

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 230

BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO INDECENT SEXUAL EXHIBITIONS; AMENDING TITLE 6, IDAHO CODE, BY THE ADDITION OF A NEW CHAPTER 39, TITLE 6, IDAHO CODE, TO PROVIDE LEGISLATIVE FINDINGS AND TO ESTABLISH PROVISIONS REGARDING A CIVIL ACTION; AND DECLARING AN EMERGENCY AND PROVIDING AN EFFECTIVE DATE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Title 6, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW CHAPTER, to be known and designated as Chapter 39, Title 6, Idaho Code, and to read as follows:

CHAPTER 39

INDECENT SEXUAL EXHIBITIONS -- CIVIL ACTION

6-3901. LEGISLATIVE FINDINGS. The legislature finds and declares that:

(1) The free speech clause of the first amendment to the constitution of the United States provides that "Congress shall make no law ... abridging the freedom of speech," and the supreme court of the United States has applied the same to state governments through the fourteenth amendment.

(2) In early American free speech jurisprudence, the scope of free speech protections was limited only to the right of every individual to "freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right," as explained by early American legal theorist James Kent in his commentaries on American law.

(3) Consistent with this natural right of every man to speak freely, section 9, article I of the constitution of the state of Idaho guarantees that "every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty."

(4) Early American free speech jurisprudence also recognized, as associate justice Joseph Story explained in his commentaries on the constitution of the United States, that "an absolute right to speak, or write, or print, whatever he might please, without any responsibility ... is a supposition too wild to be indulged by any rational man."

(5) In landmark cases like *Stromberg v. People of State of California* (1931) and *U.S. v. O'Brien* (1968), the supreme court of the United States later expanded the scope of free speech protections to include conduct that is intended to express a message.

(6) The supreme court of the United States explained in *Young v. American Mini Theatres, Inc.* (1976) that "broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached."

1 (7) The supreme court of the United States affirmed in *Rumsfeld v.*
2 *Foundation for Academic and Institutional Rights, Inc.* (2006) that first
3 amendment protection for conduct extends "only to conduct that is inherently
4 expressive."

5 (8) The supreme court of the United States affirmed in *City of Dallas v.*
6 *Stanglin* (1989) that "it is possible to find some kernel of expression in al-
7 most every activity a person undertakes ... but such a kernel is not suffi-
8 cient to bring the activity within the protection of the First Amendment."

9 (9) Sexualized conduct per se is not entitled to first amendment pro-
10 tection, as provided in *Edge v. City of Everett*, 929 F.3d 657 (9th Cir.
11 2019).

12 (10) The supreme court of the United States explained in *Texas v. John-*
13 *son* (1989) that although expressive conduct may deserve some free speech
14 protection, "the government generally has a freer hand in restricting ex-
15 pressive conduct than it has in restricting the written or spoken word."

16 (11) Even when sexualized conduct is inherently expressive, the supreme
17 court of the United States has repeatedly found that sexualized expressive
18 conduct is more regulable under the first amendment to the constitution of
19 the United States than other speech, especially when such a restriction cre-
20 ates only a de minimis intrusion on expression, as provided in *City of Erie v.*
21 *Pap's A.M.*, 529 U.S. 277, 279 (2000).

22 (12) Because there is a substantial and compelling government interest
23 in protecting the physical and psychological well-being of minors, sexual-
24 ized expressive conduct is even more regulable when there is a reasonable
25 risk that children will be in the audience, as the supreme court of the United
26 States has repeatedly recognized.

27 (13) As the supreme court of the United States acknowledged in *Reno v.*
28 *American Civil Liberties Union* (1997), "There is a compelling interest in
29 protecting the physical and psychological well-being of minors which ex-
30 tended to shielding them from indecent messages that are not obscene by adult
31 standards."

