BILL ANALYSIS

Senate Research Center
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S.B. 5
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

At 20 weeks post-fertilization, scientific evidence suggests that preborn children are capable of feeling pain as all the neuro-receptors for pain are in place and functioning. 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.

S.B. 5 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.

Mifeprex (RU-486) was approved by the United States Food and Drug Administration (FDA) for use by pregnant women wishing to terminate a pregnancy for up to 49 days gestation only. The drug has no other approved indication for use during pregnancy. The RU-486 label instructs that tablets are intended for oral administration only, and should be administered only in a clinic, medical office, or hospital, and by or under the supervision of a physician able to assess the gestational age of an embryo and to diagnose ectopic pregnancies. Abortion-inducing drugs pose substantial risks to women, and these risks are magnified when the drugs are misused. The purpose of S.B. 5 is to protect the health and welfare of women considering a drug-induced abortion. It ensures that physicians providing drug-induced abortions are only doing so in the way in which the FDA tested and approved the abortion-inducing drug.

S.B. 5 requires that Texas abortion providers meet the basic standards prescribed by the manufacturer of RU-486 and the FDA. This includes requiring that abortion-inducing drugs be provided only by a physician and that the physician examine the woman prior to administering the abortion-inducing drug. S.B. 5 requires that the drug label be provided to the patient.

S.B. 5 requires that the woman receive the name and telephone number of the physician or other health care personnel who will handle emergencies that arise from the use of the abortion-inducing drug. Finally, the physician must provide a written report of adverse events to the FDA MedWatch Reporting System.

Many women suffer from minor to severe medical complications as a result of surgical procedures, including abortions. Women who choose to have an abortion should receive the same standard of care any other individual in Texas receives, regardless of the surgical procedure performed. S.B. 5 seeks to increase the health and safety of a woman who chooses to have an abortion by requiring a physician performing or inducing an abortion to have admitting privileges at a hospital and to provide certain information to the woman.

In 1992, the Supreme Court ruled in *Casey v. Planned Parenthood* that states have the right to regulate abortion clinics. In 1997, Texas enforced increased regulations; however, today 38 licensed abortion facilities still operate at a second, lower standard for the most common surgical procedure in Texas performed solely on women. Six Texas abortion facilities meet the standard as ambulatory surgical facilities. In medical practice, Medicare is the national standard for

insurance reimbursement. Abortion is an all cash (or limited credit card) business, so abortion facilities have not been subject to the same oversight as other surgical facilities.

Moving abortion clinics under the guidelines for ambulatory surgical centers will provide Texas women choosing abortion the highest standard of health care. Texas allows no other procedure to opt out of the accepted standard of care.

Miscarriages are excluded from the definition of abortion as defined in Section 245.002 of the Texas Health and Safety Code. Physicians' offices and clinics performing less than 50 abortions in any 12-month period are excluded by Section 245.004 (Exemptions from Licensing Requirement) of the Texas Health and Safety Code.

S.B. 5 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; amends current law relating to requirements for physicians who perform abortions, and creates an offense; amends current law relating to distributing or prescribing abortion-inducing drugs and provides penalties; and amends current law relating to minimum standards for abortion facilities.

As proposed, S.B. 5 amends current law relating to the regulation of abortion procedures, providers, and facilities and provides penalties.

[**Note:** While the statutory reference in this bill is to the Texas Department of Health (TDH) and the Texas Board of Health (board), the following amendments affect the executive commissioner of the Health and Human Services Commission and the Department of State Health Services, as the successor agencies to TDH and the board.]

RULEMAKING AUTHORITY

Rulemaking authority previously granted to the Texas Board of Health is modified in SECTION 4 (Section 245.010, Health and Safety Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. (a) Provides that the legislature finds that:

> (1) substantial medical evidence recognizes that an unborn child is capable of experiencing pain by not later than 20 weeks after fertilization;
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> (2) 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;
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> (3) 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
>
> (4) 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:
>
> > (A) the woman has adequate time to decide whether to have an abortion in the first 20 weeks after fertilization; and
> >
> > (B) 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.

(b) Provides that the legislature intends that every application of this statute to every individual woman be severable from each other. Requires that the application of the statute to those women, 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, 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 10 of this Act.

SECTION 2. Amends Subchapter A, Chapter 171, Health and Safety Code, by adding Section 171.0031, as follows:

Sec. 171.0031. REQUIREMENTS OF PHYSICIAN; OFFENSE. (a) Requires a physician performing or inducing an abortion to:

(1) on the date the abortion is performed, have active admitting privileges at a hospital that is located not further than 30 miles from the location at which the abortion is performed or induced and provides obstetrical or gynecological health care services; and

(2) provide the pregnant woman with:

(A) a telephone number by which the pregnant woman may reach the physician, or other health care personnel employed by the physician or by the facility at which the abortion was performed with access to the woman's relevant medical records, 24 hours a day to request assistance for any complications that arise from the performance of the abortion or ask health-related questions regarding the abortion; and

(B) the name and telephone number of the nearest hospital to the home of the pregnant woman at which an emergency arising from the abortion would be treated.

(b) Provides that a physician who violates Subsection (a) commits an offense. Provides that an offense under this section is a Class A misdemeanor punishable by a fine only, not to exceed $4,000.

SECTION 3. Amends Chapter 171, Health and Safety Code by adding Subchapters C and D, as follows:

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

Sec. 171.041. SHORT TITLE. Authorizes that this subchapter be cited as the Preborn Pain Act.

Sec. 171.042. DEFINITIONS. Defines "post-fertilization age" and "profound and irremediable congenital anomaly" in this subchapter.

