

BILL ANALYSIS

Senate Research Center

C.S.S.B. 13
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Health & Human Services
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Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

At 20 weeks post-fertilization, scientific evidence suggests that all the neuro-receptors for pain are in place and functioning and preborn children are capable of feeling pain. Myriad peer-reviewed studies have found anatomical, behavioral, and physiological evidence that the developing preborn child is capable of experiencing pain by 20 weeks post-fertilization. A 2007 study by the Department of Obstetrics and Gynecology at the University of Arkansas for Medical Sciences states that “fetuses undergoing intrauterine invasive procedures, definitely illustrative of pain signaling, were reported to show coordinated responses signaling the avoidance of tissue injury.” Pre-born pain laws similar to this legislation have been passed in other states.

C.S.S.B. 13 establishes a separate and independent compelling state interest in protecting the lives of the unborn children from the state at which the medical evidence indicates they are capable of feeling pain.

C.S.S.B. 13 amends Chapter 171 of the Health and Safety Code to prohibit abortions at or after 20 weeks post-fertilization unless there is a significant physical threat to the life of the mother.

C.S.S.B. 13 amends current law relating to abortion at or after 20 weeks post-fertilization.

[**Note:** While the statutory reference in this bill is to the Texas Department of Health (TDH), the following amendments affect the Department of State Health Services, as the successor agency to TDH.]

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. (a) Authorizes that this Act be cited as the Preborn Pain Act.

(b) Provides that the legislature finds that substantial medical evidence recognizes that an unborn child is capable of experiencing pain by not later than 20 weeks after fertilization; the state has a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that these children are capable of feeling pain; the compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that an unborn child is capable of feeling pain is intended to be separate from and independent of the compelling state interest in protecting the lives of unborn children from the stage of viability, and neither state interest is intended to replace the other; and restricting elective abortions at or later than 20 weeks post-fertilization, as provided by this Act, does not impose an undue burden or a substantial obstacle on a woman's ability to have an abortion because the woman has adequate time to decide whether to have an abortion in the first 20 weeks after fertilization; and this Act does not apply to abortions that are necessary to avert the death or substantial and irreversible physical impairment of a major bodily function of the pregnant woman.

(c) Provides that the legislature intends that every application of this statute to every individual woman is required to be severable from each other. Provides that in the unexpected event that the application of this statute is found to impose an impermissible undue burden on any pregnant woman or group of pregnant women, the application of the statute to those women is required to be severed from the remaining applications of the statute that do not impose an undue burden, and those remaining applications are required to remain in force and unaffected, consistent with Section 7 of this Act.

SECTION 2. Amends Chapter 171, Health and Safety Code, by adding Subchapter C, as follows:

SUBCHAPTER C. ABORTION PROHIBITED AT OR AFTER 20 WEEKS POST-FERTILIZATION

Sec. 171.041. DEFINITIONS. Defines "post-fertilization age" and "severe fetal abnormality" in this subchapter.

Sec. 171.042. DETERMINATION OF POST-FERTILIZATION AGE REQUIRED. Prohibits a physician, except as otherwise provided by Section 171.045, from performing or inducing or attempting to perform or induce an abortion without, prior to the procedure:

- (1) making a determination of the probable post-fertilization age of the unborn child; or
- (2) possessing and relying on a determination of the probable post-fertilization age of the unborn child made by another physician.

Sec. 171.043. ABORTION OF UNBORN CHILD OF 20 OR MORE WEEKS POST-FERTILIZATION AGE PROHIBITED. Prohibits a person, except as otherwise provided by Section 171.045, from performing or inducing or attempting to perform or induce an abortion on a woman if it has been determined, by the physician performing, inducing, or attempting to perform or induce the abortion or by another physician on whose determination that physician relies, that the probable post-fertilization age of the unborn child is 20 or more weeks.

Sec. 171.044. METHOD OF ABORTION. (a) Provides that this section applies only to an abortion authorized under Section 171.045(a)(1) or (2) in which:

- (1) the probable post-fertilization age of the unborn child is 20 or more weeks; or
- (2) the probable post-fertilization age of the unborn child has not been determined but could reasonably be 20 or more weeks.

(b) Requires a physician performing an abortion under Subsection (a), except as otherwise provided by Section 171.045(a)(3), to terminate the pregnancy in the manner that, in the physician's reasonable medical judgment, provides the best opportunity for the unborn child to survive.

Sec. 171.045. EXCEPTIONS. (a) Provides that the prohibitions and requirements under Sections 171.042, 171.043, and 171.044 do not apply to an abortion performed if there exists a condition that, in the physician's reasonable medical judgment, so complicates the medical condition of the woman that, to avert the woman's death or a serious risk of substantial and irreversible physical impairment of a major bodily function, other than a psychological condition, it necessitates, as applicable:

- (1) the immediate abortion of her pregnancy without the delay necessary to determine the probable post-fertilization age of the unborn child;
- (2) the abortion of her pregnancy even though the post-fertilization age of the unborn child is 20 or more weeks; or

(3) the use of a method of abortion other than a method described by Section 171.044(b).

(b) Prohibits a physician from taking an action authorized under Subsection (a) if the risk of death or a substantial and irreversible physical impairment of a major bodily function arises from a claim or diagnosis that the woman will engage in conduct that may result in her death or in substantial and irreversible physical impairment of a major bodily function.

(c) Provides that the prohibitions and requirements under Sections 171.042, 171.043, and 171.044 do not apply to an abortion performed on an unborn child who has a severe fetal abnormality.

