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

REPLY BRIEF FOR THE PETITIONERS

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The Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. 1395dd, requires covered hospitals to offer stabilizing treatment to any patient who presents with an emergency condition that seriously threatens her life or health. 42 U.S.C. 1395dd(b)(1). The statute provides that state law is preempted if it "directly conflicts with a requirement" of EMTALA. 42 U.S.C. 1395dd(f). Two years ago, the Department of Health and Human Services (HHS) issued a guidance document reminding hospitals that those principles apply in the narrow and tragic circumstances where the only treatment that can save a pregnant woman's life or prevent serious harm to her health involves terminating her pregnancy. Pet. App. 123a-135a (the Guidance).

This case originated as a challenge to the Guidance by Texas and two medical associations. The Fifth

Circuit held that despite EMTALA's guarantee of stabilizing treatment, the statute does not require any particular care and *never* requires pregnancy termination —no matter how grave the threat to a pregnant woman's life or health. Based on that holding, the court affirmed a permanent injunction barring HHS from enforcing its interpretation of EMTALA in Texas or as applied to members of the respondent associations.

Because this Court had granted certiorari to resolve the same question about EMTALA in *Moyle* v. *United States*, 144 S. Ct. 2015 (2024) (per curiam), the government followed its usual practice and filed a short petition asking this Court to hold the petition pending *Moyle* and then dispose of the petition as appropriate. The Court ultimately dismissed *Moyle* as improvidently granted and vacated the stay it had entered in that case, reinstating a preliminary injunction barring Idaho from enforcing its prohibition on pregnancy termination in circumstances where EMTALA requires that care.

This Court should grant certiorari, vacate the Fifth Circuit's decision, and remand (GVR) in light of intervening developments—including the Court's disposition of *Moyle*; a recent Texas Supreme Court decision that has led respondents to expressly disclaim any conflict between Texas law and HHS's understanding of EMTALA; the Court's decision in *FDA* v. *Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024), which makes clear that the members of the respondent associations cannot be required to terminate a pregnancy against their conscience; and respondents' failure to defend a key aspect of the Fifth Circuit's holding. Taken together, those developments create at least a reasonable probability that the lower courts would find that this case does not present a justiciable controversy or that

they would take a different view of the merits if they conclude jurisdiction exists to reach them.

Respondents' brief in opposition confirms that a GVR is warranted. Respondents insist that the Fifth Circuit did not determine EMTALA's substantive or preemptive reach and instead held only that the Guidance should have been issued via notice-and-comment rulemaking. But the Fifth Circuit squarely held that "EMTALA does not mandate medical treatments, let alone abortion care, nor does it preempt Texas law." Pet. App. 29a. That holding was essential to the Fifth Circuit's judgment. Among other things, the court affirmed an injunction that extends beyond the Guidance by prohibiting HHS from enforcing its interpretation of EMTALA. Respondents' refusal to defend the judgment they won below is itself an additional reason to GVR. And respondents' other arguments—including their new assertion that there is no conflict between Texas law and EMTALA—underscore the need for further proceedings in the lower courts.

A. This Court Should GVR

1. This Court's authority to GVR is grounded in its power to remand for further proceedings "as may be just under the circumstances." 28 U.S.C. 2106. The Court has explained that a GVR is warranted when "intervening developments" reveal "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). The Court has "GVR'd in light of a wide range of developments," including the Court's "own decisions," "State Supreme Court decisions," and "positions newly taken" by the parties, including "state attorneys general." *Id.* at 166-167.

This Court need not be certain that the lower courts will reach a different result on remand. Rather, "[i]t is precisely because of uncertainty" about the effect of an intervening development "that [this Court] GVR[s]." *Lawrence*, 516 U.S. at 172; see *id.* at 174. In appropriate cases, a GVR "conserves the scarce resources of this Court," "assists the court below by flagging a particular issue that it does not appear to have fully considered," and "assists this Court by procuring the benefit of the lower court's insight." *Id.* at 167.

