

## **BILL ANALYSIS**

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S.B. 1033  
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### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

The State of Texas currently has no laws in place to prevent discriminatory abortions performed due to the race, ethnicity, sex, probability of having or diagnosis of Down syndrome, or probability of having or diagnosis of a severe disability of a preborn child.

Discriminatory abortions are banned in some form in Arizona, Arkansas, Illinois, Kansas, North Carolina, North Dakota, Oklahoma, Pennsylvania, and South Dakota.

S.B. 1033 prohibits discriminatory abortions in Texas.

H.B. 2, 83(2), prohibited abortion in Texas after 20 weeks of pregnancy in most cases. However, late-term abortions are permitted in cases of a severe fetal abnormality. When a diagnosis of a severe fetal disability is made, abortion is not the only option. Even in the most extreme cases, when a preborn child is unlikely to survive outside the womb, perinatal palliative care programs exist to care for both the child and the family.

Currently, women may not be aware of these services when deciding to terminate. Additionally, misdiagnosis does occur; a child not expected to survive or thrive after birth may live a full and happy life.

S.B. 1033 closes the fetal abnormality loophole for late-term abortions, while maintaining an exception for medical emergencies. S.B. 1033 additionally requires that perinatal palliative care information be provided to a pregnant woman at the time of diagnosis of severe fetal disability so the woman may make a fully-informed healthcare decision.

As proposed, S.B. 1033 amends current law relating to information regarding perinatal palliative care and prohibiting discriminatory abortions and creates an administrative penalty, a civil remedy, and a criminal offense.

### **RULEMAKING AUTHORITY**

Rulemaking authority is expressly granted to the executive commissioner of the Health and Human Services Commission in SECTION 18 of this bill.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Provides that this Act may be cited as the Preborn Nondiscrimination Act.

SECTION 2. Establishes that the legislature finds that Texas has a compelling state interest in protecting all Texans from discrimination based on sex, race, and disability and that Texas enforces prohibitions against discrimination based on sex, race, and disability in various areas, including housing, employment, education, insurance, and health program and service provision.

SECTION 3. Amends Chapter 161, Health and Safety Code, by adding Subchapter X, as follows:

#### **SUBCHAPTER X. PERINATAL PALLIATIVE CARE**

Sec. 161.701. PURPOSE OF SUBCHAPTER. Provides that the purpose of this subchapter is to ensure that a pregnant woman who receives a diagnosis of a life-threatening disability of the woman's preborn child is informed of the availability of perinatal palliative care and that a pregnant woman who chooses abortion after receiving a diagnosis of a life-threatening disability of the woman's preborn child makes a fully informed decision.

Sec. 161.702. DEFINITION. Defines "perinatal palliative care."

Sec. 161.703. PERINATAL PALLIATIVE CARE INFORMATIONAL MATERIALS. (a) Requires the Health and Human Services Commission (HHSC) to develop perinatal palliative care informational materials and post the materials on HHSC's Internet website. Requires the materials to include a description of the health care and other services available through perinatal palliative care and information about medical assistance benefits that may be available for prenatal care, childbirth, and perinatal palliative care.

(b) Requires HHSC to develop, regularly update, and publish a geographically indexed list of all perinatal palliative care providers and programs in this state. Authorizes HHSC to include perinatal palliative care providers and programs in other states that provide care to residents of this state but prohibits HHSC from including an abortion provider, as defined by Section 171.002 (Definitions). Requires HHSC to post the list of perinatal palliative care providers and programs, including contact information, on HHSC's Internet website and note the providers and programs that provide services free of charge.

Sec. 161.704. PERINATAL PALLIATIVE CARE CERTIFICATION FORM. Requires HHSC to develop a form on which a pregnant woman certifies that she has received the perinatal palliative care informational materials and list of the perinatal palliative care providers and programs described by Section 161.703.

