Misleading Statements About "Life of the Mother" Exceptions in Pro-life Laws Require Correction

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ABSTRACT: Misleading statements in a recent *Obstetrics & Gynecology* article require correction. No state has an abortion law that is a total ban on abortion. Every state law permits abortion when necessary to save a mother's life. Texas law does not require an "imminent" risk and allows a doctor to use his "reasonable medical judgment" to determine if an abortion is necessary to prevent a "risk" of maternal death. Similarly, Idaho allows a doctor to use his "good faith medical judgment" to determine when to intervene, without need for "immediacy".

Erroneous statements in Dr. Steven Cherry's March 2024 *Obstetrics & Gynecology* article "Abortion Trigger Laws Compared With the Emergency Medical Treatment and Labor Act" are likely to introduce further confusion for physicians practicing under state pro-life laws and without professional medical association guidance.[1]

According to Dr. Cherry, who performs reviews for the Kepro Peer Review Organization on potential EMTALA infractions, in the wake of the *Dobbs v. Jackson Women's Health Organization* decision, "Some states have mandated a total [abortion] ban." However, all states with one or more broad gestational limits on abortion permit abortion in those rare

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[1] Cherry, S. Abortion Trigger Laws Compared With the Emergency Medical Treatment and Labor Act. Obstet Gynecol. March 2024; 143(3): 366-368.

circumstances when it is necessary to save the life of a pregnant woman, and all but four permit abortion in additional circumstances.[2]

Dr. Cherry argues that "[t]he maternal health exception poses a problem for practicing physicians in that it is often unclear how close to death or harm a pregnant patient must be before abortion is legally justified." However, physicians should be reassured that they can make this determination based on their "reasonable medical judgment," a standard very common in the medical profession and used for cases involving medical malpractice litigation.[3] Pro-life laws are enacted to protect the lives of unborn children and their mothers, not to tie the hands of physicians caring for seriously ill pregnant women.

Nonetheless, Dr. Cherry misconstrues the legal standards in state pro-life laws, arguing that "it is unethical to allow patients to risk death when it is preventable" and that the standards are "ridiculous" and "likely to result in grievous patient injury." Yet, no state "legal standard" prevents doctors from saving the lives of pregnant women. Dr. Cherry points to media reports of women being denied necessary care for partial molar pregnancy, cesarean scar ectopic pregnancy, and previable, premature rupture of membranes at 15 weeks' gestation, despite abundant evidence from the American College of Obstetricians and Gynecologists (ACOG) that intervention in these circumstances is supported because each of these tragic circumstances can pose a risk to a mother's life.[4]

Specifically, Dr. Cherry mischaracterizes the laws in Texas and Idaho, which are similar to the gestational limits enacted in the other states. Regarding Texas, Dr. Cherry states that "Texas defines *life-threatening* as an imminent risk of death," but the Texas abortion limit does not place a temporal limitation on "life-threatening" and Dr. Cherry does not provide a citation to support his assertion.

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[2] *See,* Mary E. Harned and Ingrid Skop, Pro-Life Laws Protect Mom and Baby: Pregnant Women's Lives are Protected in All States, On Point Issue 86, Charlotte Lozier Institute, https://lozierinstitute.org/pro-life-laws-protect-mom-and-baby-pregnant-womens-lives-are-protected-in-all-states/. These laws are either in effect or are enjoined pending litigation.

[3] This standard is neither new nor specific to abortion or even to Texas law. In the United States, "reasonable medical judgment" arose out of the relevant standard of care for physicians. *See Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999). "[T]his is the same standard by which all . . . medical decisions are judged under traditional theories of tort law," *id.* at 464—the "reasonable man" standard, but for physicians. It first appears in situations requiring a physician to certify mental incompetence using "reasonable medical judgment" or in medical malpractice cases, establishing a zone of reasonable actions. *See Rogers v. U.S.*, 334 F.2d 931, 935 (6th Cir. 1964).

[4] American College of Obstetricians and Gynecologists, "Prelabor Rupture of Membranes: ACOG Practice Bulletin, Number 217." Obstetrics and Gynecology 2020;135(3):e80-97, doi: 10.1097/AOG.0000000000003700; American College of Obstetricians & Gynecologists, "Practice Bulletin 193- Tubal Ectopic Pregnancy." Obstetrics and Gynecology 2018;131(3):e91-e103, doi: 10.1097/AOG.0000000000002560; American College of Obstetricians & Gynecologists, "Practice Bulletin 200- Early Pregnancy Loss." Obstetrics and Gynecology 2018;132(5):e197-e207, doi: 10.1097/AOG.0000000000002899.

