

SUBJECT: Prohibiting an abortion after fetal heartbeat of unborn child is detected

COMMITTEE: Public Health — favorable, without amendment

VOTE: 6 ayes — Klick, Allison, Jetton, Oliverson, Price, Smith

4 nays — Campos, Coleman, Collier, Zwiener

1 absent — Guerra

SENATE VOTE: On final passage, March 30 — 19-12 (Alvarado, Blanco, Eckhardt, Gutierrez, Hinojosa, Johnson, Menéndez, Miles, Powell, West, Whitmire, Zaffirini)

WITNESSES: *On House companion bill, HB 1515:*

For — Shawn Hall Lecuona, Burning for Quote, Lecuona Law, PLLC, and Lecuona Life Ministries; Mary Smith, Concerned Women for America; Molly White, Conservative Republicans of Texas; Alexandra Rafferty and Chelsey Youman, Human Coalition Action; Mary Castle, Jonathan Covey, Gregory McCarthy, and Jonathan Saenz, Texas Values Action; Pat Fry; Paul Hale; Jill Oliver; Denise Seibert; (*Registered, but did not testify*: Abby Johnson, And Then There Were None; Nona Ellington, Operation Outcry; Jana Pinson, Pregnancy Center of the Coastal Bend; Jill Glover, Republican Party of Texas; Jon Ker, State Republican Executive Committee; Victoria Avelar, Melanie Salazar, and Sarah Zarr, Students For Life Action; Ruth York, Tea Party Patriots of Eastland County and Texas Family Defense Committee; Shannon Jaquette, Texas Catholic Conference of Bishops; Cindi Castilla, Texas Eagle Forum; Donald Garner, Texas Faith and Freedom Coalition; Ashley Leenerts, Jackson Milton, Katherine Pitcher, and John Seago, Texas Right to Life; Jason Vaughn, Texas Young Republicans; Manfred Wendt, Young Conservatives of Texas; and 33 individuals)

Against — Drucilla Tigner, ACLU of Texas; Blake Rocap, Avow; Rhea Shahane, Deeds Not Words and Texas Law Democrats; Kamyon Conner, Texas Equal Access Fund; and 9 individuals; (*Registered, but did not*

testify: Jeff Haas and Bradley Pierce, Abolish Abortion Texas; Carl Dunn, American College of Obstetricians and Gynecologists; Caroline Duble, Avow; Andrea Reyes, Deeds Not Words; Rosann Mariappuram, Jane's Due Process; Karen Munoz and Jorge Renaud, LatinoJustice; Amanda Williams, Lilith Fund; Alison Mohr Boleware, National Association of Social Workers - Texas Chapter; Christina Haarhoff, Not a Victim; Alejandro Garcia, Planned Parenthood Texas Votes; Diana Gomez, Progress Texas; CR Cali, Sermon in the Park; Sarah Moseley, Texas Cannabis Collective; Carisa Lopez and Jules Mandel, Texas Freedom Network; Michelle Anderson, The Afiya Center; Paul Brown, Watermark Community Church; and 78 individuals)

On — Peter Allison; Joseph Reynolds; (*Registered, but did not testify*: Phillip George, Grace Life Church of Dallas; Bruce Kendrick, Watermark Community Church; Sarah Allison; Vivian Koerner)

BACKGROUND: Health and Safety Code ch. 171 establishes certain regulations for abortions in Texas.

Health and Safety Code sec. 245.002 defines "abortion" as the act of using or prescribing an instrument, drug, medicine, or any other substance, device, or means with the intent to cause an unborn child's death. The term excludes birth control devices or oral contraceptives. An act is not an abortion if the act is done with the intent to:

- save the life or preserve the health of an unborn child;
- remove a dead, unborn child whose death was caused by spontaneous abortion; or
- remove an ectopic pregnancy.

Sec. 171.002 defines "medical emergency" as a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed.