2. A GVR is warranted here in light of this Court's disposition of *Moyle*, a Texas Supreme Court decision that has led respondents to disclaim any conflict between state law and EMTALA, the Court's decision in *Alliance*, and respondents' failure to defend a key premise of the Fifth Circuit's holding.

a. In *Moyle*, the district court preliminarily enjoined Idaho from enforcing its prohibition on abortion where that prohibition conflicts with EMTALA—that is, in emergencies where pregnancy termination is the stabilizing care necessary to prevent serious harm to a pregnant woman's health. This Court stayed the injunction and granted certiorari before judgment. See *Moyle*, 144 S. Ct. at 2019-2020 (Barrett, J., concurring). The Court later dismissed the case as improvidently granted and vacated the stay, reinstating the district court's preliminary injunction. *Id.* at 2015 (order of the Court).

A party seeking a stay pending appeal must show that this Court would likely grant certiorari and rule in its favor, that it would likely suffer irreparable harm absent a stay, and that the equities justify interim relief. See *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam); see also *Labrador* v. *Poe*, 144 S. Ct. 921, 929 n.2 (2024) (Kavanaugh, J., concurring). The Court's

vacatur of the stay in *Moyle* necessarily reflected a conclusion that Idaho had not made that showing. And although an emergency-docket order without an accompanying opinion of the Court ordinarily may not be a basis for a GVR, the Court's order in *Moyle* was issued after full merits briefing and oral argument and was accompanied by separate opinions highlighting issues that warrant further consideration by the Fifth Circuit.

First, in voting to vacate the stay in *Moyle*, several Justices explained that HHS's view of "EMTALA's reach is far more modest" than had previously been apparent and that "Idaho law ha[d] materially changed," leading the State to represent that its law would not prevent doctors from terminating a pregnancy in many situations where EMTALA requires such care. 144 S. Ct. at 2021-2022 (Barrett, J., concurring). Those developments "undercut the conclusion that Idaho would suffer irreparable harm" absent a stay. *Id.* at 2022. Here, too, intervening developments provide reason to doubt that Texas faces any irreparable injury from the Guidance's interpretation of EMTALA, undermining the Fifth Circuit's conclusions about the need for and proper scope of injunctive relief. Cf. Pet. App. 28a-29a. Indeed, intervening developments here suggest that Texas does not even have Article III standing. See pp. 6-7, *infra*.

Second, the Fifth Circuit held that EMTALA "does not mandate any specific type of medical treatment," even outside the context of pregnancy termination. Pet. App. 21a-22a. In *Moyle*, no Justice endorsed that startlingly broad position. And several Justices explained that although EMTALA "does not list particular treatments," it "unambiguously requires that a Medicare-funded hospital provide *whatever* medical treatment is necessary

to stabilize a health emergency." *Moyle*, 144 S. Ct. at 2018 (Kagan, J., concurring) (emphasis added).

The Fifth Circuit also held that EMTALA can never require pregnancy termination—even when that care is consistent with state law and indisputably necessary to save a pregnant woman's life or avert serious harm to her health. Pet. App. 21a-22a; see *id.* at 29a. Some of the separate opinions in *Moyle* expressed differing views on whether and under what circumstances EMTALA requires pregnancy termination and preempts contrary state law. Compare 144 S. Ct. at 2018-2019 (Kagan, J. concurring), with *id.* at 2028-2035 (Alito, J., dissenting). But because the Fifth Circuit began with the mistaken premise that EMTALA can never require *any* particular treatment, the court did not address the full range of textual, contextual, and other arguments aired in the opinions in *Moyle*. See Pet. App. 19a-26a. A GVR would allow the Fifth Circuit to consider those arguments in the first instance.

b. A GVR is also warranted in light of respondents' new representation that "[t]here is no conflict" between HHS's interpretation of EMTALA and state law because Texas "allows abortion where the mother risks death *or* a 'serious risk of substantial impairment of a major bodily function.'" Br. in Opp. 14 (emphasis added; citation omitted); see *id.* at 25 (the Guidance's interpretation of EMTALA "doesn't" "conflict[] with state law"). That representation is based in part on the Texas Supreme Court's decision in *State* v. *Zurawski*, 690 S.W.3d 644 (2024), which "was decided after the Fifth Circuit's ruling in this case" and which respondents assert makes clear that hospitals can "comply with both EMTALA and state law" by terminating a pregnancy in the "limited, tragic circumstances" when such care is necessary to prevent serious

harm to a pregnant woman's health. Br. in Opp. 24 & n.5; see *id.* at 1.

