

MINUTES  
**SENATE STATE AFFAIRS COMMITTEE**

**DATE:** Thursday, March 30, 2023

**TIME:** 8:00 A.M.

**PLACE:** Room WW55

**MEMBERS PRESENT:** Chairman Guthrie, Vice Chairman Bernt, Senators Winder, Anthon, Geddes (Harris), Lee, Toews, and Wintrow.

**ABSENT/ EXCUSED:** Senator Ruchti

**NOTE:** The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

**CONVENED:** **Chairman Guthrie** called the meeting of the Senate State Affairs Committee (Committee) to order at 8:00 a.m.

**RS 30776** **Relating to Sexual Exhibitions - Amends Title 6, Idaho Code. Senator Toews** described this as ongoing work dealing with minors being present at sexual exhibitions. The bill would prohibit the use of public facilities and public assets for live performances containing sexual conduct.

**Senator Winder** asked about the differences between **RS 30745** and **RS 30776**. **Senator Toews** said **RS 30776** was a combination of **RS 30745** and **H 265**. Efforts were made to capture the best parts of each to compile into **RS 30776** with hope for a good solution.

**MOTION:** **Senator Anthon** moved to send **RS 30776** to print. **Senator Bernt** seconded the motion.

**DISCUSSION:** **Senator Wintrow** appreciated this RS was not going anywhere. She considered the legislation unnecessary, unfounded, and overly broad. She felt it targeted the Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) group of people, and drag shows..

**VOICE VOTE:** The motion carried by **voice vote**. **Senator Wintrow** requested to be recorded as voting no.

**PASSED THE GAVEL:** Chairman Guthrie passed the gavel to Vice Chairman Bernt.

**RS 30745** **Relating to Sexual Exhibitions - Amends Title 6, Idaho Code. Chairman Guthrie** asked that **RS 30745** be sent to print with the caveat that, through introduction, this and **RS 30776** would be in the public domain for resolution next year. He shared these RSs and **H 265** would continue to be worked on to protect minors from obscenities. **Chairman Guthrie** described the dozens of angry emails he received because **H 265** was not heard. By way of explanation, **H 265** did not have all three legs of the Miller Test, the standard bearer for obscenity per the United States Supreme Court (Court) ruling. Because of the omissions, numerous performing arts events could have been compromised or entangled in legal battles. The aggressive cause of action, fines, ability of minors to bring a cause of action and recover monetary damage, and encouraged misuse of the legal system, would have prohibited the use of public facilities for productions whether a minor was present or not. **RS 30745** included all three legs of the Miller Test to protect literary, artistic, political, or scientific components of productions. It allowed for a cause of action through the Attorney General's office, rather than a civil cause of action. It

did not prohibit the use of public facilities for adults for a variety of products. He asked to send **RS 30745** to print to put it in the public domain.

**MOTION:** **Senator Winder** moved to send **RS 30745** to print. **Senator Anthon** seconded the motion. The motion carried by **voice vote**.

