismissed the writ of certiorari before judgment as improvidently granted. *Moyle*, 144 S. Ct. at 2015. Although this case has proceeded down a very different procedural road, it leads to the same dead end.

III. Procedural Background

A. District court

Unlike *Moyle*, this case was not pursued by the federal government as an effort to enforce EMTALA (whether as interpreted by the Memorandum or otherwise). Instead, the State of Texas, the American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG), and the Christian Medical and Dental

Associations (CMDA) sued HHS, the Secretary, CMS, the Director of the Survey and Operations Group for CMS, and the Director of the Quality Safety and Oversight Group for CMS. ROA.180-210.

As relevant here, Respondents alleged that the Memorandum exceeds HHS's statutory authority and that the agency failed to conduct the notice and comment that the Medicare Act requires. 42 U.S.C. § 1395hh; ROA.201-04. Respondents requested a declaration that the Memorandum is "unlawful, unconstitutional, and unenforceable." ROA.209. They also asked the court to "[h]old unlawful and set aside" the Memorandum and enjoin HHS from enforcing it. ROA.209-10. Although related, these claims were pleaded as two separate counts, *see* ROA.201-04, which arise under two separate statutes, *see Azar*, 587 U.S. 569 (noting that the APA "does not apply to public benefit programs like Medicare"). *Compare* 5 U.S.C. § 553(b)(A), *with* 42 U.S.C. § 1395hh(a)(2).

When HHS filed its answer in this case, it conspicuously chose *not* to include any preemption-related counterclaims such as those it asserted in *Moyle*. *See* ROA.1030-55. Nor did HHS raise whether EMTALA preempted state law, either in HHS's motion to dismiss or its response to Respondents' request for a preliminary injunction. *See* ROA.445-501. To the contrary, as HHS acknowledged, to establish its standing, "Texas principally claim[ed] that the [Memorandum] harms its 'sovereign right to enforce its criminal laws.'" ROA.468. The dispute was thus limited to whether the Memorandum violated notice-and-comment requirements or exceeded the scope of EMTALA and, thus, whether it was EMTALA or the "challenged [Memorandum] that preempts any conflicting state law." ROA.468.

For their part, Respondents AAPLOG and CMDA argued that the Memorandum's threat of civil penalties gives their member doctors standing as regulated parties. ROA.195-200. HHS told the district court here—contrary to what it said to this Court in *Moyle*—that EMTALA *overrides* federal conscience laws when EMTALA mandates abortions. ROA.532-36. But AAPLOG and CMDA contended that this EMTALA abortion mandate is contrary to these federal conscience laws. ROA.276-78.

After extensive briefing, the district court granted a preliminary injunction. Pet.App.30a-106a. The court rejected HHS's jurisdictional argument that the Memorandum is not subject to judicial review because it is not final agency action. Pet.App.64a-73a. And it found that the Memorandum threatened AAPLOG and CMDA members with fines even where they have religious or moral objections, contrary to federal law. Pet.App.102a. The district court then concluded that Respondents were likely to succeed on their claims that the Memorandum exceeds HHS's statutory authority, and that HHS should have promulgated the Memorandum via notice and comment. Pet.App.73a-97a. The court prohibited HHS from enforcing the Memorandum's and Letter's "interpretation" that ETMALA requires abortions even when state law bars them. Pet.App.105a. It likewise forbade HHS from enforcing the Memorandum's interpretation about "when an abortion is required and EMTALA's effect on state laws governing abortion" either within Texas or against AAPLOG's or CMDA's members. Pet.App.105a-106a. Upon the parties' stipulation preserving HHS's right to appeal, the court converted the preliminary injunction into a final judgment on these claims. Pet.App.109a-111a.

B. The court of appeals

The Fifth Circuit affirmed the district court. Pet.App.2a, 29a. Unlike the petition, the court of appeals recognized that the Memorandum "is at the forefront of this appeal." Pet.App.7a. Indeed, the Fifth Circuit explained that Respondents challenged the Memorandum under the Medicare Act and the APA. Pet.App.8a.

After explaining why it agreed with the district court that the Memorandum constitutes final agency action, Pet.App.12a-18a, the court of appeals concluded that HHS failed to comply with the Medicare Act's requirement that agencies may promulgate policy statements like the Memorandum only following notice and comment. Pet.App.26a-28a.