Those new representations about Texas law are significant because the essential premise of the district court's holding that the State has Article III standing was that HHS interprets EMTALA "to require physicians to perform abortions in situations not permitted by Texas law." Pet. App. 45a; see *id.* at 45a-53a. The court relied on the same premise in determining the proper scope of the injunction. *Id.* at 104a-106a. Now that Texas has expressly disclaimed that premise, there is no apparent basis for concluding that the State has Article III standing to maintain this suit or that it is entitled to injunctive relief. At a minimum, there is a "reasonable probability," *Lawrence*, 516 U.S. at 167, that the Fifth Circuit would conclude that Texas lacks standing or that the injunction should be vacated or narrowed if given the opportunity to reconsider those issues.[1]

c. The district court held that the associational respondents had Article III standing because HHS's interpretation of EMTALA would require their members "to perform abortions" in violation of their "religious or moral beliefs and medical judgments." Pet. App. 56a. But this Court's decision in *Alliance* squarely rejected that view. There, the Court unanimously reversed a Fifth Circuit decision that had found Article III standing based on doctors' fears that EMTALA "might be interpreted to

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[1] The government did not challenge respondents' standing on appeal. Pet. App. 11a. But because a lack of standing deprives the courts of Article III jurisdiction, it cannot be forfeited or waived. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). And here, Texas's lack of standing was revealed by the State's representations in this Court, which were based in part on an intervening Texas Supreme Court decision.

override * * * federal conscience laws and to require individual emergency room doctors to participate in emergency abortions." *Alliance*, 602 U.S. at 389. The Court observed that "the Government has disclaimed that reading of EMTALA" and agreed with the government that "EMTALA does not require doctors to perform abortions or provide abortion-related medical treatment over their conscience objections." *Ibid.* The Court's decision in *Alliance* thus forecloses any argument that the respondent associations have standing or are entitled to injunctive relief.[2]

d. Finally, a GVR is warranted because respondents appear to be unwilling to defend a key premise of the Fifth Circuit's decision. Again, the Fifth Circuit held that "EMTALA does not mandate any specific type of medical treatment, let alone abortion"—even if such treatment would be consistent with state law. Pet. App. 21a-22a; see *id.* at 28a-29a. Respondents, in contrast, appear to acknowledge that "comply[ing] with * * * EMTALA" may require "providing an abortion," so long as that care is consistent with state law. Br. in Opp. 24. And respondents seem to concede that EMTALA validly requires Texas hospitals to terminate ectopic

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[2] The district court also cited respondents' alleged "procedural injury" from a lack of notice and comment. Pet. App. 54a. But "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 496 (2009). And even if the lack of notice and comment somehow gave respondents standing to challenge the Guidance, it would not give them standing to secure an injunction barring enforcement of the "interpretation of EMTALA" reflected in the Guidance. Pet. App. 110a; see *Murthy* v. *Missouri*, 144 S. Ct. 1972, 1988 (2024) (plaintiffs must demonstrate standing "for each form of relief that they seek") (citation omitted).

pregnancies, a procedure that is excluded from Texas's state-law definition of "abortion" and that is the only way to prevent life-threatening complications. *Id.* at 6.

As a matter of the facts on the ground, however, HHS has recently received complaints alleging that multiple Texas hospitals have been refusing to terminate ectopic pregnancies, creating grave risks to the affected women's health and even their lives. See D. Ct. Doc. 116, at 2-3 (Aug. 21, 2024). The government has notified the district court that it does not understand the injunction to prohibit it from investigating those complaints because the termination of an ectopic pregnancy is not an "abortion" under Texas law and thus should not be understood as an "abortion" under the injunction. *Id.* at 3-4. But whatever the scope of the injunction, the precedential effect of the Fifth Circuit's opinion at minimum creates substantial doubt about whether EMTALA requires hospitals to provide that life-saving care. That even respondents are unwilling to defend that untenable result provides a powerful additional reason to GVR.

