

# Ensuring Access to Women's Healthcare in Idaho

## Idaho Abortion Statutes

Idaho's current laws ban nearly all abortions except under a narrow set of circumstances. Unfortunately, the language used in the two principal statutes, the "total abortion ban" and the "fetal heartbeat" bill, also outlaws some medically necessary treatments for pregnancy complications in women who want to have children. It is understood that this may not be the outcome the Idaho Legislature intended but has since become a very troubling, if unintended, consequence.

### **Patient Safety and Access to Care**

The current situation is harming access to healthcare for women with pregnancy complications or other serious health conditions that are complicated by pregnancy. This likely will cause some women to lose the ability to have children, to suffer serious health conditions that are medically treatable but not legally treatable, or worse, cause Idaho's maternal mortality rates to worsen. Right now, Idaho women with pregnancy complications are experiencing lack of care or delays in care that endangers their lives, health, and future ability to have children. These are women who want to begin or grow their families but have received a devastating diagnosis such as the following (among others):

- Ectopic or molar pregnancies, pregnancies that can never result in the birth of a child
- Incomplete miscarriages that, if not treated quickly, can cause a woman to lose her ability to have children or suffer serious lifelong health consequences
- Premature rupture of membranes that also cannot result in the birth of a child
- Maternal diagnoses of cancer, preeclampsia, heart failure, or other very serious medical conditions, many of which can become life threatening if left untreated
- Lethal fetal diagnoses inconsistent with life outside the womb, conditions in which the child will die before, at, or shortly after birth

### **Troubling Legal Provisions**

The law constructs "exceptions" to the abortion ban (preventing the death of the mother, rape and incest) that really aren't exceptions but are affirmative defenses physicians can use in court to defend themselves after they have been charged with a crime. This puts the burden of proof on physicians and takes away the normal legal protection of innocence until proven guilty. This is a major driver of physician hesitation about taking decisive action to provide medically necessary care when needed.

In addition, another provision of Idaho statutes allows bounty-style civil lawsuits against physicians for performing pregnancy terminations, including those done to preserve the health or fertility of the mother. Now that most abortions are illegal in Idaho, a civil lawsuit provision is duplicative and unnecessarily punitive. These layers of potential legal jeopardy cause physicians to be very cautious for fear of being charged with a crime or sued in civil court for damages. The result is that Idaho women may experience delays or lack of access to medically necessary care.

Another troubling provision is the requirement that a police report be provided to a physician by a woman or girl who seeks to terminate a pregnancy caused by rape or incest. First, police reports typically are not available in time for the procedure to be performed. More importantly, it's widely known that sexual assault crimes largely go unreported, since they are often perpetrated by someone in a position of power over the victim in rape cases, or by a family member in incest cases. A sworn victim

statement that the pregnancy was caused by rape or incest should be sufficient. That statement is admissible in court to prove the fact of rape or incest. Falsely swearing under oath is a crime and should be sufficient to ensure the truth of these statements.

### Court Decisions

The US District Court and the Idaho Supreme Court have provided limited relief for some of these circumstances, but unfortunately those decisions do not do enough to assure appropriate and timely care for Idaho women with compromised health.

The Supreme Court has said that the statutes do not apply to ectopic pregnancies and in some cases may not apply to management of some miscarriages, but it does nothing to allow evidence-based care for women with other pregnancy complications or seriously compromised health conditions. Nor does it assure doctors that they won't be subjected to prosecution for the decisions they make, since they still are presumed guilty until they prove their innocence.

Similarly, the US District Court, in a decision that is not yet final, has said that Federal law preempts the application of the Idaho abortion bans in some emergency circumstances covered by EMTALA. That is helpful but it applies only in cases in which a patient seeks care at the emergency room in a hospital, not elsewhere, and doesn't apply until a woman's life or health is in danger. In other words, it must be an active emergency. A doctor cannot rely on the decision to help the woman until her condition becomes so serious it is an emergency, and then only in a hospital emergency room. Delayed care becomes more complicated care and the outcomes are less certain. The best care is given when it can prevent emergencies, not treat them.

### Straightforward Solutions

Idaho's abortion laws should provide clear exceptions for evidence-based, medically necessary terminations that meet the community standard of care in the following circumstances:

- Preserve the life of the mother
- Preserve the health of the mother, including her ability to have children in the future
- Pregnancy caused by rape or incest
- Lethal fetal anomalies inconsistent with life outside the womb