

SUBJECT: Relating to abortion at or after 20 weeks post-fertilization

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 7 ayes — Cook, Craddick, Frullo, Harless, Hilderbran, Huberty, Smithee
1 nay — Farrar
5 absent — Giddings, Geren, Menéndez, Oliveira, Sylvester Turner

WITNESSES: For — Michelle Balon, (*Registered, but did not testify*: Jennifer Allmon and Jeffery Patterson, The Texas Catholic Conference of Bishops; Veronica Arnold, Elizabeth Graham, Emily Horne, and John Seago, Texas Right to Life; Erin Blauvelt, Rachana Chhin, Beverly Nuckols, and Joe Pojman, Texas Alliance for Life; Elizabeth Davidson, Women's Wellness Coalition of Texas; Carol Everett, Women's Wellness Coalition; Ferrell Foster, Baptist General Convention of Texas; MerryLynn Gerstenschlager, Texas Eagle Forum; Ann Hettinger and Cecilia Wood, Concerned Women for America of Texas; Jonathan Saenz, Texas Values; Kyleen Wright, Texans for Life; and 16 individuals)

Against — Anne Budroni, Planned Parenthood; , Susan Pintchovski, National Council of Jewish Women and Texas State Policy Advocacy Network; Leslie Tisdale, University Democrats; and 36 individuals; (*Registered, but did not testify*: Tanene Allison, Texas Democratic Party; Bryant Andrade, GLBTQ of UTSA; Hannah Beck, National Organization for Women at UTSA; Terri Burke, American Civil Liberties Union (ACLU) of Texas; Elizabeth Burr, Capital Area Democratic Women; Heather Busby, Melissa Nicholson and Blake Rocap, Naral Pro-Choice Texas; Carolyn Calabrese and Laura Davila, Feminist Austin Networking Group; Matthew Chandler, The Young Democrats at UTSA; Alexander Clark, Texas Young Democrats; Susan Clark, Suburban Southwest Texas Democratic Women; Stacey Edwards, Bluebonnet Brigade; Mounir Elharim, Institute for Truth; Marcia Fowler, Seeing Red; Chuck Freeman, Texas Unitarian Universalist Justice Ministry; Amy Hagstrom Miller and Samantha Riemer, Whole Woman's Health; Suzanne Hemphill and Bijal Patel, The Lilith Fund; Amanda Hernandez, Spring Democrats and Pro-Choice Houston; Tina Hester, Jane's Due Process; Lisa Hollier, Texas District of the American Congress of Obstetricians and Gynecologists;

Harold Huff, Austin County Democratic Party; Jessica Klier, Austin Women's Health Center; Colleen Loper, Annie's List; Geraldine Mongold, Faith Action for Women in Need; Peggy Morton, First Unitarian Universalist Church of Austin Social Action Committee; Cindy Noland, Faith Action for Women in Need and Catholics for Choice; Theresa Norman, Planned Parenthood; Frances Northcutt, Texas State National Organization for Women; Judy Parken, League of Women Voters of Texas; Fredericka Phillips, Suburban Southwest Texas Democratic Women; Karen Rankin, League of Women Voters; Cathryn Snyder, FANG; Jan Soifer, Travis County Democratic Party; and about 330 individuals)

On — Zenobia Joseph; (*Registered, but did not testify*: Ellen Cooper, Department of State Health Services)

BACKGROUND: Health and Safety Code, sec. 170.002 prohibits the performance of an abortion on a woman who is pregnant with a viable unborn child during the third trimester unless, in the physician's best medical judgment:

- it is necessary to prevent the woman's death or a substantial risk of serious impairment to her physical or mental health; or
- the fetus has a severe and irreversible abnormality identified by reliable diagnostic procedures.

DIGEST: CSHB 16 would add subch. C, the Preborn Pain Act, to Health and Safety Code, ch. 171. The subchapter would require a physician, prior to performing an abortion, to determine the probable "post-fertilization age," defined as the age of the unborn child calculated from the fusion of a human spermatozoon with a human ovum. An abortion could not be performed or induced if a physician determined that the probable post-fertilization age of the unborn child was 20 weeks or greater.

The ban would not apply to an abortion required to save a woman's life or to prevent her from suffering an irreversible physical impairment of a major bodily function, other than a psychological condition. The prohibition also would not apply to an abortion performed on an unborn child who had a severe fetal abnormality. A physician performing a post-20-week abortion would be required to terminate the pregnancy in the manner that, in the physician's reasonable medical judgment, provided the best opportunity for the unborn child to survive.