In the alternative, the Fifth Circuit also identified the question on Respondents' contrary-to-law argument as "whether, pursuant to HHS's Guidance on EMTALA, a physician must provide an abortion when that care is the necessary stabilizing treatment for an emergency medical condition."[3] Pet.App.19a; *see also* Pet.App.26a ("The question before the court is whether EMTALA, *according to HHS's Guidance*, mandates physicians to provide abortions." (emphasis added)). And it answered that question in the negative: Because "EMTALA does not mandate any specific type of medical treatment, let alone abortion," Pet.App.21a-22a, the Fifth Circuit explained, the Memorandum "exceeds [EMTALA's] statutory language," Pet.App.19a. And it held that the district court's

---

[3] The Fifth Circuit labeled the "Guidance" what Respondents are calling the "Memorandum"; it did so consistent with prior circuit use of the term "Guidance" to describe similar documents. Pet.App.12a-13a. Respondents have chosen "Memorandum" because that is what CMS titled the document. Pet.App.123a. The terminological difference has no legal significance in this context.

injunction was "not overbroad" because it "enjoins HHS from enforcing the Guidance and Letter regarding" only "two issues"—and even then, only "within [t]he State of Texas and against the plaintiff organizations." Pet.App.29a.

Like the district court before it, the Fifth Circuit "considered EMTALA's preemptive effects," Pet.App.23a—even though neither party briefed the question whether EMTALA preempted Texas law—but the court did so largely to note the absence of any preemption issue because Texas's law "does not directly conflict with EMTALA." Pet.App.24a. There is no conflict because Texas law requires physicians to provide the "best opportunity for the unborn child to survive" but expressly allows abortion where the mother risks death or a "serious risk of substantial impairment of a major bodily function." Tex. Health & Safety Code § 170A.002(b)(2)-(3).

The government's petition for certiorari followed.

REASONS TO DENY CERTIORARI

This Court considers only "questions set out in the petition" or "subsidiary question[s] fairly included therein." Sup. Ct. R. 14.1(a). Yet HHS did not "set out" questions relevant to the Fifth Circuit's holding—or anything else related to the Memorandum, for that matter. *Id.*; *see* Pet. (I). Instead, the question presented addresses an argument never litigated in this case: Whether Texas law directly conflicts with EMTALA. *See* 42 U.S.C. § 1395dd(f). But that issue has nothing to do with the Memorandum that formed the basis of Respondents' complaint. As this case presents no exceptional reason to circumvent the Court's rules, the Court should deny the petition. *Izumi Seimitsu Kogyo*

Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 32 (1993).

I. The Government Waived Any Challenge to the Fifth Circuit's Actual (and Entirely Correct) Holding that the Memorandum Is Unlawful.

This case has always been about the promulgation process and substantive scope of the Memorandum, not EMTALA's potential preemptive effect. The Fifth Circuit "decline[d] to *expand* the scope of EMTALA" by "mandat[ing] physicians to provide abortions when that is the necessary stabilizing treatment for an emergency medical condition." Pet.App.26a (emphasis added). This conclusion is based on three subsidiary holdings: namely, that the Memorandum (1) constitutes final agency action subject to judicial review, that (2) failed to undergo notice and comment under the Medicare Act and (3) exceeds HHS's statutory authority under the APA. HHS's petition does not challenge *any* of these holdings, tacitly conceding that the court of appeals got it right—or at least that any hypothetical error does not meet this Court's standard for certiorari review. *See* Sup. Ct. R. 10.[4]

A. The Memorandum is final agency action subject to judicial review.

1. Although it was HHS's primary argument below, Br. for Appellants 18-25, *Texas v. Becerra*, 89 F.4th 529

[4] Respondents expressly reserve the right to address on the merits the preemption issue that HHS has raised in its petition or any additional arguments that HHS asserts on reply at the appropriate time. This is, however, not that time. *Cf. Zivotofsky ex rel. Zivotofsky v. Clinton,* 566 U.S. 189, 201 (2012) (reiterating that this "is 'a court of final review and not first view'") (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam)).