Sec. 171.046. PROTECTION OF PRIVACY IN COURT PROCEEDINGS. (a) Provides that except as otherwise provided by this section, in a civil or criminal proceeding or action involving an act prohibited under this subchapter, the identity of the woman on whom an abortion has been performed or induced or attempted to be performed or induced is not subject to public disclosure if the woman does not give consent to disclosure.

(b) Requires the court to issue orders to the parties, witnesses, and counsel and to direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to protect the woman's identity from public disclosure unless the court makes a ruling under Subsection (c) to allow disclosure of the woman's identity.

(c) Authorizes a court to order the disclosure of information that is confidential under this section if:

(1) a motion is filed with the court requesting release of the information and a hearing on that request;

(2) notice of the hearing is served on each interested party; and

(3) the court determines after the hearing and an in camera review that disclosure is essential to the administration of justice and there is no reasonable alternative to disclosure.

Sec. 171.047. CONSTRUCTION OF SUBCHAPTER. (a) Requires that this subchapter be construed, as a matter of state law, to be enforceable up to but no further than the maximum possible extent consistent with federal constitutional requirements, even if that construction is not readily apparent, as such constructions are authorized only to the extent necessary to save the subchapter from judicial invalidation. Provides that judicial reformation of statutory language is explicitly authorized only to the extent necessary to save the statutory provision from invalidity.

(b) Requires the court to interpret the provision, as a matter of state law, to avoid the vagueness problem and to enforce the provision to the maximum possible extent if any court determines that a provision of this subchapter is unconstitutionally vague. Requires the Supreme Court of Texas to provide an authoritative construction of the objectionable statutory provisions that avoids the constitutional problems while enforcing the statute's restrictions to the maximum possible extent, and to agree to answer any question certified from a federal appellate court regarding the statute if a federal court finds any provision of this subchapter or its application to any person, group of persons, or circumstances to be unconstitutionally vague and declines to impose the saving construction described by this subsection.

(c) Prohibits a state executive or administrative official from declining to enforce this subchapter, or adopting a construction of this subchapter in a way that narrows its applicability, based on the official's own beliefs about what the state or federal constitution requires, unless the official is enjoined by a state or federal court from enforcing this subchapter.

(d) Prohibits this subchapter from being construed to authorize the prosecution of or a cause of action to be brought against a woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of this subchapter.

SECTION 3. Amends Section 245.011(c), Health and Safety Code, to require that the annual report each abortion facility is required to submit to the Texas Department of Health include certain information, including the probable post-fertilization age of the unborn child, rather than the period of gestation, based on the best medical judgment of the attending physician at the time of the procedure.

SECTION 4. Amends Section 164.052(a), Occupations Code, to provide that a physician or an applicant for a license to practice medicine commits a prohibited practice if that person commits certain actions, including performing or inducing or attempting to perform or induce an abortion in violation of Subchapter C, Chapter 171, Health and Safety Code.

SECTION 5. Amends Section 164.055(b), Occupations Code, to provide that the criminal penalties provided by Section 165.152 (Practicing Medicine in Violation of Subtitle) do not apply to a violation of Section 170.002 (Prohibits Acts; Exemption) or Subchapter C, Chapter 171, Health and Safety Code.

SECTION 6. Prohibits this Act from being construed to repeal, by implication or otherwise, Section 164.052(a)(18) (relating to providing that a physician or an applicant for a license to practice medicine commits a prohibited practice if that person performs an abortion on a woman who is pregnant with a viable unborn child during the third trimester of the pregnancy under certain conditions), Occupations Code, Section 170.002, Health and Safety Code, or any other provision of Texas law regulating or restricting abortion not specifically addressed by this Act. Provides that an abortion that complies with this Act but violates any other law is unlawful. Provides that an abortion that complies with another state law but violates this Act is unlawful as provided in this Act.

SECTION 7. (a) Requires that all other provisions of Texas law regulating or restricting abortion be enforced as though the restrained or enjoined provisions had not been adopted if some or all of the provisions of this Act are ever temporarily or permanently restrained or enjoined by judicial order; provided, however, that whenever the temporary or permanent restraining order or injunction is stayed or dissolved, or otherwise ceases to have effect, the provisions are required to have full force and effect.

(b) Provides that, mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provisions in this Act, are severable from each other. Requires that the remaining applications of that provision to all other persons and circumstances be severed and are prohibited from being affected if any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid. Requires that all constitutionally valid applications of this Act be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Requires that the applications that do not present an undue burden be severed from the remaining provisions and remain in force, and be treated as if the legislature had enacted a statute limited to the persons, group of persons, or circumstances for which the statute's application does not present an undue burden even if a reviewing court finds a provision of this Act to impose an undue burden in a large or substantial fraction of relevant cases. Provides that the legislature further declares that it would have passed this Act, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this Act, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this Act, were to be declared unconstitutional or to represent an undue burden.

(c) Requires that the prohibition apply to a person or group of persons or circumstances on the earliest date on which the subchapter can be constitutionally applied if Subchapter C, Chapter 171, Health and Safety Code, as added by this Act, prohibiting abortions performed on an unborn child 20 or more weeks after fertilization is found by any court to be invalid or to impose an undue burden as applied to any person, group of persons, or circumstances.

(d) Requires that the applications of a provision that do not present constitutional vagueness problems be severed and remain in force if any provision of this Act is found by any court to be unconstitutionally vague.

SECTION 8. Effective date: upon passage or the 91st day after the last day of the legislative session.