SUBJECT: Regulating abortion procedures, providers, and facilities

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

SENATE VOTE: On final passage, June 18 — 20-10 (Davis, Ellis, Garcia, Hinojosa, Rodriguez, Uresti, Van de Putte, Watson, Whitmire, Zaffirini)

WITNESSES: (*On House companion, HB 60:*)
For — Jennifer Allmon, The Texas Catholic Conference of Bishops; Carol Everett, Women's Wellness Coalition; MerryLynn Gerstenschlager, Texas Eagle Forum; Ann Hettinger and Cecilia Wood, Concerned Women for America of Texas; Beverly Nuckols, Texas Alliance for Life; John Seago and Kyleen Wright, Texans for Life; and 15 individuals; (*Registered, but did not testify*: Veronica Arnold, Elizabeth Graham, and Emily Horne, Texas Right to Life; Erin Blauvelt, Leah Brown, Rachana Chhin, and Joe Pojman, Texas Alliance for Life; Elizabeth Davidson, Women's Wellness Coalition of Texas; Ferrell Foster, Baptist General Convention of Texas; Jeffery Patterson, Texas Catholic Conference of Bishops; Jonathan Saenz, Texas Values; and 8 individuals)

Against — Hannah Beck, National Organization for Women at UTSA; Anne Budroni, Planned Parenthood; Terri Burke, American Civil Liberties Union (ACLU) of Texas; Elizabeth Burr, Capital Area Democratic Women; Heather Busby and Melissa Nicholson, Naral Pro-Choice Texas; Carolyn Calabrese and Laura Davila, Feminist Austin Networking Group; Matthew Chandler, The Young Democrats at UTSA; Susan Clark, Suburban Southwest Texas Democratic Women; Stacey Edwards, Bluebonnet Brigade; Andrea Ferrigno and Amy Hagstrom Miller, Whole Woman's Health; Chuck Freeman, Texas Unitarian Universalist Justice Ministry; Suzanne Hemphill, The Lilith Fund; Amanda Hernandez, Spring Democrats and Pro-Choice Houston; Tina Hester, Jane's Due Process; Cindy Noland, Faith Action for Women in Need and Catholics for Choice;

Frances Northcutt, Texas State National Organization for Women; and about 85 individuals; (*Registered, but did not testify*: Bryant Andrade, GLBTQ of UTSA; Charles Bailey, Texas Hospital Association; Cardenas and Colleen Loper, Annie's List; Mounir Elharim, Institute for Truth; Lisa Hollier, Texas District of the American Congress of Obstetricians and Gynecologists; Harold Huff, Austin County Democratic Party; Deanna Kilgore, Feminist Austin Networking Group; Jessica Klier and Yunuen Salgado, Austin Women's Health Center; Geraldine Mongold, Faith Action for Women in Need; Peggy Morton, First Unitarian Universalist Church of Austin Social Action Committee; Theresa Norman, Planned Parenthood; Judy Parken, League of Women Voters of Texas; Bijal Patel, Lilith Fund; Fredericka Phillips, Suburban Southwest Texas Democratic Women; Susan Pintchovski, National Council of Jewish Women and Texas State Policy Advocacy Network; Karen Rankin, League of Women Voters; Rico Reyes, Rico Reyes for HD 50; Samantha Riemer, Whole Woman's Health; Blake Rocap, Naral Pro-Choice Texas; Cathryn Snyder, FANG; Jan Soifer, Travis County Democratic Party; Leslie Tisdale, University Democrats at UT; and about 325 individuals)

On — (*Registered, but did not testify*: Lyudmila Baskin and Ellen Cooper, Department of State Health Services; Laureta Sela)

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.

The 78th Legislature in 2003 enacted HB 15 by Corte, which added Health and Safety Code, ch. 171 (the Woman's Right to Know Act). Sec. 171.004 requires that an abortion of a fetus age 16 weeks or greater be performed at an ambulatory surgical center or hospital licensed to perform the abortion.

Health and Safety Code, sec. 245.010(c) prohibits certain health and safety standards of an abortion facility from being more stringent than Medicare certification standards.

DIGEST:

CSSB 5 would add new requirements to state laws governing abortions, the facilities where abortions are performed or induced, and the distribution of abortion-inducing drugs.

Twenty-week ban. The bill 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 arising from a prohibited abortion under the Preborn Pain Act, 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.

Physician and facility requirements. The bill would require a physician performing or inducing an abortion to have active admitting privileges at a hospital providing obstetrical or gynecological health care services that was located within 30 miles of the abortion facility. The physician would be required to provide the woman with emergency telephone contact information for the physician or other health care personnel and the nearest hospital in case of complications. A violation of these requirements would be a class A misdemeanor, punishable only by a fine of $4,000 or less.

Beginning September 1, 2014, the minimum standards for an abortion facility would be equivalent to those for an ambulatory surgical center. The bill would repeal a statutory provision prohibiting certain minimum standards for abortion facilities from being more stringent than Medicare certification standards. The executive commissioner of the Health and Human Services Commission would be required to adopt the new standards for abortion facilities by January 1, 2014.

CSSB 5 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.

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.

Drug-induced abortions. The bill would add a separate subchapter on abortion-inducing drugs such as the Mifeprex regimen, also known as RU-486. A drug, medicine, or other substance that may be known to cause an abortion but that was prescribed, dispensed, or administered for other medical reasons would not be considered an abortion-inducing drug.

An act would not be considered an abortion if done with the intent to:

- remove an unborn child whose death was caused by a spontaneous abortion or to remove an ectopic pregnancy; or
- treat a maternal disease or illness for which a prescribed, drug, medicine, or other substance was indicated.