**PASSED THE GAVEL:** Vice Chairman Bernt passed the gavel back to Chairman Guthrie.

**H 374**

**Relating to Abortion and to Provide that Certain Abortions and Attempts are not Criminal Abortions.** **Senator Lakey** presented this bill as the result of session-long discussions. Idaho's law prohibiting abortion became effective after the Court in Dobbs returned the full authority to regulate abortion to the states. When the law became effective, the federal government filed a challenge in the context of emergency rooms. On August 24, 2022, Judge Windmill issued a decision granting a preliminary injunction while the case was being litigated as to the application of the law only in the context of the emergency rooms situation governed under federal law, which was the Emergency Treatment and Labor Act (ETALA). The decision was based on the judge's interpretation of Idaho's abortion law. On January 1, 2023, the Idaho Supreme Court (ISC) issued its decision upholding Idaho's abortion laws over Planned Parenthood's challenge. The Idaho law conformed to Idaho's historic precedence regarding abortion laws in the state and Idaho's Constitution. The ISC interpreted and applied the language in Idaho's abortion law in its decision. The interpretation of Idaho was binding on the federal government as far as the application of Idaho law in that decision. It removed the interpretive basis of Judge Windmill's decision in the preliminary injunction. The federal case was pending and the reconsideration request filed by the State was undetermined. The discussions included review of the ISC decision and listened to concerns raised by the current law. The amendments were straightforward. **Senator Lakey** noted page 1 included additional language that was reflective of the intent and codified the findings of the ISC. Amendments included adding exceptions to the definition of abortion: 1) Removal of a dead or unborn child, 2) removal of an ectopic or molar pregnancy, and 3) treatment of a woman no longer pregnant. Those who argued that the definitions were included in abortion prohibition were incorrect. The Court noted the interpretation did not include those situations; it removed the trigger language. Changes were to the approach and exceptions related to the good faith medical judgement of the physician that the abortion was necessary to prevent the death of the mother, and to the rape and incest exceptions. The law provided the exceptions were affirmative defenses. In Judge Windmill's decision on the preliminary injunction, the affirmative defense approach was addressed. The ISC clarified the approach was lawful and constitutional. **Senator Lakey** acknowledged physicians' concerns about the affirmative defense approach versus a standard exception approach. This left the description of the exceptions as is, but changed it from an affirmative defense to a simple exception. There was a procedural difference between a standard exception and an affirmative defense, but it was not a practical difference. He felt concerns were addressed but things changed from a practical standpoint. It qualified that the rape and incest exception applied in the first trimester to make sure the claims were promptly raised. It specified that a copy of the police report or child protective services report be provided substantiating the rape or incest exception remained part of the confidential medical record. Current public records law would allow a victim of rape or incest to obtain a redacted report filed with agencies. The request could not interfere with a pending law enforcement investigation.

**Senator Wintrow** noted the definition for medical emergency was not used in this case. Why not use this definition in code versus treatment if a woman was dying. **Senator Lakey** explained the decision was to focus on the life of the mother versus a health exception. That was part of what the Court looked at in the Planned Parenthood case and it was historically Idaho's precedent, to focus on the life of the mother. **Senator Wintrow** understood it was a firm stance on attending to death versus overall health or long term health implications if there were complications. **Senator Lakey** repeated, the focus was on the life of the mother. **Senator Wintrow** pointed out in the rape exception, the time was reduced to one trimester. Regarding the sexual assault area, how did he reconcile a requirement for police reports in an abortion case, when reporting to police was exempted in the case of collecting sexual assault kit evident. The hospital was exempted from reporting to police to avoid further trauma to the victim. In the rape case, the victim was allowed medical treatment and evidence was collected and stored. **Senator Lakey** explained the difference was the context of abortion. It was not just the criminal prosecution, it was weighing the life of an unborn child in that context. He said the balance was the life of an unborn child/life of the mother, and health of the mother/health of the child. He reminded the discussion was about taking the life of an unborn child in this context.

**TESTIMONY:**

**Dr. Megan Kasper**, Obstetrician-Gynecologist (OBGYN), spoke in support of **H 374**. She said there were small changes in this bill that were worth noting. Removing the affirmative defense was a relief. Adding clear exceptions for miscarriages and ectopic pregnancies was beneficial for her as a doctor. It sent a clear message to Idaho doctors to say this was what we want you to do.

**Dr. Loren Colson**, Family Medicine Physician who practiced Obstetrics, opposed the bill. He did not feel the exceptions in the bill were usable. The phrase, "prevent the death of the mother" was not broad enough to allow for exceptions where the mother's health was at risk, such as, if continuing the pregnancy could result in infertility or other permanent bodily harm. He believed the narrow scope of the law would result in harm to a pregnant woman who could not obtain standard medical care due to a provider fearing imprisonment. He believed it would result in severe physician shortages in Idaho because OBGYNs would perceive Idaho was hostile towards doctors. He said the State's attempt to protect lives would lead to the loss of lives and cause worse health outcomes. He concluded that pregnancy was complicated and doctors did not need to worry about whether medical care provided would land them in prison because of the complex medical decision they had to make.