(5th Cir. May 1, 2023) (No. 23-10246), the petition does not challenge the Fifth Circuit's conclusion that the Memorandum is "final agency action" subject to judicial review. 5 U.S.C. § 704. For good reason: The Memorandum easily meets this Court's two-part test for when an agency action is final.

First, "the action must mark the 'consummation' of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citation omitted). Even in the Fifth Circuit, HHS did not deny that the Memorandum met this aspect of the *Bennett* test. Pet.App.12a. This was a wise concession given that the Memorandum and Letter were in no way tentative, Pet.App.123a-135a—no doubt taking their cue from the President's unequivocal announcement just two weeks earlier, *Remarks by President Biden*, *supra* n.1.

Second, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178 (citation omitted). This is a question of substance, not form: "Agencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements." *Azar*, 587 U.S. at 575. It is thus well-settled that "the mandatory language of a document" can "alone . . . be sufficient to render it binding." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (citing, among other things, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000)); *accord, e.g.*, *A&E Coal Co. v. Adams*, 694 F.3d 798, 801 (6th Cir. 2012) (applying *General Electric* and *Appalachian Power*). That can occur if, for example, a guidance document "from beginning to end . . . reads like a ukase. It commands, it requires, it orders, it dictates." *Appalachian Power*, 208 F.3d at 1023. "[I]f the language of the document is such that private parties can rely on it as a norm or safe harbor by which to shape their actions," it will also be deemed "binding as a practical matter." *Gen. Elec. Co.*, 290 F.3d at 383 (quoting Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1329 (1992)).

The Fifth Circuit correctly applied these principles to conclude that the Memorandum binds HHS because it includes mandatory language that "effectively withdraws the agency's discretion 'to adopt a different view of the law.'" Pet.App.14a (quoting *Texas v. EEOC*, 933 F.3d 433, 442 (5th Cir. 2019)); *see also* Pet.App.15a-16a (discussing *EEOC*, 933 F.3d at 445, and *Luminant Generation Co., L.L.C. v. EPA*, 757 F.3d 439, 440, 442 (5th Cir. 2014)). The Memorandum "instructs hospitals and physicians to provide abortions in certain cases irrespective of state law," dictates "clear legal consequences should a physician or hospital violate" it, and "establishes safe harbors." Pet.App.16a. "Legal consequences thus flow from the [Memorandum]." Pet.App.16a. And private parties can rely on the Memorandum "as a norm or safe harbor to avoid liability." Pet.App.14a.

2. Because the Solicitor General does not raise the "final agency action" issue in her petition, it appears that HHS accepts this part of the ruling. Below, HHS argued the Memorandum was not "new" but instead "simply repeats EMTALA's requirements," Br. for Appellants 16, based on two September 2021 guidance documents, *id.* at 19-20. But one of those prior guidance documents did not even mention abortion. Pet.App.17a. To the contrary, it focused on "[h]ospitals that are not capable of handling high-risk deliveries or high-risk infants," and it reiterated EMTALA's requirement that a person in labor may not be transferred except upon request or with a medical certification that "the benefits of the transfer to the woman and/or the unborn child outweigh its risks." CMS, *Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Are Experiencing Pregnancy Loss* (Sept. 17, 2021), https://perma.cc/65CQ-YLUQ. *Contra* Pet.App.125a, 131a. And the other guidance document related to the Church Amendments, 42 U.S.C. § 300a-7(c), and expressly defined "lawful abortion" based on "[d]ecades of precedent" predating *Dobbs* before it ever reached the question of EMTALA, OCR, *Guidance on Nondiscrimination Protections Under the Church Amendments for Health Care Personnel* (Sept. 17, 2021), https://perma.cc/FKH7-LZS2.

Accordingly, the Fifth Circuit correctly recognized that neither document could account for the "sea change in the law" that *Dobbs* created. Pet.App.17a-18a. "Put simply," the court explained, the Memorandum "sets out HHS's legal position—for the first time—regarding how EMTALA operates post-*Dobbs*." Pet.App.18a. That, the court of appeals aptly concluded, "is new policy," which "does not 'merely restate' EMTALA's requirements." Pet.App.16a, 18a.