The bill would prohibit anyone other than a physician from giving, selling, dispensing, administering, or prescribing an abortion-inducing drug to a pregnant woman. Physicians would be required to follow the protocol tested and authorized by the U.S. Food and Drug Administration (FDA) as outlined in the final printed label of the drug, except they could administer the dosage amount prescribed by the clinical management guidelines defined by the American Congress of Obstetricians and Gynecologists Practice Bulletin as those guidelines existed on January 1, 2013.

A physician would be required to provide the woman with a copy of the

label and a telephone number to reach the physician or other health care personnel for questions or to receive medical assistance following any complications. A follow-up visit would be required within 14 days after use of the drug to confirm that the pregnancy had been completely terminated and to assess the degree of bleeding. Doctors would be required to report serious adverse events related to the drugs to the FDA through the MedWatch Reporting System.

The Texas Medical Board would be authorized to take disciplinary action or assess an administrative penalty against a physician who violated the provisions concerning abortion-inducing drugs. A woman who received a medical abortion under this subchapter could not be assessed a penalty.

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. CSSB 5 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:

CSSB 5 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 also would improve the standard of care for women seeking earlier abortions.

Fetal pain. CSSB 5 would recognize the state’s compelling interesting 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, CSSB 5 would provide sufficient time for a woman to receive an abortion if she so chose.

Physician and facility requirements. An abortion is a surgical procedure and CSSB 5 would ensure a higher level of care by requiring all abortions to be performed in an ambulatory surgical center. Compared to an ordinary abortion facility, these surgical centers hire more highly qualified professionals and implement more rigorous quality-assurance programs. Ambulatory surgical centers are more often checked for compliance with safety requirements and must be equipped with back-up generators and better air filtration systems. These more frequent inspections could prevent the occurrence of a situation in Texas like the one recently exposed in Philadelphia, in which Dr. Kermit Gosnell was recently convicted of murder after killing babies who were born alive. A patient also died at that substandard clinic.

The bill would give operators of abortion facilities sufficient time to

comply with the new standards, which would not take effect until September 2014. While improving standards comes at a cost, abortion facility operators should be willing to invest some of their profits to ensure the highest level of care for their patients.

Doctors who provide abortions should be required to have admitting privileges at a nearby hospital in case one of their patients suffers complications and needs to be hospitalized. All of the state's existing facilities are within 30 miles of a hospital where they could be admitted, and two-thirds of physicians who perform abortions already have those privileges. The bill would force doctors who did not have hospital admitting privileges to upgrade their standards or stop performing abortions.

Drug-induced abortions. CSSB 5 would ensure the safety of women using RU-486 to induce an abortion by requiring physicians to administer the medication in the manner approved by the FDA, which says the drugs should be taken on two different days at a clinic under a doctor's supervision. Some abortion facilities are sending women home to take the second dosage alone without giving them information about what to do if complications arise.

The bill would ensure that women safely took the drugs and left the facility prepared to contact a physician or other medical personnel, as well as the nearest hospital, in case of emergency. The bill also would protect women by requiring a follow-up visit within 14 days to make sure the pregnancy had been completely terminated.

OPPONENTS SAY:

CSSB 5 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 bill also would make it more difficult for abortion clinics to operate by adding costly new requirements that are not necessary for early abortions.

Fetal pain. The U.S. Supreme Court legalized abortion nationwide in 1973 and allowed states to place restrictions on the procedure from the time of viability. CSSB 5 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. CSSB 5 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.

Physician and facility requirements. Early abortions are safer and simpler procedures than those commonly performed in ambulatory surgical centers. Texas women are adequately protected under current law, which requires only those who have been pregnant for 16 weeks or longer to receive abortions in ambulatory surgical centers.

CSSB 5 could result in closed clinics and force women to choose unsafe options. Of the state's 42 abortion clinics, 37 would not meet the ambulatory surgical center requirements, and retrofitting those facilities to meet the new standards would be expensive. According to Whole Woman's Health, it costs an additional $40,000 each month to operate a practice's surgical center compared to its non-surgical centers.

The current surgical centers performing abortions are located in the state's major metropolitan areas. If clinics in other parts of the state closed, it could force women to travel long distances and increase the cost of exercising their constitutional right to an abortion.

It could be difficult for doctors who perform or induce abortions to meet the requirement to have admitting privileges at a hospital with an obstetrical unit located within 30 miles. Some private, religiously affiliated hospitals do not admit physicians who perform abortions.

Drug-induced abortions. Women should not be required to go to an ambulatory surgical center to take abortion-inducing drugs that are currently being safely administered in abortion facilities.

NOTES:

Compared to the bill passed by the Senate, the House committee substitute would:

- add findings about fetal pain;
- add the Preborn Pain Act prohibiting abortions at 20 weeks post fertilization;
- add to the subchapter about abortion-inducing drugs a definition of abortion and remove a requirement that both the physician and woman be present at an abortion facility when the drugs are administered;
- require annual reporting of probable post-fertilization age of the unborn child instead of the period of gestation;
- make performing or inducing an abortion after 20 weeks a prohibited medical practice;
- exempt a violation of the Preborn Pain Act from certain criminal penalties; and
- add language that if the Preborn Pain Act was found by any court to be invalid or to impose an undue burden as applied to any person, group of persons, or circumstances, that the ban would be applied on the earliest date it could be constitutionally applied.

Two other abortion bills are on today's Major State Calendar. CSHB 60 by Laubenberg is the House companion to CSSB 5, and CSHB 16 by Laubenberg contains the Preborn Pain Act provisions of CSSB 5.