DIGEST:

SB 8 would establish the Texas Heartbeat Act, which would prohibit a physician from performing an abortion on a woman who was pregnant with an unborn child who had a detectable fetal heartbeat. The bill would require a physician, before an abortion was performed, to conduct a test to determine whether a fetal heartbeat was detected. The bill also would allow any person, other than a state or local government employee, to file a civil action against a physician or other person who performed, induced, and/or aided and abetted in performing or inducing an abortion.

Enforcement. The bill would transfer enforcement of Health and Safety Code ch. 171 from the Department of State Health Services to the Health and Human Services Commission. The bill would require the commission to enforce ch. 171, except for provisions relating to the detection of a fetal heartbeat, which would be enforced exclusively through private civil actions.

Definitions. Under the bill, "fetal heartbeat" would mean cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac.

"Unborn child" would mean a human fetus or embryo in any gestation stage from fertilization until birth.

Detection of fetal heartbeat. The bill would prohibit a physician from knowingly performing or inducing an abortion on a pregnant woman unless the physician had determined whether the woman's unborn child had a detectable fetal heartbeat. To determine whether there was a fetal heartbeat, the physician would have to conduct a test that was consistent with the physician's good faith and reasonable understanding of standard medical practice and appropriate for the estimated gestational age of the unborn child and the condition of the pregnant woman and her pregnancy.

For the purpose of determining the presence of a fetal heartbeat, "standard medical practice" would include employing the appropriate means of detecting the heartbeat based on the estimated gestational age of the unborn child and the woman's condition and her pregnancy.

In determining whether the woman's unborn child had a detectable fetal heartbeat, the physician would be required to record in the woman's medical record the unborn child's estimated gestational age, the method used to estimate the gestational age, and the test used for detecting a fetal heartbeat, including the date, time, and results of the test.

Prohibited actions by physician. Under the bill, a physician could not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child or failed to perform a test to detect a fetal heartbeat. A physician would not violate this provision if the physician did not detect a fetal heartbeat while performing the required test.

Exceptions; records. The prohibited actions by a physician would not apply if a physician believed a medical emergency existed. A physician who performed or induced an abortion under a medical emergency would be required to make written notations in the pregnant woman's medical record of the physician's belief that a medical emergency necessitated the abortion and the medical condition that prevented compliance. A copy of the notations would have to be maintained in the physician's practice records.

Construction of detection of fetal heartbeat. Provisions relating to the detection of a fetal heartbeat would not create or recognize a right to abortion before a fetal heartbeat was detected. The bill could not be construed to:

- authorize the initiation of a cause of action against or the prosecution of a woman on whom an abortion was performed, induced, or attempted to be performed or induced in violation of the bill;
- wholly or partly repeal, either expressly or by implication, any other statute that regulates or prohibits abortion, including certain pre-*Roe v. Wade* regulations;
- restrict a political subdivision from regulating or prohibiting

abortion in a manner at least as stringent as the laws of the state.

Limitations on public enforcement. No enforcement of provisions relating to the detection of a fetal heartbeat or of certain Penal Code provisions in response to violations of the bill could be taken or threatened by the state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of the state or a political subdivision against any person, except as provided in the bill.

Civil action for certain violations. The bill would authorize any person, other than an officer or employee of a state or local governmental entity in the state, to bring a civil action against any person who:

- performed or induced an abortion in violation of the bill's provisions;
- knowingly engaged in conduct that aided or abetted the performance or inducement of an abortion, including paying for or reimbursing the abortion costs through insurance or otherwise, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation; or
- intended to engage in the conduct described above.

The bill would allow a person to bring a civil action until the sixth anniversary of the date the cause of action accrued.

The state, a state official, or a district or county attorney could not intervene in a civil action. The bill would not prohibit a person from filing an amicus curiae brief in the action.

Affirmative defense. The bill would create an affirmative defense for persons alleged to have aided or abetted a violation of the bill's provisions. The affirmative defense would apply if the defendant reasonably believed the physician had complied or would comply with the bill. The defendant would have the burden of proving an affirmative defense by a preponderance of the evidence.