Sec. 161.705. HEALTH CARE PROVIDER DUTIES ON DIAGNOSIS OF PREBORN CHILD'S LIFE-THREATENING DISABILITY. Requires a health care provider who diagnoses a pregnant woman's preborn child as having a life-threatening disability to, at the time of the diagnosis, provide the pregnant woman with a written copy of the perinatal palliative care informational materials and list of the perinatal palliative care providers and programs described by Section 161.703 and the perinatal palliative certification form described by Section 161.704, and obtain from the pregnant woman the signed perinatal palliative care certification form and place the form in the pregnant woman's medical records.

Sec. 161.706. EXCEPTION. (a) Provides that a health care provider is not required to provide the perinatal palliative care informational materials or perinatal palliative care certification form under this subchapter if the health care provider verifies the pregnant woman's medical record contains a signed perinatal palliative care certification form for that pregnancy as required under Section 161.705(2).

(b) Provides that this section does not affect a health care provider's duty to provide the perinatal palliative care informational materials or perinatal palliative certification form described by this subchapter as required under Subchapter B (Informed Consent), Chapter 171.

SECTION 4. Amends Chapter 170, Health and Safety Code, by designating Sections 170.001 and 170.002 as Subchapter A and adding a subchapter heading to read as follows:

SUBCHAPTER A. GENERAL PROVISIONS; POST-VIABILITY ABORTION PROHIBITED

SECTION 5. Amends Section 170.001(3), Health and Safety Code, to define "viable" as the stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case, a preborn child, rather than an unborn child, possesses the capacity to live outside its mother's womb after its premature birth from any cause.

SECTION 6. Amends Section 170.002, Health and Safety Code, as follows:

Sec. 170.002. PROHIBITED ACTS; EXEMPTION. (a) Prohibits a person, except as provided by Subsection (b), from intentionally or knowingly performing an abortion on a woman who is pregnant with a viable preborn child, rather than a viable unborn child, during the third trimester of the pregnancy.

(b) Provides that Subsection (a) does not prohibit a person from performing an abortion if at the time of the abortion the person is a physician and concludes in good faith according to the physician's best medical judgment that the abortion is necessary due to a medical emergency, as defined by Section 171.002. Deletes existing Subdivisions (1) and (3) and existing text of Subdivision (2) relating to certain other determinations made by the physician and makes nonsubstantive changes.

(c) Requires a physician who performs an abortion that, according to the physician's best medical judgment at the time of the abortion, is to abort a viable preborn child, rather than viable unborn child, during the third trimester of the pregnancy to certify in writing to HHSC, on a form prescribed by HHSC, the medical indications supporting the physician's judgment that the abortion was authorized by Subsection (b), rather than by Subsection (b)(2) or (3). Deletes text relating to procedures for certification under Subsection (b)(3).

SECTION 7. Amends Chapter 170, Health and Safety Code, by adding Subchapter B, as follows:

SUBCHAPTER B. DISCRIMINATORY ABORTION PROHIBITED

Sec. 170.051. DEFINITION. Defines "disability."

Sec. 170.052. DISCRIMINATORY ABORTION. Prohibits a person from knowingly performing or attempting to perform on a pregnant woman an abortion based on the race, ethnicity, sex, or probability of diagnosis of or of having a disability of the woman's preborn child or using force or the threat of force to intentionally injure or intimidate a person in order to coerce the performance or attempted performance of an abortion based on the race, ethnicity, sex, or probability of diagnosis of or of having a disability of the woman's preborn child.

Sec. 170.053. CRIMINAL PENALTY. (a) Provides that a person who violates Section 170.052 commits an offense. Provides that an offense under this subsection is a Class A misdemeanor.

(b) Prohibits a woman on whom an abortion is performed or attempted in violation of Section 170.052 from being prosecuted for a violation of that section or for conspiracy to commit a violation of that section.

Sec. 170.054. ADMINISTRATIVE PENALTY. Provides that a physician who violates Section 170.052 engages in unprofessional conduct for which the physician's license may be suspended or revoked under Chapter 164 (Disciplinary Actions and Procedures), Occupations Code.