Far from creating a circuit split requiring this Court's attention, this ruling was entirely consistent with the widely held position that a rule purporting to allow agency discretion "is in purpose or likely effect . . . a binding rule of substantive law," and a court should look past the label and take the rule "for what it is." *Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666-67 (D.C. Cir. 1978); *see also, e.g.*, *Iowa League of Cities v. EPA*, 711 F.3d 844, 862-63 (8th Cir. 2013); *accord Azar*, 139 S. Ct. at 1812 (citing *Guardian* with favor). By failing to pursue this argument or challenge this well-established rule in its petition, HHS has forfeited any argument that the Memorandum was not final agency action subject to review.

B. The Medicare Act required the Memorandum to undergo notice and comment.

HHS has similarly failed to challenge the Fifth Circuit's case-dispositive holding, Pet.App.26a-28a, that the Medicare Act required the Memorandum to undergo notice and comment as a "'rule, requirement, or other statement of policy" that "establishes or changes a substantive legal standard governing the scope of benefits, the payment for services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits under [Medicare],'" *Azar*, 587 U.S. at 570 (second alteration in original) (quoting 42 U.S.C. § 1395hh(a)(2)). This procedural issue is not "fairly included" in the substantive question that HHS's petition presents. *See* Sup. Ct. R. 14.1(a).

1. HHS has not disputed that the Memorandum—for which HHS demonstrably never conducted notice and comment—governs at least "payment for services" or "the eligibility of individuals, entities, or organizations to furnish or receive [Medicare] services or benefits." 42 U.S.C. § 1395hh(a)(2); Br. for Appellants 46-49. As a result, this issue turns on whether the Memorandum (a) constitutes "at least a 'statement of policy,'" *Azar*, 587 U.S. at 572 (quoting 42 U.S.C. § 1395hh(a)(2)), or (b) "establishes or changes a substantive legal standard," 42 U.S.C. § 1395hh(a)(2)). The Fifth Circuit correctly concluded that it does both.

First, the Memorandum qualifies as a statement of policy because it "'le[ts] the public know [the agency's] current . . . adjudicatory approach' to a critical question." *Azar*, 139 S. Ct. at 1810 (quoting *Syncor Int'l Corp. v.*

Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997)). Indeed, the Memorandum advises that CMS "may . . . penalize" a hospital that does not comply "by terminating its provider agreement." Pet.App.133a. It also provides safe-harbor provisions for "individual physicians" wanting to perform abortions, who, it says, could "enforce[]" the Memorandum "in a variety of ways"—by using it as a "defense" against state enforcement action, to "enjoin threatened enforcement" in a federal suit, or as a defense in a disciplinary action. Pet.App.132a-133a.

Moreover, though both EMTALA and the Memorandum prescribe civil monetary penalties for EMTALA violations, the penalties the Memorandum describes exceed the ones EMTALA authorizes. EMTALA dictates that a "participating hospital that negligently violates" one of the statute's requirements "is subject to a civil money penalty of not more than $50,000 (or not more than $25,000 in the case of a hospital with less than 100 beds) for each such violation." 42 U.S.C. § 1395dd(d)(1)(A); *see also* 42 C.F.R. §§ 1003.500, 1003.510(a). But the Memorandum states that such a hospital may be subject to penalties of "$119,942 for hospitals with over 100 beds, [and] $59,973 for hospitals under 100 beds/per violation." Pet.App.133a (citing as its authority 42 C.F.R. § 1003.500). The Memorandum also specifically threatens individual physicians with civil penalties of $119,942 if they refuse to comply. Pet.App.133a.

Second, the Memorandum "establishes or changes a substantive legal standard," 42 U.S.C. § 1395hh(a)(2); *see also Azar*, 587 U.S. at 572, for the reasons already discussed, *supra* pp. 15-17.

In arguing below that the Memorandum was nonetheless excused from the Medicare Act's notice-and-comment requirement, HHS insisted that the Memorandum does not "set an adjudicatory approach affecting the substance of a physician's determination whether an individual is experiencing an emergency medical condition" or "dictate how a physician would conclude that abortion is the necessary stabilizing treatment." Br. for Appellants 48-49. But there is a recognized difference between a rule that affects a regulated party's "substantive obligations" and one that "changes" HHS's enforcement "scheme." *Ascension Borgess Hosp. v. Becerra*, 61 F.4th 999, 1003 (D.C. Cir. 2023). This Court has interpreted the Medicare Act to require notice and comment for any "statement of policy" apprising the public of *the agency's* current enforcement or adjudicatory approach regardless of whether the rule also alters regulated persons' or entities' substantive legal obligations. *Azar*, 587 U.S. at 572. The Memorandum so apprises the public because it advises of HHS's "current enforcement or adjudicatory approach." *Syncor*, 127 F.3d at 94; *see* Pet.App.27a.