**Senator Wintrow** felt this law only codified the Court's ruling. She asked Dr. Colson about doctors leaving the state. **Dr. Colson** said physicians were not used to evidence based medical care being criminalized. He believed doctors feared providing medical care that might be construed as an abortion. **Senator Wintrow** asked about the range of conditions that might occur during a pregnancy. **Dr. Colson** testified that when the standard was to prevent the death of the mother, it became difficult because of the uncertainty of when a doctor should intervene. Regarding the exceptions, there was no comprehensive list.

**Senator Winder** referred to page 2, lines 13-14, and asked his medical opinion of the words "serious risk of substantial or irreversible impairment of a major bodily function." **Dr. Colson** said, from line 10, "medical emergency" was not the language used providing an exception. He stated medical emergency was not applicable to one of the circumstances covered as an exception in this law.

**Ken McClure**, Idaho Medical Association (IMA), urged support of the bill. A concern was the right medical care needed to go to the patient at the right time and place. Physicians were not trained to allow patients to knock on death's door before helping them. He stated conversations would continue into next year and he would appear with a better piece of legislation to address the ability and need of doctors to save lives. He said the focus was to help families have families and the IMA did not take a position in support of elective abortion. In the few cases where there were complications, doctors needed the certainty that they could treat without being charged with criminal conduct.

**Senator Wintrow** heard him reference legislation that seemed to allow treatment for the health of the mother that was not included in this bill. **Mr. McClure** stated there was legislation pending in the House of Representatives that gave better hope than this bill, but that one did not progress.

**Senator Toews** was interested in how big was this issue. He said Idaho Code § 39-261 required induced abortions to be reported. In the last 10 years, over 40 counties reported five induced abortions. Was that accurate or was it under reported. **Mr. McClure** doubted the accuracy of the data. There had been uncertainty about what was abortion and what was the management of a miscarriage, or the result of a complication in the pregnancy. In some cases, if the fetus died, extracting it was not an abortion. If a fetus was about to die and was extracted before the woman became septic, that was not reported as an abortion. There was no clarity about the report. **Senator Toews** asked if we needed more clarity. **Mr. McClure** stated the medical association did not struggle with the clarity in that statute as much as it struggled with the clarity about saving women's health and their lives without threat of jail.

**Bessie Yeley** testified this bill would change Idaho Code § 18-622 from criminal abortion to the Defense of Life Act. The abortion ban did not consider the life of a pregnant person in the attempt to clean up the destruction of Idaho's criminal abortion laws and the harm it imposed. Proponents of the bill acknowledged Idaho women were harmed by not having life saving acts through abortion care. It was disrespectful to the lives of Idahoans and was the bare minimum. Doctors said Idahoans were at risk and physicians were uncomfortable practicing medicine under threat. She listed medical conditions that could complicate pregnancies beyond the first trimester. No doctor should have to risk his license and jail to save a life.

**Colleen Shackelford**, Nurse Practitioners of Idaho (NPI), said she cared for over 2,000 patients and NPI represented over 1,700 nurse practitioners. She supported **H 374**, which amended current law to clarify definitions of criminal versus non-criminal abortion. The bill decriminalized the removal of an already dead baby, removal of an ectopic pregnancy or molar pregnancy, or treatment of a woman who was no longer pregnant. **Ms. Shackelford** said Idaho was ranked 50th in the nation for the number of primary care physicians per capita with 162 OBGYN physicians. Restrictive laws that criminalized safe, reasonable, and lifesaving medical practices would devastate the workforce and reduce access to care. She feared the threat of felony charges for practicing medicine within her scope and training.

**Dr. Lauren Miller**, a maternal fetal medicine doctor who specialized in high risk pregnancies, offered limited support of **H 265**. She stated health was never guaranteed and pregnancy was inherently dangerous. The amendments proposed were limited and did not allow exceptions to preserve the health of the pregnant patient, to treat life threatening complications, or to allow for palliative termination. Exceptions in the bill removed the affirmative defense, but the exception only allowed the doctor to act to prevent the death of the mother. How close to death did a patient need to be before the doctor could safely act.