Sec. 170.055. CIVIL REMEDIES. (a) Authorizes a civil action to be brought against a person who violates Section 170.052 by the woman on whom an abortion was performed or attempted in violation of Section 170.052, the father of the preborn child for an abortion performed or attempted on a pregnant woman in violation of Section 170.052, unless the woman's pregnancy resulted from the father's criminal conduct, or a maternal grandparent of the preborn child for an abortion performed or attempted on a pregnant woman in violation of Section 170.052 on a woman who was less than 18 years of age at the time of the violation, unless the woman's pregnancy resulted from the maternal grandparent's criminal conduct.

(b) Authorizes a person who brings an action under this section to obtain injunctive relief, damages incurred by the person, including actual damages for all psychological, emotional, and physical injuries resulting from the violation of Section 170.052, court costs, and reasonable attorney's fees, or both injunctive relief and damages.

(c) Requires an action for damages or injunctive relief under this section to be filed in a district court in the county in which the woman on whom the abortion was performed or attempted in violation of Section 170.052 resides, and not later than the sixth anniversary of the date the abortion was performed or attempted in violation of Section 170.052.

(d) Provides that the damages and injunctive relief authorized by this section are in addition to any other remedy available by law.

(e) Prohibits a civil action under this section from being brought against a woman on whom an abortion is performed or attempted in violation of Section 170.052.

SECTION 8. Amends Section 171.002, Health and Safety Code, by adding Subdivision (3-a) to define "preborn child" as an unborn child as defined by Section 171.061.

SECTION 9. Amends Section 171.012, Health and Safety Code, by amending Subsection (a) and adding Subsections (f) and (g), as follows:

(a) Provides that consent to an abortion is voluntary and informed only if:

(1) the physician who is to perform the abortion informs the pregnant woman on whom the abortion is to be performed of:

(A)-(B) makes no changes to these paragraphs;

(C) the probable gestational age of the preborn child, rather than unborn child, at the time the abortion is to be performed;

(D) the medical risks associated with carrying the preborn child to term; and

(E) the state law prohibiting abortion of a preborn child solely on the basis of the preborn child's race, ethnicity, sex, or probability of diagnosis of or of having a disability, as defined by Section 170.051;

(2) makes no changes to this subdivision;

(3) the physician who is to perform the abortion or the physician's agent:

(A) makes no changes to this paragraph;

(B) informs the pregnant woman that those materials:

(i) have been provided by HHSC, rather than by the Department of State Health Services (DSHS);

(ii) are accessible on an Internet website sponsored by HHSC, rather than DSHS;

(iii) describe the preborn child, rather than unborn child, and list agencies that offer alternatives to abortion; and

(iv) makes no changes to this subparagraph;

(4) makes no changes to this subdivision;

(5) before receiving a sonogram under Subdivision (4)(A) and before the abortion is performed and before any sedative or anesthesia is administered, the pregnant woman completes and certifies with her signature an election form that contains a certain specified statement;

(6)–(7) makes no changes to these paragraphs.

(f) Requires the physician who is to perform the abortion, if the pregnant woman's preborn child has been diagnosed with a life-threatening disability, to, at least 24 hours before the abortion or at least two hours before the abortion if the pregnant woman waives this requirement by certifying that she currently lives 100 miles or more from the nearest abortion provider that is a facility licensed under Chapter 245 (Abortion Facilities) or a facility that performs more than 50 abortions in any 12-month period:

(1) orally and in person, inform the pregnant woman of the availability of perinatal palliative care, as that term is defined by Section 161.702; and

(2) provide the pregnant woman with a written copy of the perinatal palliative care informational materials and list of the perinatal palliative care providers and programs described by Section 161.703 and the perinatal palliative care certification form described by Section 161.704.

(g) Authorizes the physician, if a pregnant woman described by Subsection (f), after receiving from the physician who is to perform the abortion the perinatal palliative care informational materials and certification form described by that subsection in the manner required by that subsection, chooses to have an abortion instead of continuing the pregnancy in perinatal palliative care, to perform the abortion only after the pregnant woman signs the certification form and the physician places the signed certification form in the pregnant woman's medical records.

SECTION 10. Amends Section 171.0121, Health and Safety Code, as follows:

Sec. 171.0121. MEDICAL RECORD. (a) Requires a copy of the signed, written certification received by the physician under Section 171.012(a)(6), and, if applicable, under Section 161.704, to be placed in the pregnant woman's medical records before the abortion begins.

