UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant.	Case No. 1:22-cv-329

SUPPLEMENTAL DECLARATION OF LEE A. FLEISHER, M.D.

I, Lee A. Fleisher, M.D., of the Centers for Medicare & Medicaid Services (CMS), declare that the following statements are true and correct to the best of my knowledge and belief, and that they are based on my personal knowledge as well as information provided to me in the ordinary course of my official duties. The following statements are provided as a supplement to the prior written testimony that I submitted in relation to this case on August 8, 2022.

1. I have reviewed the Declarations of Dr. Richard Scott French (the "French Declaration"), ECF 75-1, and Dr. Kraig White (the "White Declaration"), ECF 66-1. Both the French Declaration and the White Declaration discuss my prior declaration, including my testimony explaining that the appropriate stabilizing treatment for some emergency medical conditions experienced by pregnant patients is termination of pregnancy. French Decl. ¶¶ 17-29; White Decl. ¶¶ 2-7.

2. Both Dr. French and Dr. White agree with my prior statements that termination of pregnancy is the necessary and appropriate medical treatment for pregnant patients under the circumstances discussed. As Dr. French explains: "[E]very one of the

five examples provided by Dr. Fleisher present a life-threatening situation. Thus, if the conditions described in each of these examples have reached the point that it is not safe to transfer the patient until stabilizing treatment is given, it would be my good faith medical opinion that a life-saving surgery would more likely than not result in the termination of the pregnancy." French Decl. ¶ 29. Dr. White similarly agrees. White Decl. ¶¶ 2-7.

3. The only point of disagreement with my prior testimony appears to be Dr. French's interpretation of the Idaho statute that is challenged in this case. Dr. French states that "life-saving surgery is not an abortion, and the language in the Idaho statute permits such life-saving surgeries/procedures." French Decl. ¶ 29. Dr. French's interpretation is inconsistent with my reading of the Idaho statute, which defines abortion to mean "the use of any means to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child." Idaho Code § 18-604(1). While I agree that the statutory definition of "abortion" in the Idaho Code covers some procedures that would not be characterized as an abortion *in the medical community*, the language of the Idaho statute appears to cover any medical treatment that requires intentional termination of a pregnancy regardless of the circumstances.

4. Additionally, it appears that Dr. French and Dr. White believe that the Idaho statute does not threaten criminal liability when termination of the pregnancy occurs in response to a "life-threatening" condition. French Decl. ¶¶ 29-30; White Decl.¶ 2. From a medical perspective, I do not believe "life-threatening," which generally implies only a *risk* of death, necessarily has the same meaning as the Idaho law's affirmative defense—

"necessary to prevent . . . death"—which generally implies avoiding a certainty (or at least very high probability) of death.

5. Regardless, I do not believe "life-threatening" fully encompasses all potential emergency medical conditions for which a pregnant patient might be entitled to stabilizing treatment under EMTALA. Specifically, the State's declarations do not address situations in which termination of pregnancy is necessary to protect a patient's health, or to ensure that a pregnant patient will not suffer a serious impairment to their bodily functions or serious dysfunction of any bodily organ or part, but where the patient's life is likely not in danger at that point in time. As explained in my prior declaration, many pregnancy conditions pose serious risks to the patient's health that are appropriately stabilized through termination of pregnancy, even though a physician may not be able to establish or know that termination of pregnancy is "necessary to prevent the death of the woman" at that time. In those instances, termination of pregnancy would be necessary to protect the patient's health, even though death is not immediately threatened.

6. For example, I previously discussed the scenario of a patient who comes to an emergency department with preterm premature rupture of membranes ("PPROM"), which is a premature breaking open of the amniotic sac that increases the risk of severe intra-amniotic infection. If PPROM is diagnosed, the patient faces serious risk of infection which could impair the function of any number of organs or bodily functions. As an example, developing significant infection in the uterus could seriously impair the patient's reproductive organs if the condition is allowed to deteriorate. Providing stabilizing treatment in the form of termination of pregnancy at the point of diagnosis would be an appropriate means to preserve the patient's reproductive organs at that time. If stabilizing

treatment were withheld at that point in time, the infection could only worsen and treatment at a later point would present significantly higher risk of complications, potentially requiring a hysterectomy and/or harming their future fertility. If a patient is diagnosed with PPROM before severe infection occurs, a patient may not immediately face a life-threatening risk. However, immediate treatment through termination of pregnancy may be necessary because delaying treatment would allow the condition to progress, thereby threatening other bodily organs and functions, including but not limited to future fertility. Under those circumstances, the patient and physician may decide that termination of pregnancy may be the appropriate stabilizing treatment to protect the patient from organ dysfunction or other bodily impairment, even though the stabilizing treatment is not yet in response to a life-threatening circumstance.

7. In general, medical risk to individual patients exists along a continuum, and there are no medical "bright lines" specifying when exactly a condition becomes "life-threatening" or "necessary to prevent the death" of the pregnant patient. Even in situations where it is unclear whether the patient's life is in immediate danger, it may be apparent that the patient's condition will continue to deteriorate absent stabilizing treatment through termination of pregnancy. Under those circumstances, terminating the pregnancy to avoid the patient's health falling into serious jeopardy, bodily functions being seriously impaired, or organs becoming seriously dysfunctional (rather than waiting to see if and/or when the patient's condition worsens to the point that they are about to die) may be the appropriate recommendation from the physician as medically necessary and is what EMTALA requires.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of August, 2022 in Philadelphia, PA.

Lee A. Fleisher, M.D.