Defense to action. Under the bill, the following would not be defenses to a civil action:

- ignorance or mistake of law;
- a defendant's belief that requirements under Health and Safety Code ch. 171 were unconstitutional;
- a defendant's reliance on any court decision that had been overruled on appeal or by a subsequent court, even if that court decision had not been overruled when the defendant engaged in prohibited conduct;
- a defendant's reliance on any state or federal court decision that was not binding on the court in which the action was brought;
- non-mutual issue preclusion or non-mutual claim preclusion;
- the consent of the unborn child's mother to the abortion; or
- any claim that the enforcement of ch. 171 or the imposition of civil liability against the defendant would violate the constitutional rights of certain third parties, except as provided by the bill.

Court. If a claimant prevailed in a civil action brought under the bill, the court would have to award:

- injunctive relief sufficient to prevent the defendant from violating or engaging in acts that aided or abetted violations of the bill;
- statutory damages of at least \$10,000 for each abortion that the defendant performed or induced in violation and for each abortion performed or induced in violation that the defendant aided or abetted; and
- costs and attorney's fees.

A court could not award costs or attorney's fees under the Texas Rules of Civil Procedure or any other rule adopted by the supreme court to a defendant in a civil action.

Undue burden defense limitations. A defendant in a civil action would not have standing to assert the rights of women seeking an abortion as a

defense to liability unless:

- the U.S. Supreme Court held that the state's courts were required to confer standing on that defendant to assert the third-party rights of women seeking an abortion in state court as a matter of federal constitutional law; or
- the defendant had standing to assert the rights of women seeking an abortion under the tests for third-party standing established by the U.S. Supreme Court.

Affirmative defense. A defendant in a civil action could assert an affirmative defense to liability if the defendant had standing to assert the third-party rights of a woman or group of women seeking an abortion and the defendant demonstrated that the relief sought by the claimant would impose an undue burden on that woman or group of women.

The affirmative defense would not be available if the U.S. Supreme Court overruled *Roe v. Wade* or *Planned Parenthood v. Casey*, regardless of whether the conduct on which the cause of action was based occurred before the Supreme Court overruled either of those decisions.

Court findings. A court could not find an undue burden unless the defendant introduced evidence providing that an award of relief would prevent a woman or group of women from obtaining an abortion or an award of relief would place a substantial obstacle in the path of a woman or a group of women who were seeking an abortion.

Prohibitions. The bill would prohibit a defendant from establishing an undue burden by:

- merely demonstrating that an award of relief would prevent women from obtaining certain assistance from others in their effort to obtain an abortion; or
- arguing or attempting to demonstrate that an award of relief against other defendants or other potential defendants would impose an undue burden on women seeking an abortion.

Constitutional rights. The bill would not in any way limit or preclude a defendant from asserting the defendant's personal constitutional rights as a defense to liability under a civil action. A court could not award relief under a civil action if the conduct for which the defendant had been sued was an exercise of state or federal constitutional rights that personally belonged to the defendant.

Venue. A civil action that was brought under the bill would have to be brought in specified counties. The action could not be transferred to a different venue without the written consent of all parties.

Immunity. SB 8 would prevail over any conflicting law. The state would have sovereign immunity, a political subdivision would have governmental immunity, and each officer and employee of the state or a political subdivision would have official immunity in any action, claim, or counterclaim or other type of legal action that challenged the validity of Health and Safety Code ch. 171 or its application.

Severability. If any application of any provision under Health and Safety Code ch. 171 to any person, group of persons, or circumstances was found by a court to be invalid or unconstitutional, the remaining applications of that provision to all other persons and circumstances would have to be severed and could not be affected. Those provisions would remain in force.

Other attorney's fees. Any person, including an entity, attorney, or law firm, who sought declaratory or injunctive relief to prevent this state from enforcing certain laws that regulate or restrict abortion would be jointly and severally liable to pay the costs and attorney's fees of the prevailing party, as defined in the bill.

Other provisions. The bill would make certain conforming changes under current law, including requiring physicians to provide documentation when an abortion was performed due to a medical emergency.