(b) Requires a copy of the signed, written certification required under Sections 171.012(a)(5) and (6) and of any signed, written certification required under Section 161.704 to be retained by the facility where the abortion is performed until the seventh anniversary of the date the certification is signed, or if the pregnant woman is a minor, the later of the seventh anniversary of the date the certification is signed or the woman's 21st birthday. Makes nonsubstantive changes.

SECTION 11. Amends Section 171.0122(d), Health and Safety Code, as follows:

(d) Authorizes a pregnant woman to choose not to receive the verbal explanation of the results of the sonogram images under Section 171.012(a)(4)(C) in certain

circumstances. Deletes existing text relating to the fetus having an irreversible medical condition or abnormality and makes nonsubstantive changes.

SECTION 12. Amends Section 171.014(a), Health and Safety Code, as follows:

(a) Requires DSHS to publish informational materials that include the information required to be provided under Sections 171.012(a)(1)(B), (D), and (E), rather than Section 171.012(a)(1)(B) and (D), and (a)(2)(A), (B), and (C), and the materials required by Sections 161.703, 171.015, and 171.016, rather than by Sections 171.015 and 171.016.

SECTION 13. Amends Section 171.042, Health and Safety Code, as follows:

Sec. 171.042. New heading: DEFINITION. Defines "post-fertilization age." Deletes existing text defining "severe fetal abnormality."

SECTION 14. Amends Section 285.202(a), Health and Safety Code, to redefine "medical emergency" by deleting existing text relating to the fetus having a severe fetal abnormality.

SECTION 15. Amends Section 164.052(a), Occupations Code, as follows:

(a) Provides that a physician or an applicant for a license to practice medicine commits a prohibited practice if the person:

(1)–(17) makes no changes to these subdivisions;

(18) performs an abortion on a woman who is pregnant with a viable preborn child, rather than a viable unborn child, during the third trimester of the pregnancy unless the abortion is necessary due to a medical emergency, as defined by Section 171.002, Health and Safety Code, rather than necessary for certain other medical reasons;

(19) makes no changes to this subdivision;

(20)–(21) makes nonsubstantive changes; or

(22) performs or attempts to perform an abortion or engages in other conduct in violation of Section 170.052, Health and Safety Code.

SECTION 16. 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 or 170.052, Health and Safety Code, or Subchapter C (Abortion Prohibited At or After 20 Weeks Post-Fertilization), F (Partial-Birth Abortions), or G (Dismemberment Abortions), Chapter 171, Health and Safety Code.

SECTION 17. Repealer: Section 171.046(c) (relating to prohibitions and requirements under certain sections that do not apply to an abortion performed on an unborn child with a severe fetal abnormality), Health and Safety Code.

Repealer: Section 285.202(a-1) (relating to the definition of "severe fetal abnormality"), Health and Safety Code.

Repealer: Section 285.202(a-2) (relating to the definition of "reasonable medical judgment"), Health and Safety Code.

SECTION 18. Requires HHSC, not later than December 1, 2019, to develop the perinatal palliative care informational materials, list of perinatal palliative care providers and programs, and perinatal palliative care certification form required by Subchapter X, Chapter 161, Health and Safety Code, as added by this Act, and update any forms and informational materials under Subchapter B, Chapter 171, Health and Safety Code, as amended by this Act, and requires the

executive commissioner of HHSC to adopt rules necessary to implement Subchapter X, Chapter 161, Health and Safety Code, as added by this Act and Subchapter B, Chapter 171, Health and Safety Code, as amended by this Act.

SECTION 19. (a) Makes application of Subchapter X, Chapter 161, Health and Safety Code, as added by this Act, prospective to January 1, 2020.

(b) Makes application of the changes made by this Act to Chapters 170 and 171, Health and Safety Code, and Chapter 164, Occupations Code, prospective to January 1, 2020.

SECTION 20. Severability clause.

SECTION 21. Effective date: September 1, 2019.