**Senator Wintrow** asked about a range of complications. **Dr. Miller** said she struggled with that too. How long did she wait before emptying an infected uterus. **Senator Wintrow** stated the Committee was codifying what existed in law since August 2022. She wondered about doctor retention or recruitment with the codifying. **Dr. Miller** doubted physicians would be comfortable coming to this state because of the law.

**Senator Toews** said before Roe v Wade, the language was consistent for 110 years. The exception was when the physician deemed it necessary to produce the miscarriage of a woman to save her life. In 1947 the law was codified to say unless the same was necessary to preserve her life. How did physicians function during that time period as opposed to now. **Dr. Miller** stated medicine changed and interventions today were greater than in the 1900s. There was more doctors could do to save lives before they got incredibly sick.

**Senator Bernt** suggested doctors were okay following the laws, and coming and working in Idaho before but you say they are not now. Why was it okay then and a struggle now. **Dr. Miller** did not know the consequences for terminating a pregnancy during the earlier time period. She stated a felony of two to five years today was significant if a doctor was second guessed. Today's climate was different with all the litigation and vigilantism.

**Mistie DelliCarpini-Tolman**, State Director of Planned Parent Alliance Advocated Idaho, opposed the bill. She said it masqueraded as expanding exceptions to the State's criminal abortion ban, but it enshrined restrictions to abortion care. Exceptions were insufficient in the bill related to rape and incest were arbitrary, medically unnecessary, and cruel restriction that would re-traumatize victims. She thought it unreasonable to require filing a police report, meeting a time limit, or risking safety and privacy to justify receiving basic reproductive health care. **Ms. Tolman** stated the bill did not allow abortion care to protect a person's health. Providers could only intervene if the situation was life threatening, which was vague, impracticable, and would prevent giving legal, safe care for fear of criminalization and lawsuits. She concluded the bill only amended the criminal abortion ban, leaving inconsistent exemptions. Government should not be in the business of policing why one person deserved health care and another did not.

**Dr. Emily Corrigan**, OBGYN who specialized in emergency and inpatient management of complicated pregnancies, opposed this bill. She claimed that since Roe v Wade was overturned, numerous patients had to seek care at multiple hospitals to find a physician who would treat them. She asked that doctors be allowed to do their jobs. She claimed to hear weekly about OBGYNs leaving the state because of the abortion restrictions. She acknowledge the bill was slightly better than the current limitations. The language to prevent death was not broad enough.

**Jennifer Beazer**, a health care provider in genetic clinics, provided the list of genetic abnormalities that could occur during pregnancies was extensive. She agreed with previous testimony by doctors and talked about the options doctors offered to patients in some situations. She wanted to see amendments to address rape and incest victims that did not require a police report. She felt a protection order sufficed in corroborating rape or incest. She concluded the physical and mental health of the mother was as critical as saving her life.

**David Ripley**, Executive Director of Idaho Chooses Life, said his organization and the IMA dialogued about the trigger law. Regarding exceptions, he believed the

life of the mother meant life threatening conditions that required medical treatment. Language that fully expressed that idea was illusive to comfort everyone. He addressed the concerns raised about protecting a mother's health. He noted provisions in subsection 4 that clearly authorized physicians to treat the mother, even if treatment compromised the unborn baby. He asked for support of the legislation.

**Senator Wintrow** was at a loss as to why "protect the health of the mother" could not be included in the bill. **Mr. Ripley** explained the health of the mother was entirely different than the life of the mother. He explained the spectrum could be between headaches and death. Somewhere on the range were numerous health conditions that might or might not be life threatening. Considering this involved a separate life (the unborn baby), finding a way to express that in code to preserve pro-life values, and consider the doctors who had to participate in that decision, was challenging. **Senator Wintrow** wondered why he did not consult with doctors for help with the continuum. She claimed 20 or more percent of pregnancies resulted in miscarriage. **Mr. Ripley** repeated he met with IMA to identify acceptable language. During conversations, the board of the IMA stated it was almost never the case that the required therapy for any health condition a woman faced, was an abortion.