In a civil or criminal proceeding involving a prohibited abortion under the bill, the identity of the woman would not be subject to public disclosure unless the woman consented or a court found, following a hearing, that disclosure was essential to the administration of justice. The bill would allow court records to be sealed and courtrooms to be closed to prevent the disclosure. It would not authorize the prosecution of a woman on whom an abortion was performed or attempted in violation of the Preborn Pain Act.

The bill would amend the Occupations Code to make it a prohibited practice for a physician to perform or induce an abortion in violation of the 20-week ban. The bill would exempt physicians who violated the Preborn Pain Act from criminal penalties provided under certain provisions of the Occupations Code.

Reporting. CSHB 16 would include among the annual reporting requirements by facilities for each abortion performed the probable post-fertilization age of the unborn child rather than the period of gestation.

Severability. The bill would include language to sever any provision declared temporarily or permanently restrained or enjoined by judicial order from all other provisions of Texas law regulating or restricting abortions, allowing provisions not subject to a judicial order to continue to be enforced.

Findings. CSHB 16 would adopt legislative findings that substantial medical evidence recognizes that an unborn child is capable of experiencing pain by not later than 20 weeks after fertilization and the state has a compelling interest in protecting the lives those unborn children. The findings would state that restricting elective abortions at or later than 20 weeks post-fertilization does not impose an undue burden because the woman has had adequate time to decide to have an abortion.

Effective date. The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect on the 91st day after the last day of the first called session (September 24, 2013, if both houses adjourn sine die on June 25).

SUPPORTERS
SAY:

CSHB 16 would recognize advances in knowledge of fetal development that demonstrate unborn children can feel pain at 20 weeks post fertilization and would prohibit abortions at that stage.

The bill would recognize the state's compelling interest in protecting an unborn child from pain. There is scientific evidence suggesting that a preborn child is capable of feeling pain at 20 weeks post-fertilization because neuroreceptors are functioning.

According to a recent study by the University of Arkansas for Medical Sciences, fetuses undergoing intrauterine invasive procedures were reported to show coordinated responses signaling the avoidance of tissue injury, responses that indicate a response to pain. Sonogram pictures show babies in utero withdrawing from a probe as early as 12 weeks. In addition, doctors sometimes use anesthesia when performing procedures on a fetus in recognition of possible pain.

The 2005 article in the Journal of the American Medical Association cited by opponents is out of date and does not reflect numerous studies done since that time providing evidence that a five-month-old baby in the womb does feel pain.

While banning most abortions after 20 weeks, the bill would make appropriate exceptions for pregnancies that threatened the mother's life or major bodily function and when a severe fetal abnormality was present. It would not be appropriate to make exceptions based on subjective, and possibly inaccurate, evaluations of a pregnant woman's mental state, which could be influenced by hormonal mood swings that many women experience at various times during pregnancy.

The bill would not affect the ability of a woman who became pregnant due to rape or incest from having an abortion. In such unfortunate cases, CSHB 16 would provide sufficient time for a woman to receive an abortion if she so chose.

**OPPONENTS
SAY:**

CSHB 16 would use the disputed claim that fetuses at 20 weeks of development can feel pain to deny women their constitutional right to an abortion.

The U.S. Supreme Court legalized abortion nationwide in 1973 and allowed states to place restrictions on the procedure from the time of viability. CSHB 16 would be unconstitutional because it would ban abortions of fetuses before they were viable outside the womb based on an unproven claim that a 20-week-old fetus can feel pain. The authors of a 2005 article in the Journal of the American Medical Association reviewed

research into fetal development and concluded that the fetus probably does not feel pain before 29 or 30 weeks.

The bill would be subject to constitutional challenges similar to one that resulted in a federal appeals court in May 2013 striking down an Arizona law that bans abortions from 20 weeks' gestation. The court said it was "unalterably clear" under U.S. Supreme Court rulings that women have a right to terminate pregnancies until a fetus is viable. Courts are weighing challenges to similar laws in other states.

Fetal abnormalities often are not detected until a woman is at least 20 weeks into her pregnancy. CSHB 16 could place barriers to an abortion under those circumstances by removing a doctor's discretion to perform an abortion after this deadline.

Unlike Texas law on third-trimester abortions, the bill would not allow an exception based on the pregnant woman's mental health status. It also would not allow exceptions for pregnancies resulting from rape and incest.

NOTES:

The committee substitute differs from the bill as filed in that the committee substitute would refer to "severe fetal abnormality," rather than "profound and irremediable congenital anomaly."

Two other abortion-related bills are on today's Major State Calendar. CSHB 60 by Laubenberg would enact the Preborn Pain Act provisions of CSHB 16 and add new requirements for physicians, abortion facilities, and drug-induced abortions. CSSB 5 by Hegar is the Senate companion to CSHB 60.