2. But even if it doesn't, the Fifth Circuit's holding is analytically distinct from—and thus not fairly encompassed within—whether EMTALA preempts Texas law. *Izumi*, 510 U.S. at 32. Because HHS does not (and cannot) claim that EMTALA preempts the field of abortion regulation, the question it presents turns on whether "compliance with both state and federal law is impossible," *Oneok, Inc. v. Learjet, Inc.,* 575 U.S. 373, 377 (2015), or whether "state law stands as an obstacle in the accomplishment and execution of the full purposes and objectives of Congress," *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989) (contrasting *Arizona v. United States*, 567 U.S. 387, 401 (2012), with *California*, 490 U.S. at 100.

The Fifth Circuit considered an entirely different question: Whether the Memorandum followed the appropriate procedures to *become* federal law with the power to preempt contrary state law. For forty years, this Court has held that whether a federal regulation preempts state law depends on whether the relevant agency acted within "the proper bounds of its lawful authority to take such action." *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (citing *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982)). And this Court has held for even longer that those bounds are procedural as well as substantive: Any "substantive" agency rule that "affect[s] individual rights and obligations" is not considered valid federal law unless it goes through the notice-and-comment procedures that the APA establishes. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *see also, e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). The same principle applies to rules subject to notice and comment under the Medicare Act. *Azar*, 587 U.S. at 571-72.

Because HHS failed to undergo that process, its Memorandum—the only document that imposes the relevant requirements on Respondents, and the only document Respondents have challenged—never became a valid, legally binding interpretation of EMTALA. Thus, the Fifth Circuit's judgment must stand regardless of the Court's resolution of HHS's question presented.

C. The Memorandum exceeds statutory authority under the APA.

HHS also forfeits any challenge to the Fifth Circuit's holding that the Memorandum is in "excess of statutory jurisdiction, authority, or limitations, or short of statutory right" and thus must be "held unlawful and set aside." 5 U.S.C. § 706(2)(C); Pet.App.18a-23a. The court noted that "Congress did not explicitly address whether physicians must provide abortions when they believe it is the necessary 'stabilizing treatment.'" Pet.App.20a. As it was supposed to do, the Fifth Circuit applied "traditional tools of statutory interpretation," *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2268 (2024), and concluded that the Memorandum "exceeds the statutory language," Pet.App.19a.

1. In reaching its conclusion, the Fifth Circuit relied heavily on the fact that EMTALA specifies only one stabilizing treatment: Delivery of an unborn child and the placenta when the mother is in labor. 42 U.S.C. § 1395dd(e)(3)(A); Pet.App.21a. This mandate of one specific treatment, the court explained, implies that the statute does *not* mandate other specific treatments. Pet.App.21a (citing *Texas v. United States*, 809 F.3d 134, 182 (5th Cir. 2015), *aff'd by an equally divided Court*, 579 U.S. 547 (2016)) (applying the canon of *expressio unius est exclusio alterius*). As the Fifth Circuit recognized, "HHS's argument that 'any' type of treatment should be provided is outside EMTALA's purview." Pet.App.23a.

This conclusion is underscored by EMTALA's larger statutory and historical context—both of which are important to "how we communicate conversationally" and thus "relevant to interpreting the scope of a delegation" of agency authority. *Biden v. Nebraska*, 143 S. Ct. 2355, 2379-80 (2023) (Barrett, J., concurring). "Under the supremacy-of-text principle," the Fifth Circuit explained, "'words are given meaning by their context, and context includes the purpose of the text.'" Pet.App.25a (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56-58 (2012)). EMTALA's purpose "is to provide emergency care to the uninsured"—not create a national standard of care for when abortion is appropriate. Pet.App.21a. Again, far from creating a circuit split requiring this Court's intervention, other courts agree with this principle. *See, e.g.*, *Harry v. Marchant*, 291 F.3d 767, 773 (11th Cir. 2002) (en banc) ("EMTALA was not intended to establish guidelines for patient care."); Pet.App.22a (collecting cases).