Further, in 2023 the Texas Supreme Court held that the Texas abortion limit "does not require 'imminence' or ... that a patient be 'about to die before a doctor can rely on the [life] exception.'"[5] In fact, taken as a whole, Texas' law is explicitly deferential to a treating physician in an emergency. The state's restriction on abortion does not apply when:

> In the exercise of *reasonable medical judgment*, the pregnant female on whom the abortion is performed, induced, or attempted has a *life-threatening physical condition* aggravated by, caused by, or arising from a pregnancy that *places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced*.[6]

Note, there must only be a "risk" of death, and the physician may exercise "reasonable medical judgment" defined as "a medical judgment made by a reasonably prudent physician, knowledgeable about a case and the treatment possibilities for the medical conditions involved."[7] It should be noted that since the *Dobbs* decision, 71 abortions have been performed in Texas under the laws' exceptions.[8]

The Texas Supreme Court further described physicians' discretion in making these determinations:

> Only a doctor can exercise 'reasonable medical judgment' to decide whether a pregnant woman 'has a life-threatening physical condition,' making an abortion necessary to save her life or to save her from 'a serious risk of substantial impairment of a major bodily function.' If a doctor, using her 'reasonable medical judgment,' decides that a pregnant woman has such a condition, then the exception applies, and Texas law does not prohibit the abortion. ... A pregnant woman does not need a court order to have a lifesaving abortion in Texas.[9]

Dr. Cherry also mischaracterizes the law in Idaho. He states that for an abortion to be legal, "the law dictates that the patient's death must be imminent or certain without an abortion." Dr. Cherry again fails to cite a provision in Idaho law to support this statement. In truth, the abortion prohibition does not apply if "the physician determined, *in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman*."[10] Thus, this statute

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[5] *In re State of Texas*, No. 23-0994, Per Curiam (Dec. 11, 2023), https://casetext.com/case/in-re-state-322203.

[6] Tex. Health & Safety Code §§ 170A.002(b)(2) (emphasis added).

[7] Id.

[8] https://www.hhs.texas.gov/about/records-statistics/data-statistics/itop-statistics.

[9] *In re State of Texas*, supra.

[10] Idaho Code § 18-622(2)(a) (emphasis added).

does not provide that the risk of death must be "imminent" or "certain."

The Supreme Court of Idaho clarified that the exception to the Idaho abortion restriction is not limited to a risk of imminent death. The Court held:

> The plain language ... leaves wide room for the physician's "good faith medical judgment" on whether the abortion was "necessary to prevent the death of the pregnant woman" based on those facts known to the physician at that time. This is clearly a subjective standard, focusing on the particular physician's judgment. ... the statute does not require *objective certainty, or a particular level of immediacy, before the abortion can be "necessary" to save the woman's life. Instead, the statute uses broad language to allow for the "clinical judgment that physicians are routinely called upon to make for proper treatment of their patients."*[11]

When a physician determines that a mother and her unborn child must be separated, both Texas and Idaho require the physician to attempt to separate them in a manner that provides the best opportunity for the unborn child to survive unless doing so would pose a greater risk of death to the pregnant woman. This requirement reflects one of the purposes behind the Emergency Medical Treatment and Labor Act (EMTALA), which requires stabilizing treatment for both a mother and her unborn child in an emergency.

Importantly, the laws in Texas and Idaho do not require, as Dr. Cherry claims, that "pregnant patients in Texas and Idaho must wait for their condition to deteriorate substantially before they can legally receive a medically indicated abortion." This statement is legally insupportable and endangers seriously ill pregnant women whose doctors may fear prosecution based on Dr. Cherry's irresponsible statements.

