

July 14, 2022

The Honorable Richard Durbin
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Durbin and Ranking Member Grassley:

On behalf of the American College of Emergency Physicians (ACEP) and our 40,000 members, I would like to thank you for providing the opportunity to comment on the hearing entitled, “A Post-Roe America: The Legal Consequences of the Dobbs Decision.” As emergency physicians who strive to provide high-quality, objective, and evidence-based medicine, we are deeply concerned about the potential medical and legal implications of legislative, regulatory, and judicial interference in the physician-patient relationship and practice of medicine resulting from the United States Supreme Court overturning the legal precedent established by *Roe v. Wade*.

Emergency physicians are unique in that they are bound by oath and law to care for anyone, anytime, and our commitment and dedication to our patients in need of lifesaving emergency care will not change. We, too, are still assessing both the health- and legal-related implications this decision will have on the practice of emergency medicine, especially concerning the extent to which the Emergency Medical Treatment and Labor Act (EMTALA) protects emergency physicians’ duty to deliver lifesaving care to their patients and how this federal law may interact with the myriad state laws already in effect or others that have been proposed.

Updated guidance recently provided by the Centers for Medicare & Medicaid Services (CMS) reiterates that EMTALA preempts any directly contradicting state laws around the medical screening examination, stabilizing treatment, and transfer requirements that are the core components of this federal law. It specifically clarifies that if a physician believes an abortion needs to be performed to stabilize a patient with an emergency medical condition, the physician **must** provide the treatment regardless of any state law that may prohibit abortions and do not include an exception for the life and health of the pregnant person. Further, with respect to what constitutes an “emergency medical condition” (EMC), the guidance states that the determination of an EMC “is the responsibility of the examining physician or other qualified medical personnel. An emergency medical condition may include a condition that is likely or certain to become emergent without stabilizing treatment.” Finally, the guidance states that EMTALA preempts “any state actions against a physician who provides an abortion in order to stabilize an emergency medical condition in a pregnant individual presenting to the hospital.”

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While we appreciate the updated guidance provided by the Administration, there still remain significant questions about the extent of these protections and the potential for legal actions or state enforcement against emergency physicians who may have to terminate a pregnancy in order to protect the health of their patient. Although the guidance may reinforce the fact that an emergency physician's EMTALA obligations could, after the fact, serve as a defense against state enforcement actions, it does not prevent legal actions from being taken against them to begin with. Further, the guidance references "actions" a state could take against a physician that would be preempted by EMTALA, but does not differentiate between state criminal laws and laws that only include civil penalties. It remains unclear whether EMTALA, a civil statute, preempts state laws that include criminal penalties. It is this interaction between federal civil laws and state criminal laws that remains an important issue—one that ACEP believes still must be explored and clarified. Ultimately, we are concerned that all of the uncertainty that still remains will have a chilling effect on the practice of medicine as emergency physicians will be faced with the choice of following their clinical judgment and fulfilling their oath to their patients, or breaking the law.

As we grapple with this uncertain legal landscape, we are forming a task force of emergency medicine experts to fully assess both the clinical and legal aspects of this decision and their potential effects on patient care and safety. We know that Congress will examine these issues as well and we urge legislators to ensure that politics never compromise an emergency physician's ability to have an honest discussion with a patient about their health, evaluate all treatment options, and use their clinical judgement to continue to provide treatment that patients need.

Once again, thank you for the opportunity to provide our perspective on the questions regarding the legal and clinical issues facing emergency physicians in light of the decision in *Dobbs v. Jackson Women's Health Organization*. Should you have any questions, please do not hesitate to contact Ryan McBride, ACEP Congressional Affairs Director, at rmcbride@acep.org.

Sincerely,

A handwritten signature in cursive script that reads "Gillian Schmitz, MD, FACEP".

Gillian Schmitz, MD, FACEP
ACEP President