Similarly, the Medicare Act's larger structure supports Respondents' view because that statute prohibits the control of federal personnel over "medical treatment decisions." *United States v. Univ. Hosp., State Univ. of N.Y. at Stony Brook*, 729 F.2d 144, 160 (2d Cir. 1984); *see* 42 U.S.C. § 1395. To be sure, EMTALA instructs medical providers and physicians to stabilize patients when they present with an emergency medical condition, *see* 42 U.S.C. § 1395dd(b)(1), but after that point, States govern the practice of medicine—particularly through state law "govern[ing] medical malpractice," Pet.App.23a (collecting cases). And, in Texas, a physician or provider may comply with both EMTALA and state law by offering stabilizing treatment in accordance with state law. 42 U.S.C. § 1395dd(a). That can, in limited, tragic circumstances, include providing an abortion when doing so is necessary to prevent the "substantial impairment of a major bodily function." *Zurawski*, 690 S.W.3d at 664 (quoting Tex. Health & Safety Code § 170A.002(b)(2)).[5]

2. Answering HHS's question presented would admittedly require the Court to determine what EMTALA

[5] Although *Zurawski* was decided after the Fifth Circuit's ruling in this case, it is consistent with the Fifth Circuit's analysis and now binds this Court regarding how to interpret Texas's health-of-the-mother exception. *E.g.*, *United States v. Taylor*, 596 U.S. 845, 859 (2022) (noting that "state courts [are] the final arbiters of state law in our federal system").

means, and that answer might, in turn, shed some light on whether the Memorandum merely reiterated EMTALA's requirements or exceeded them. But "[a] question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not 'fairly included therein.'" *Izumi*, 510 U.S. at 31-32 (quoting *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992); Sup. Ct. R. 14.1(a)). That is, while answering the question presented might clarify what *EMTALA* means, whether the *Memorandum's* standard exceeds the statutory scope remains "distinct, both analytically and factually." *Id.* at 32.

Parties must separately raise such ancillary, "complementary," or "related" questions to present them properly in a petition to this Court. *See id.*; Sup. Ct. R. 14.1(a). Yet HHS acted in flagrant disregard of this Court's warning, "stated on numerous occasions," that it will deem issues "not raised in the petition" unpreserved. *Izumi*, 510 U.S. at 32 (citing *Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found.,* 402 U.S. 313, 320 n.6 (1971)). Thus, the Court must presume that the Fifth Circuit's conclusion is correct when assessing whether the Memorandum preempts state law. *Yee*, 503 U.S. at 537. And if the Memorandum was not a valid interpretation of EMTALA, the Court will never reach the question whether the Memorandum, properly interpreted, conflicts with state law—which it doesn't.

II. Because the Memorandum Is Unlawful, This Case Is an Improper Vehicle to Resolve Whether EMTALA Preempts State Law.

A. To be sure, in very rare instances, this Court has "made exceptions to Rule 14.1(a)." *Izumi*, 510 U.S. at 33. For example, this Court has occasionally chosen to overrule one of its prior decisions "even though neither party requested it" or to decide a case on non-constitutional grounds instead of the constitutional question that a petition for certiorari presented. *Id.* (citing *Blonder-Tongue*, 402 U.S. at 319-21; *Boynton v. Virginia*, 364 U.S. 454, 457 (1960); *Neese v. S. Ry. Co.*, 350 U.S. 77, 78 (1955)). Moreover, the Court must notice any "possible absence of jurisdiction" and may "consider a plain error not among the questions presented but evident from the record and otherwise within [its] jurisdiction to decide." *Id.* (quoting *Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981)) (citing *Lake Country Ests., Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 398 (1979); *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976)).