The bill would take effect September 1, 2021, and would apply only to an abortion performed or induced on or after the effective date.

SUPPORTERS
SAY:

SB 8 would establish the Texas Heartbeat Act, which is necessary to protect more lives of unborn children. By prohibiting an abortion after a fetal heartbeat is detected, the bill would help to ensure that an unborn child was carried to the full term of a woman's pregnancy.

Some contemporary medical research indicates that a fetal heartbeat is a key medical predictor that an unborn child will reach live birth. To make an informed decision on whether to continue her pregnancy, a pregnant woman has a compelling interest in knowing the likelihood of her unborn child surviving to full-term birth based on the presence of cardiac activity, which is a strong indicator that a life is present. An unborn child's life is worthy of protection, which the bill would offer.

Currently, state law generally bans abortions after 20 weeks of pregnancy, but a fetal heartbeat can be detected as early as six weeks. The bill would reduce the number of abortions performed in Texas by prohibiting abortions once a fetal heartbeat was detected.

Enforcing the Texas Heartbeat Act only through civil enforcement by private citizens, not the state, would strengthen citizens' ability to hold violators accountable for a practice that many Texans find morally objectionable. Allowing any private citizen, other than an employee of state or local government, to file suit against a physician or anyone who aided and abetted the performance of an abortion would be similar to certain legal proceedings involving Medicaid fraud.

Texas never repealed, either expressly or by implication, state statutes enacted before the ruling in *Roe v. Wade* that prohibit and criminalize abortion unless the mother's life is in danger. By establishing that Texas has compelling interests from the outset of a woman's pregnancy in protecting the health of the woman and the life of the unborn child, the Texas Heartbeat Act could withstand constitutional challenges, which would mitigate any increased legal costs.

The bill would provide an exception for a woman experiencing a valid medical emergency, as determined and documented by the physician.

Concerns about improving access to services for women, including maternal health care and assistance in finding stable housing and employment, could be better addressed in other legislation.

CRITICS
SAY:

SB 8 would reduce a woman's access to reproductive health care by prohibiting an abortion after a fetal heartbeat was detected. The bill would unnecessarily interfere with the doctor-patient relationship and could endanger a woman's life by further restricting her constitutionally protected right to choose abortion.

By prohibiting an abortion after a fetal heartbeat was detected, the bill would substantially reduce the timeframe in which a woman could decide whether to proceed with or terminate her pregnancy. Some fetal heartbeats can be detected as early as six weeks, but many women do not find out they are pregnant until after the six-week mark. This would restrict a woman's ability to make an informed choice about her pregnancy.

Allowing any private citizen, including someone who was not personally connected to the woman, to bring a civil action against a physician who performed and a person who aided or abetted in the performance of an abortion could unnecessarily open the door to numerous, frivolous lawsuits. The aiding and abetting provisions under SB 8 are too broad and could subject healthcare providers to expensive and burdensome lawsuits.

The bill also could significantly increase costs for defendants and increase case backlogs in the court system. Limiting the defenses to civil actions and prohibiting a wrongly sued defendant from recovering any attorney's fees would inhibit defendants' ability to sufficiently defend themselves. The minimum \$10,000 fine also could prevent persons from being able to afford a defense.

SB 8 could subject the state to even more lawsuits by further limiting

abortions, which could supersede what is constitutionally authorized under *Roe v. Wade*. This could increase legal costs for the state.

In addition to providing an exception to an abortion when a woman has a medical emergency, the bill should include an exception for cases of rape and incest. Excluding such exceptions could impose additional pain and trauma on survivors of sexual assault.

Instead of interfering with a woman's reproductive health care choices, the Legislature should identify and establish programs that improve access to maternal health care, housing and employment assistance, and other financial resources.

OTHER
CRITICS
SAY:

Instead of enacting more restrictions, the Legislature should prohibit abortion outright. Such a bold move could help lead the way to ending a practice that many Texans believe is morally unjustifiable.