Again, in language notably similar to that used by the Supreme Court of Idaho quoted above, the Texas Supreme Court held that the law does not "ask the doctor to wait until the mother is within an inch of death or her bodily impairment is fully manifest or practically irreversible. ... Rather, the exception is predicated on a doctor's acting within the zone of reasonable medical judgment, which is what doctors do every day. An exercise of reasonable medical judgment does not mean that every doctor would reach the same conclusion."[12]

In Dr. Cherry's examples of women who were refused abortions, he does not argue that any of the patients were denied abortion by courts. If their treating healthcare providers decided not to perform abortions based on fear of prosecution rather than "reasonable medical judgment," then the answer is better education and guidance for healthcare practitioners. Dr. Cherry makes additional broad assertions with no basis in the texts of these state laws. No enacted statute dictates that the presence of hemorrhage, infection, or sepsis

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[11] *Planned Parenthood Great Nw. v. Idaho*, 522 P.3d 1132, 1203 (Idaho 2023).

[12] *In re State of Texas*, supra.

is a prerequisite for medically indicated abortion as Dr. Cherry inexplicably states.

Dr. Cherry also misrepresents the nature of a case in Alabama, fabricating a danger for Alabama women facing high-risk pregnancies. *In West Alabama Women's Center v. Marshall*, the plaintiffs do not allege that Alabama is threatening to "make transfer a felony" when patients have life-threatening complications in pregnancies, nor do the statements made by Alabama public officials that prompted the lawsuit reflect this intention. In fact, the plaintiffs concede that doctors are "potentially" continuing to perform abortions *in* Alabama that meet the Alabama life and health exceptions.[13]

Dr. Cherry also fails to fully explain the Fifth Circuit's decision in a challenge to the Biden Administration's interpretation of EMTALA. The court held that EMTALA did not preempt Texas law because there was not a conflict between federal and state law: "EMTALA does not mandate any specific type of medical treatment, let alone abortion." Further, because "EMTALA imposes obligations on physicians with respect to both the pregnant woman and her unborn child" which is "a dual requirement," EMTALA "leaves the balancing of stabilization to doctors, who must comply with state law."[14] In other words, EMTALA and pro-life state laws share the goal of protecting both the mother and the unborn child's lives.

Dr. Cherry's advice that "hospitals and physicians who are trapped between conflicting state laws and Emergency Medical Treatment and Labor Act rules and regulations" should transfer the patients is poor advice. Transferring a pregnant woman suffering a life-threatening emergency out of a state restricting elective abortion to a state permitting elective abortion is demonstrably poor-quality care. Doctors can care for their patients in risky pregnancies, protecting their health and life, and still take emergency action if it is ultimately needed. There is no conflict here.

Even pre-*Dobbs*, most hospitals, physicians, and support staff did not participate in elective abortions.[15] However, when a pregnant woman's life was in danger these same providers would provide the care needed to protect her life, even if doing so resulted in the tragic death of her unborn child. The same care is still permitted in those rare and heartbreaking circumstances. If women are

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[13] Verified Complaint for Declaratory and Injunctive Relief, ¶ 26 (July 31, 2023), https://www.aclu.org/cases/west-alabama-womens-center-et-al-v-marshall-et-al?document=Complaint-West-Alabama-Womens-Center-et-al-v-Marshall-et-al.

[14] *Texas v. Becerra*, No. 23-10246 (5th Cir. 2024), https://www.ca5.uscourts.gov/opinions/pub/23/23-10246-CV0.pdf.

[15] Desai S, Jones R, Castle K. Estimating abortion provision and abortion referrals among United States obstetricians and gynecologists in private practice. Contraception 2018;97:297-302; Stuhlberg DB, Dude AM, Dahlquist I, Curlin FA. Abortion provision among practicing obstetrician-gynecologists. Obstet Gynecol 2011;118(3):609-614. doi: 10.1097/AOG.0b013e31822ad973.

being denied appropriate care due to physician confusion and fear of prosecution, the answer is education and guidance, not inaccurate fearmongering.

In order to correct the record and educate confused physicians, we (an expert on state pro-life laws and an obstetrician/gynecologist practicing in Texas) submitted a letter to the editor of *Obstetrics & Gynecology* explaining what the laws actually require (as demonstrated above). Within 48 hours, our submission was rejected without explanation. This rejection is troubling, given the dangers posed by the inaccuracies in Dr. Cherry's article to pregnant women facing rare, life-threatening complications. Fundamentally, opponents of pro-life laws should voice their objections with intellectual honesty rather than misrepresenting laws that were written to preserve the lives of mothers and their unborn children.

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