In nearly every other instance, however, this Court adheres to the principle that "our system 'is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.'" *United States v. Sineneng-Smith*, 590 U.S. 371, 375-76 (2020) (alteration in original) (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia J., concurring in part and concurring in the judgment)). In that system, "[c]ourts are essentially passive instruments of government," who "do not, or should not, sally forth each day looking for wrongs to right" but instead to "decide only questions presented by the parties." *Id.* at 376 (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh'g en banc)). If anything, that principle applies with special force when the party in question is a sovereign, who "is not in a position identical to that of a private litigant" and may make litigation choices for reasons unrelated to the case at bar. *United States v. Mendoza*, 464 U.S. 154, 159 (1984).

B. This is not one of those cases where this Court has recognized (or should recognize) an exception to the party-presentation (and preservation) principle that Rule 14.1 embodies. Although *Moyle* and this case have been litigated very differently, they have been litigated nearly contemporaneously. *Compare* Complaint, *supra* (filed Aug. 2, 2022), *with* ROA.35 (original complaint filed July 14, 2022). As a result, HHS was acutely aware that the two cases do not share the same substantive legal question.

In *Moyle*, for instance, the federal government sued the State of Idaho to prevent it from enforcing its state law regulating abortion and explicitly argued that EMTALA preempted the state law. *See generally* Complaint, *supra*. The federal government expressly relied on the Supremacy Clause to assert that Idaho's law was preempted by the federal government's contracting relationships with private hospitals. *Id*. The district court ruled on the application of the Supremacy Clause and specifically held that EMTALA preempted Idaho's law. *See United States v. Idaho*, 623 F. Supp. 3d 1096, 1103-05, 1110, 1117 (D. Idaho 2022). The parties in *Moyle* expressly briefed the preemption issue and presented fulsome preemption arguments. Idaho did not assert (as Texas does here) that the Memorandum was deficient; instead, it responded to the federal government's EMTALA preemption claims.

Here, by contrast, Respondents sued HHS for failing to conduct notice and comment under the Medicare Act and for exceeding its statutory authority under the APA in promulgating the Memorandum. ROA.35-67; ROA.180-212. Respondents' claims have always turned on defects with the Memorandum itself, not on EMTALA's scope or preemptive effect. And those are the claims the lower courts decided. Pet.App.1a-29a; Pet.App.30a-106a. Nevertheless, HHS chose to ask this Court (at I) to decide whether EMTALA "preempts state law" when "terminating a pregnancy is required to stabilize an emergency medical condition . . . but the State prohibits an emergency-room physician from providing that care"—the same question that the Court considered last Term in *Moyle*. *See* Pet. 6.

C. HHS's effort to smuggle completely new issues into this case at the eleventh hour materially prejudices Respondents and the adversarial process. For example, had HHS appropriately raised a *Moyle*-style preemption counterclaim in its answer, Texas would have vigorously disputed that such a claim survives *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015)—as it has done in unrelated litigation, *see, e.g.*, Br. for Appellants, *United States v. Texas*, No. 24-50149 (5th Cir. Mar. 13, 2024). The lower courts would have had the opportunity to adjudicate *those* arguments, not just Respondents' claims under the Medicare Act and the APA.

Likewise, HHS included no conscience exemptions in the Memorandum and, on the contrary, told the district court that EMTALA overrides federal conscience laws. To this day, CMS has not conformed the Memorandum to concessions about conscience laws that the Solicitor General made before this Court in *Moyle*. Those "impermissible *post hoc* rationalizations" cannot undermine the injunction against the Memorandum, which still bears its legal infirmities until the agency changes and reissues it. *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 22 (2020).

This Court is thus left "without the benefit of thorough lower court opinions to guide [its] analysis of the merits." *Zivotofsky*, 566 U.S. at 201. Granting review in these circumstances risks setting up the Court for a repeat of *Moyle*—a dismissal as improvidently granted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

MATTHEW S. BOWMAN
JOHN J. BURSCH
JAMES A. CAMPBELL
Alliance Defending Freedom
440 First Street NW, Ste. 600
Washington, D.C. 20001

Counsel for American Association of Pro-Life Obstetricians & Gynecologists and Christian Medical and Dental Associations

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

AARON L. NIELSON
Solicitor General

LANORA C. PETTIT
Principal Deputy Solicitor General
Counsel of Record

KATELAND R. JACKSON
SARA B. BAUMGARDNER
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Lanora.Petit@oag.texas.gov
(512) 936-1700

Counsel for Texas

AUGUST 2024