32 (14) Sexualized expressive conduct is even more regulable when children
33 are exposed through "broadcasts ... public displays, unsolicited mailings
34 and other means of expression" that the observing child "has no meaningful
35 opportunity to avoid," as explained by the supreme court of the United States
36 in *Sable v. F.C.C.* (1989).

37 (15) The supreme court of the United States concluded in *F.C.C. v. Paci-*
38 *fica Foundation* (1978) that indecent content that is "patently offensive" or
39 "vulgar, offensive, and shocking ... is not entitled to absolute constitu-
40 tional protection under all circumstances."

41 (16) The *Pacifica* court found that indecency "has a separate meaning"
42 from obscenity, in that obscenity requires prurient appeal but that "pruri-
43 ent appeal" is not an "essential component of indecent language."

44 (17) The *Pacifica* court treated federal communications commission reg-
45 ulations prohibiting indecent broadcast monologues "at times of the day when
46 there is a reasonable risk that children may be in the audience" as a consti-
47 tutionally permissible example of a time, place, and manner regulation.

48 (18) The *Pacifica* court affirmed that through time, place, and manner
49 regulations, indecent "expression may be withheld from the young without re-
50 stricting the expression at its source."

1 (19) Time, place, and manner regulations on indecent live shows, exhi-
 2 bitions, or performances that both involve sexual conduct and are patently
 3 offensive to an average person applying contemporary community standards in
 4 the adult community as a whole with respect to what is suitable for minors are
 5 constitutionally permissible when there is a reasonable risk that children
 6 may be in the audience and alternative avenues of communication still exist.

7 (20) The supreme court of the United States concluded in *City of Ren-*
 8 *ton v. Playtime Theatres, Inc.* (1986) that a municipal zoning ordinance re-
 9 stricting the location of adult movie theaters should be "properly analyzed
 10 as a form of time, place, and manner regulation."

11 (21) The *Renton* court concluded that the municipal zoning ordinance,
 12 despite its content-based restriction on adult movies, should be treated as
 13 content-neutral because it was "aimed not at the content of the films shown
 14 at adult motion picture theatres, but rather at the secondary effects of such
 15 theaters on the surrounding community."

16 (22) The *Renton* court upheld the municipal zoning ordinance as consti-
 17 tutionally permissible because it "serve[d] a substantial governmental in-
 18 terest and allow[ed] for reasonable alternative avenues of communication."

19 (23) Sexually explicit shows, exhibitions, or performances when chil-
 20 dren are present, like material harmful to minors, are a "contributing fac-
 21 tor to crime, to juvenile crime, and also a basic factor in impairing the
 22 ethical and moral development of our youth," as detailed in section 18-1513,
 23 Idaho Code.

24 (24) Sexually explicit shows, exhibitions, or performances when chil-
 25 dren are present, like when children are exposed to pornographic materials,
 26 are correlated with a number of social problems, including but not limited
 27 to juvenile delinquency, sexual violence, sexual deviancy, risky and unsafe
 28 sexual behavior, and impaired moral and ethical development.

29 (25) These negative secondary effects would be combated by a time,
 30 place, and manner regulation on live shows, exhibitions, or performances
 31 that both involve sexual conduct and are patently offensive to an average
 32 person applying contemporary community standards in the adult community as a
 33 whole with respect to what is suitable for minors.

34 6-3902. CIVIL ACTION. (1) Any person or institution that knowingly or-
 35 ganizes, hosts, or performs in a show, exhibition, or performance by a live
 36 person before a live audience must take reasonable steps to restrict the ac-
 37 cess of minors if:

38 (a) The person or institution has reason to believe that minors are
 39 likely to be present;

40 (b) The show, exhibition, or performance involves live persons engaged
 41 in sexual conduct; and

42 (c) The show, exhibition, or performance is patently offensive to an
 43 average person applying contemporary community standards in the adult
 44 community as a whole with respect to what is suitable for minors.

45 (2) (a) Any minor who is exposed to sexual conduct as a result of a vi-
 46 olation of subsection (1) of this section shall have a private cause of
 47 action against the person or institution that failed to take reasonable
 48 steps to restrict the access of minors.