**Cindy Thorngren**, President of the Southwest Chapter of the National Organization for Women, stated one in 100 women used to die of pregnancy in the 1700s and 1800s. A concern she expressed was lack of exceptions for minors who survived rape or incest, and the need for police reports. Also, the broadness of the health of the mother. She questioned why the legislature was getting involved between a mother and her doctor. She concluded women's lives were still in danger.

**Senator Lakey** closed by acknowledging the support for the clarifications and some objections to the bill. He recognized the need for more discussion of a complex issue. He emphasized the exceptions for ectopic and molar pregnancies and removal of a dead, unborn child, codified what the Court concluded. The Court was clear in its decision that exceptions identified by Idaho were usable and not vague. He commented on the need for an immediacy standard. The exception listed was a good faith, subjective medical judgement of the doctor, not objective. Putting a time frame would limit that exception rather than improve it. Life of the unborn and life of the mother was the focus.

**MOTION:** **Senator Anthon** moved to send **H 374** to the floor with a **do pass** recommendation. **Senator Toews** seconded the motion.

**DISCUSSION:** **Senator Wintrow** declared she would not support the bill. She argued the law codified the Court ruling from August 2022. She stated more medical practices were closing because Idaho presented a hostile working environment. The small codifications were not helpful, according to testimony. She stated the bill failed to fix anything and legislature needed to get out of the medical business and let physicians practice medicine. **Senator Wintrow** claimed thousands of things that could go wrong in a pregnancy and the delineation of only two would result in harm and death. She repeated, physicians reported the good faith effort was not enough. She failed to see the rape and incest exception as real exceptions because in Idaho Code § 18-8807 those were civil causes of action, bounty hunter law, this bill doubled down on that, and doctors could still be sued. **Senator Wintrow** stated the bill lacked compassion for victims of rape and incest, who did not know they were pregnant in the first trimester. She wanted the phrase "life threatening" added.

**Senator Lee** acknowledged there was no perfect legislation. She appreciated the efforts and hard negotiations to bring forth the legislation. She stated she would take this, whether or not it was codifying the Court's ruling, and that it was important to her to add the clarifications. She never intended to support legislation that said it

could not help a mother who had ectopic pregnancies. She recognized there were things to continue working on, and she would support moving this forward to ensure protection of a mother's life.

**Senator Guthrie** thanked the medical professionals who testified. He said these bills did not go far enough and he wanted to do more to protect the health and lives of mothers. He vowed to build on this and refocus respect for the medical profession. He recognized the cost and efforts of doctors who trained for their professions.

**Senator Anthon** explained the Committee was faced with a piece of legislation requiring a yes or no vote. Changes and more protections were desirable, but this legislation was what was before it. No one wanted someone to suffer and face difficult decisions. Senators were trying to craft through the political process, a piece of legislation that helped. He believed this legislation helped and he would support it.

**Senator Wintrow** perceived a lack of a compassionate response. Her difficulty was reconciling her body, her life, her self-determination, her experiences, with interferences by the State. She claimed the State chose to codify a specific religion and she did not see the discussion as just black and white. For her, this hamstrung physicians and was a harmful policy.

**Senator Winder** thanked those involved in finalizing the legislation. He hoped for more clarity, but this legislation required a vote. It was a step in the right direction to clarify for the public and physicians what the intent of the legislature was to treat women under the circumstances described. He imagined future changes, but this was helpful for today.

**VOICE VOTE:** The motion carried by **voice vote**. **Senator Wintrow** requested to be recorded as voting no.

**Senators Wintrow** and **Lee** recognized Chairman Guthrie's leadership and dedication to balancing the issues before this Committee.

**ADJOURNED:** There being no further business at this time, **Chairman Guthrie** adjourned the meeting at 9:19 a.m.

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Senator Guthrie  
Chair

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Joyce Brewer  
Secretary