Sec. 171.043. DETERMINATION OF POST-FERTILIZATION AGE REQUIRED. Prohibits a physician, except as otherwise provided by Section 171.046, 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. 171.044. ABORTION OF UNBORN CHILD OF 20 OR MORE WEEKS POST-FERTILIZATION AGE PROHIBITED. Prohibits a person, except as otherwise provided by Section 171.046, 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. 171.045. METHOD OF ABORTION. (a) Provides that this section applies only to an abortion authorized under Section 171.046(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 171.046(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. 171.046. EXCEPTIONS. (a) Provides that the prohibitions and requirements under Sections 171.043, 171.044, and 171.045(b) 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 171.045(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 171.043, 171.044, and 171.045(b) do not apply to an abortion performed on an unborn child who has a profound and irremediable congenital anomaly.

Sec. 171.047. 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. 171.048. 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.

SUBCHAPTER D. ABORTION-INDUCING DRUGS

Sec. 171.061. DEFINITIONS. Defines "abortion," "abortion-inducing drug," "final printed label" or "FPL," "gestational age," "medical abortion," "Mifeprex regimen," "RU-486 regimen," "RU-486," "physician," "pregnant," and "unborn child" in this subchapter.

Sec. 171.062. ENFORCEMENT BY TEXAS MEDICAL BOARD. Requires the Texas Medical Board (TMB), notwithstanding Section 171.005 (Department to Enforce), to enforce this subchapter.

Sec. 171.063. DISTRIBUTION OF ABORTION-INDUCING DRUG. (a) Prohibits a person from knowingly giving, selling, dispensing, administering, providing, or prescribing an abortion-inducing drug to a pregnant woman for the purpose of inducing an abortion in the pregnant woman or enabling another person to induce an abortion in the pregnant woman unless:

(1) the person who gives, sells, dispenses, administers, provides, or prescribes the abortion-inducing drug is a physician; and

(2) the provision, prescription, or administration of the abortion-inducing drug satisfies the protocol tested and authorized by the United States Food and Drug Administration as outlined in the final printed label of the abortion-inducing drug.

(b) Requires the physician, before the physician gives, sells, dispenses, administers, provides, or prescribes an abortion-inducing drug, to examine the pregnant woman and document, in the woman's medical record, the gestational age and intrauterine location of the pregnancy.

(c) Requires the physician who gives, sells, dispenses, administers, provides, or prescribes an abortion-inducing drug to provide the pregnant woman with:

(1) a copy of the final printed label of that abortion-inducing drug; and

(2) a telephone number by which the pregnant woman may reach the physician, or other health care personnel employed by the physician or by the facility at which the abortion was performed with access to the woman's relevant medical records, 24 hours a day to request assistance for any complications that arise from the administration or use of the drug or ask health-related questions regarding the administration or use of the drug.

(d) Requires the physician who gives, sells, dispenses, administers, provides, or prescribes the abortion-inducing drug, or the physician's agent, to schedule a follow-up visit for the woman to occur not more than 14 days after the administration or use of the drug. Requires the physician, at the follow-up visit, to confirm that the pregnancy is completely terminated and assess the degree of bleeding.

(e) Requires the physician who gives, sells, dispenses, administers, provides, or prescribes the abortion-inducing drug, or the physician's agent, to make a reasonable effort to ensure that the woman returns for the scheduled follow-up visit under Subsection (d). Requires the physician or the physician's agent to document a brief description of any effort made to comply with this subsection, including the date, time, and name of the person making the effort, in the woman's medical record.

(f) Requires the physician to report the event to the United States Food and Drug Administration through the MedWatch Reporting System not later than the third day after the date the physician learns that the event occurred if a physician gives, sells, dispenses, administers, provides, or prescribes an abortion-inducing drug to a pregnant woman for the purpose of inducing an abortion as authorized by this section and the physician knows that the woman experiences a serious adverse event, as defined by the MedWatch Reporting System, during or after the administration or use of the drug.

Sec. 171.064. ADMINISTRATIVE PENALTY. (a) Authorizes TMB to take disciplinary action under Chapter 164 (Disciplinary Actions and Procedures), Occupations Code, or assess an administrative penalty under Subchapter A (Administrative Penalties), Chapter 165 (Penalties), Occupations Code, against a person who violates Section 171.063.

(b) Prohibits a penalty from being assessed under this section against a pregnant woman who receives a medical abortion.

SECTION 4. Amends Section 245.010(a), Health and Safety Code, as follows:

(a) Requires that the rules contain minimum standards to protect the health and safety of a patient of an abortion facility and contain provisions requiring compliance with the requirements of Subchapter B (Informed Consent), Chapter 171. Requires that the minimum standards for an abortion facility, on and after September 1, 2014, be equivalent to the minimum standards adopted under Section 243.010 (Minimum Standards) for ambulatory surgical centers.

SECTION 5. 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 6. 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 7. 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 8. Repealer, effective September 1, 2014: Section 245.010(c) (relating to prohibiting certain standards from being more stringent than Medicare certification standards), Health and Safety Code.

SECTION 9. 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 10. (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 11. (a) Requires the executive commissioner of the Health and Human Services Commission to adopt the standards required by Section 245.010, Health and Safety Code, as amended by this Act, not later than January 1, 2014.

(b) Provides that a facility licensed under Chapter 245 (Abortion Facilities), Health and Safety Code, is not required to comply with the standards adopted under Section 245.010, Health and Safety Code, as amended by this Act, before September 1, 2014.

SECTION 12. Effective date: upon passage or on the 91st day after the last day of the legislative session.