1 (b) Any civil action arising under this section shall be commenced ac-
2 cording to the provisions of section 5-230, Idaho Code.

3 (c) Any minor who prevails in an action brought pursuant to this sec-
4 tion may recover five thousand dollars (\$5,000) in statutory damages
5 for each violation of this section. The minor may also recover monetary
6 damages from the defendant for all psychological, emotional, economic,
7 and physical harm suffered.

8 (d) Any minor who prevails in an action brought pursuant to this section
9 is entitled to recover reasonable attorney's fees and costs from the de-
10 fendant.

11 (e) It shall be an affirmative defense to an action brought pursuant to
12 the provisions of this section when:

13 (i) The defendant is a host if such host is able to produce a
14 legally enforceable contract signed by the event organizers, per-
15 formers, or an authorized agent working on behalf of the event
16 organizers or performers when such contract stipulates that per-
17 formers at the event shall not engage in an exhibition, show, or
18 performance that violates the requirements of subsection (1) of
19 this section while using the facilities provided by the host;

20 (ii) The parent or legal guardian of a minor fourteen (14) years
21 of age or older accompanies such minor to a ticketed show, exhi-
22 bition, or performance or has provided prior written consent for
23 such minor to attend a ticketed show, exhibition, or performance
24 in the company of a designated adult; or

25 (iii) The defendant had reasonable cause to believe that the minor
26 involved was eighteen (18) years of age or older, or such minor
27 exhibited to the defendant a draft card, driver's license, birth
28 certificate, or other official or apparently official document
29 purporting to establish that the minor was eighteen (18) years of
30 age or older.

31 (f) It shall not be a defense to an action brought pursuant to this
32 section that the minor was accompanied by the minor's parent or legal
33 guardian, except as provided in paragraph (e) (ii) of this subsection.

34 (3) When either the attorney general or the county prosecuting attor-
35 ney for the jurisdiction has reason to believe that any person or institution
36 is violating, has violated, or is about to violate the requirements of sub-
37 section (1) of this section, the attorney general or such county prosecuting
38 attorney shall have a cause of action for injunctive relief. The injunction
39 shall be sufficient to prevent the defendant from violating the requirements
40 of this section.

41 (4) For purposes of this section:

42 (a) "Host" means to knowingly provide the facilities for a show, ex-
43 hibition, or performance involving live persons engaged in sexual con-
44 duct.

45 (b) "Minor" means any person less than eighteen (18) years of age.

46 (c) "Organize" means to knowingly participate in the planning for a
47 show, exhibition, or performance involving live persons engaged in sex-
48 ual conduct.

49 (d) (i) "Sexual conduct" means:

1 1. Acts, whether actual or simulated, of masturbation,
2 sexual intercourse, or physical contact with a person's un-
3 clothed genitals or pubic area;

4 2. Sexually explicit depictions of acts described in sub-
5 paragraph (i)1. of this paragraph; or

6 3. Sexually provocative dances or gestures performed with
7 accessories that exaggerate male or female primary or sec-
8 ondary sexual characteristics.

9 (ii) "Sexual conduct" shall not include dances or gestures per-
10 formed by an athletic, cheer, or dance team maintained or spon-
11 sored by a secondary school or an institution of higher education,
12 provided that the dances or gestures are performed in association
13 with or in conjunction with an interscholastic, intercollegiate,
14 intramural, or club athletic event featuring teams that are spon-
15 sored by the secondary school or the institution of higher educa-
16 tion.

17 (5) The provisions of this section are hereby declared to be severable
18 and if any provision of this section or the application of such provision to
19 any person or circumstance is declared invalid for any reason, such declara-
20 tion shall not affect the validity of the remaining portions of this section.

21 SECTION 2. An emergency existing therefor, which emergency is hereby
22 declared to exist, this act shall be in full force and effect thirty days fol-
23 lowing signature by the Governor.