

BILL ANALYSIS

Senate Research Center
87R13880 SCL-F

S.B. 1173
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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 confirmed diagnosis of Down Syndrome, or probability of having or confirmed diagnosis of a disability of a preborn child.

Discriminatory abortions are banned in some form in Arizona, Arkansas, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, and Tennessee.

H.B. 2, 83(2), prohibited abortion in Texas after 20 weeks of pregnancy in most cases. However, it formed a loophole allowing an abortion to be performed at any time in a pregnancy based on the diagnosis of a severe abnormality of a preborn child.

S.B. 1173 prohibits discriminatory abortions on the basis of race, ethnicity, sex, probability or confirmed diagnosis of Down Syndrome or probability or diagnosis of a disability in Texas; closes the fetal abnormality loophole for late-term abortions while maintaining an exception for medical emergencies; and requires that perinatal palliative care information be provided to a pregnant woman at the time of diagnosis of a severe fetal disability so the woman may make a fully-informed decision.

As proposed, S.B. 1173 amends current law relating to the regulation of abortion, including information regarding perinatal palliative care and prohibiting discriminatory abortions; authorizes disciplinary action; provides a civil remedy; and creates a criminal offense.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the executive commissioner of the Health and Human Services Commission in SECTION 20 of this bill.

SECTION BY SECTION ANALYSIS

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

SECTION 2. Provides that the legislature finds that:

- (1) Texas has a compelling state interest in protecting all Texans from discrimination based on sex, race, and disability; and
- (2) 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.

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 that the materials include:

(1) a description of the health care and other services available through perinatal palliative care; and

(2) 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 Texas. Provides that HHSC is authorized to include perinatal palliative care providers and programs in other states that provide care to residents of Texas but is prohibited from including an abortion provider, as defined by Section 171.002 (Definitions), or an affiliate, as defined by Section 2272.001 (Definitions), Government Code, as added by Chapter 501 (S.B. 22), Acts of the 86th Legislature, Regular Session, 2019, of an abortion provider. 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, at the time of the diagnosis, to:

(1) 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; and

(2) 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. 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).

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; THIRD TRIMESTER ABORTION
PROHIBITED**

SECTION 5. Amends Section 170.001, Health and Safety Code, by adding Subdivision (2-a), to define "preborn child" in Chapter 170 (Prohibited Acts Regarding Abortion) to mean an unborn child as defined by Section 171.061 (Definitions).

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 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 text providing 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 fetus is not a viable fetus and the pregnancy is not in the third trimester; that the abortion is necessary to prevent the death or a substantial risk of serious impairment to the physical or mental health of the woman; or that the fetus has a severe and irreversible abnormality, identified by reliable diagnostic procedures.

(c) Makes conforming changes.

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" to mean, in this subchapter:

- (1) a physical or mental impairment that would substantially limit one or more of an individual's major life activities;
- (2) an assessment referencing an individual's impairment described by Subdivision (1); or
- (3) a physical disfigurement, scoliosis, dwarfism, Down syndrome, albinism, amelia, or any other type of physical, mental, or intellectual abnormality or disease.

Sec. 170.052. DISCRIMINATORY ABORTION PROHIBITED. Prohibits a person from:

- (1) knowingly performing or attempting to perform on a pregnant woman an abortion based on the race, ethnicity, sex, or disability of the woman's preborn child, including a probability of diagnosis that the child has a disability; or
- (2) using force or the threat of force to intentionally injure or intimidate a person to coerce the performance or attempted performance of an abortion based on the race, ethnicity, sex, or disability of the woman's preborn child, including a probability of diagnosis that the child has a disability.

Sec. 170.053. CRIMINAL PENALTY. (a) Provides that a person who violates Section 170.052 commits 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. LICENSE SUSPENSION OR REVOCATION. Provides that a physician who violates Section 170.052 engages in unprofessional conduct for which the physician's license is authorized to 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:

(1) the woman on whom an abortion was performed or attempted in violation of Section 170.052;

(2) 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

(3) a maternal grandparent of the preborn child for an abortion performed or attempted in violation of Section 170.052 on a pregnant 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:

(1) injunctive relief;

(2) 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

(3) both injunctive relief and damages.

(c) Requires that an action for damages or injunctive relief under this section be filed:

(1) in a district court in the county in which the woman on whom an abortion was performed or attempted in violation of Section 170.052 resides; and

(2) 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 in Chapter 171 (Abortion) "preborn child" to mean 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 (g) and (h), 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) and (B) makes no changes to these paragraphs ;

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

(D) the medical risks associated with carrying the preborn child, rather than the 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 disability as defined by Section 170.051, including a probability of diagnosis that the child has a disability;

(2) makes no changes to this subdivision;

(3) the physician who is to perform the abortion or the physician's agent takes certain actions, including informing the pregnant woman that certain informational materials have been provided by HHSC, rather than by the Department of State Health Services (DSHS), are accessible on an Internet website sponsored by HHSC, rather than DSHS, describe the preborn, rather than unborn, child and list agencies that offer alternatives to abortion;

(4) makes no changes to this subdivision;

(5) before receiving a sonogram and before the abortion is performed and before any sedative or anesthesia is administered, the pregnant woman completes and certifies with her signature a certain election form set forth and amended in this subdivision; and

(6) and (7) makes no changes to these subdivisions.