B. Respondents Offer No Good Reason To Deny A GVR

Respondents neither discuss the possibility of a GVR nor meaningfully grapple with the relevant intervening developments. Instead, they assert (Br. in Opp. 15-29) that this Court should leave the judgment below undisturbed on the theory that the Fifth Circuit did not address EMTALA's substantive or preemptive scope at all and instead resolved only the validity of the Guidance. That is wrong—as even a cursory review of the decision below makes clear.

Respondents insist (Br. in Opp. 25) that the Fifth Circuit addressed only the Guidance—not EMTALA. That is a remarkable assertion. In the decision below,

the Fifth Circuit expressly and repeatedly held that "EMTALA does not mandate medical treatments, let alone abortion care." Pet. App. 29a; see, *e.g.*, *id.* at 21a-22a ("EMTALA does not mandate any specific type of medical treatment, let alone abortion."). Indeed, the Fifth Circuit framed the central "question" before it as whether EMTALA "mandates physicians to provide abortions when that is the necessary stabilizing treatment for an emergency medical condition." *Id.* at 26a. The court held that "[i]t does not," *ibid.*—and all of the court's conclusions about the validity of the Guidance followed from that central holding.

At the start, the Fifth Circuit held that the Guidance constituted final agency action because it extended, rather than "merely restat[ed]," EMTALA's requirements. Pet. App. 18a. Next, the court held that the Guidance exceeded HHS's statutory authority because, in the court's view, EMTALA does not "mandate[] physicians to provide abortions when that is the necessary stabilizing treatment for an emergency medical condition." *Id.* at 26a. Last, the court concluded that the Guidance was "required" to undergo notice and comment under the Medicare Act because the Guidance "goes beyond EMTALA by mandating" that hospitals offer pregnancy termination in certain circumstances. *Id.* at 28a. Each of those holdings rested on the Fifth Circuit's resolution of the statutory question presented in the government's petition.

Respondents' assertion (Br. in Opp. 21) that the Fifth Circuit never decided "whether EMTALA preempts Texas law" likewise blinks reality. The court held that EMTALA does not "preempt Texas law." Pet. App. 29a. That is unsurprising, given that respondents themselves urged the Fifth Circuit to resolve the

preemption issue in their questions presented and argued at length that EMTALA does not require pregnancy termination or preempt contrary state law. Resp. C.A. Br. 1, 3, 30-39.

Nor can respondents square their portrayal of the decision below with the injunction they obtained. The permanent injunction prohibits HHS from enforcing not only the Guidance itself, but also the "interpretation of EMTALA" reflected in the Guidance. Pet. App. 29a. That aspect of the judgment plainly cannot be justified based on the Fifth Circuit's holdings about the procedural validity of the Guidance. And if, as respondents argue, this case were not about "EMTALA's potential preemptive effect," Br. in Opp. 15, then the lower courts would have had no grounds to enjoin the government from enforcing its understanding of "EMTALA's effect on state laws" or the circumstances when "Texas abortion laws are preempted by EMTALA," Pet. App. 29a.

Equally misguided is respondents' refrain (Br. in Opp. 2, 15, 25-29) that the government "waived" various challenges to the Fifth Circuit's decision by filing a standard hold petition based on *Moyle*. The petition explained (Pet. 4-7) that the Fifth Circuit's decision rested on the court's resolution of the same question of statutory interpretation that was before this Court in *Moyle* and that the Court's disposition of *Moyle* was thus likely to have direct implications for the decision below. That is just what has come to pass: The Court's disposition of *Moyle*, together with the other intervening developments discussed above, warrants a GVR. And like the Court's order in *Moyle*, a GVR here would allow the lower courts to consider in the first instance all relevant legal developments bearing on the resolution of the important question presented.

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The petition for a writ of certiorari should be granted, the court of appeals' judgment vacated, and the case remanded for further consideration.

Respectfully submitted.

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