Makes nonsubstantive changes.

(g) Requires the physician who is to perform the abortion, if the pregnant woman's preborn child has been diagnosed with a life-threatening disability, 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 in which more than 50 abortions are performed in any 12-month period, to:

(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.

(h) Authorizes the physician who is to perform the abortion, if a pregnant woman described by Subsection (g), after receiving from the physician 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 that, before the abortion begins, a copy of the signed, written certification received by the physician under certain sections,

including, if applicable, under Section 161.704 be placed in the pregnant woman's medical records.

(b) Requires that a copy of certain forms, including any signed, written certification required under Section 161.704 be retained by the facility where the abortion is performed until a certain time. Makes nonsubstantive changes.

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

(d) Deletes existing text providing that a pregnant woman may choose not to receive the verbal explanation of the results of the sonogram images under Section 171.012(a)(4)(C) (relating to a physician's verbal explanation of a sonogram) if the fetus has an irreversible medical condition or abnormality, as previously identified by reliable diagnostic procedures and documented in the woman's medical file. Makes a nonsubstantive change.

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 certain sections, including Sections 171.012(a)(1)(E) and the materials required by certain sections, including Section 161.703. Makes nonsubstantive changes.

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

Sec. 171.042. New heading: DEFINITION. Redefines "post-fertilization age" in Subchapter C (Abortion Prohibited At or After 20 Weeks Post-Fertilization) as the age of the preborn, rather than unborn, child as calculated from the fusion of a human spermatozoon with a human ovum. Deletes existing text defining "severe fetal abnormality" for Subchapter C.

SECTION 14. Amends Sections 171.043, 171.044, and 171.045, Health and Safety Code, as follows:

Sec. 171.043. DETERMINATION OF POST-FERTILIZATION AGE REQUIRED. Prohibits a physician, except as otherwise provided by Section 171.046 (Exceptions), 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 preborn, rather than unborn, child; or
- (2) possessing and relying on a determination of the probable post-fertilization age of the preborn, rather than unborn, child made by another physician.

Sec. 171.044. New heading: ABORTION OF PREBORN 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 preborn, rather than 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) (relating to an exception for an abortion under certain circumstances relating to the post-fertilization age of an unborn child) in which:

- (1) the probable post-fertilization age of the preborn, rather than unborn, child is 20 or more weeks; or

(2) the probable post-fertilization age of the preborn, rather than 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) (relating to certain methods of abortion), to terminate the pregnancy in the manner that, in the physician's reasonable medical judgment, provides the best opportunity for the preborn, rather than unborn, child to survive.

SECTION 15. Amends Section 171.046(a), Health and Safety Code, as follows:

(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 preborn, rather than unborn, child;

(2) the abortion of her pregnancy even though the post-fertilization age of the preborn, rather than 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).

SECTION 16. Amends Section 285.202(a), Health and Safety Code, to redefine "medical emergency" by deleting existing text relating to a severe fetal abnormality.

SECTION 17. 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 that person performs certain actions, including performing an abortion on a woman who is pregnant with a preborn, rather than 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, or performing or attempting to perform an abortion or engaging in other conduct in violation of Section 170.052, Health and Safety Code. Deletes existing text 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 unless the abortion is necessary to prevent the death of the woman, the viable unborn child has a severe, irreversible brain impairment, or the woman is diagnosed with a significant likelihood of suffering imminent severe, irreversible brain damage or imminent severe, irreversible paralysis. Makes nonsubstantive changes.

SECTION 18. Amends Section 164.055(b), Occupations Code, as follows:

(b) Provides that the criminal penalties provided by Section 165.152 (Practicing Medicine in Violation of Subtitle) do not apply to a violation of certain sections, including Section 170.052, Health and Safety Code.

SECTION 19. (1) Repealer: Section 171.046(c) (relating to the nonapplicability of certain sections to an unborn child with a severe fetal abnormality), Health and Safety Code.

(2) Repealers: Sections 285.202(a-1) and (a-2) (relating to the definition of "severe fetal abnormality" and "reasonable medical judgment"), Health and Safety Code.

SECTION 20. Provides that, not later than December 1, 2021:

(1) HHSC is required to:

(A) 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

(B) update any forms and informational materials under Subchapter B, Chapter 171, Health and Safety Code, as amended by this Act; and

(2) the executive commissioner is required to adopt any 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 21. (a) Makes application of Subchapter X, Chapter 161, Health and Safety Code, as added by this Act, prospective to January 1, 2022.

(b) Makes application of Chapter 170, Health and Safety Code, as amended by this Act, Subchapters B and C, Chapter 171, Health and Safety Code, as amended by this Act, and Chapter 164, Occupations Code, as amended by this Act, prospective to January 1, 2022.

SECTION 22. Severability clause.

SECTION 23. Effective date: September 1, 2021.