

BILL ANALYSIS

Senate Research Center

C.S.S.B. 8
By: Hughes et al.
State Affairs
3/16/2021
Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The fetal heartbeat is a key medical predictor of whether an unborn child will reach live birth. A fetal heartbeat can be detected as early as six weeks. Current Texas law generally bans abortions after 20 weeks of pregnancy. This bill would prevent abortions from being performed or induced once a fetal heartbeat is detected unless there is a medical emergency as defined under Health and Safety Code Section 171.002(3).

The proposed legislation amends the Health and Safety Code, the Government Code, and the Civil Practice and Remedies Code.

The bill establishes that the State of Texas never repealed, either expressly or impliedly, the state statutes enacted before *Roe v. Wade* which prohibit abortion unless the mother's life is in danger.

The bill mandates that the physician determine whether there is a heartbeat. If a heartbeat is detected, the physician is prohibited from knowingly performing or inducing an abortion and can be held civilly liable. Private civil enforcement for this violation, violation of the chapter, and aiding and abetting is available once the bill becomes effective.

Finally, the bill sets out what must be noted in the pregnant woman's medical record. This includes formatting and notes on why the abortion was performed or induced. If a physician performs or induces an abortion under the medical emergency exception, the reason for the abortion must be noted in the pregnant woman's medical records.

(Original Author's/Sponsor's Statement of Intent)

C.S.S.B. 8 amends current law relating to abortion, including abortions after detection of an unborn child's heartbeat and authorizes a private civil right of action.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the executive commissioner of the Health and Human Services Commission in SECTION 3 (Section 171.212, Health and Safety Code) and SECTION 7 (Section 171.012, Health and Safety Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Requires that this Act be known as the Texas Heartbeat Act.

SECTION 2. Provides that the legislature finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger.

SECTION 3. Amends Chapter 171, Health and Safety Code, by adding Subchapter H, as follows:

SUBCHAPTER H. DETECTION OF FETAL HEARTBEAT

Sec. 171.201. DEFINITIONS. Defines, in this subchapter:

- (1) "fetal heartbeat" to mean cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac;
- (2) "gestational age" to mean the amount of time that has elapsed from the first day of a woman's last menstrual period;
- (3) "gestational sac" to mean the structure comprising the extraembryonic membranes that envelop the unborn child and that is typically visible by ultrasound after the fourth week of pregnancy;
- (4) "physician" to mean an individual licensed to practice medicine in this state, including a medical doctor and a doctor of osteopathic medicine;
- (5) "pregnancy" to mean the human female reproductive condition that begins with fertilization, that occurs when the woman is carrying the developing human offspring, and that is calculated from the first day of the woman's last menstrual period;
- (6) "standard medical practice" to mean the degree of skill, care, and diligence that an obstetrician of ordinary judgment, learning, and skill would employ in like circumstances;
- (7) "unborn child" to mean a human fetus or embryo in any stage of gestation from fertilization until birth.

Sec. 171.202. **LEGISLATIVE FINDINGS.** Provides that the legislature finds, according to contemporary medical research, that:

- (1) fetal heartbeat has become a key medical predictor that an unborn child will reach live birth;
- (2) cardiac activity begins at a biologically identifiable moment in time, normally when the fetal heart is formed in the gestational sac;
- (3) 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; and
- (4) to make an informed choice about whether to continue her pregnancy, the 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.

Sec. 171.203. **DETERMINATION OF PRESENCE OF FETAL HEARTBEAT REQUIRED; RECORD.** (a) Provides that for the purposes of determining the presence of a fetal heartbeat under this section, "standard medical practice" includes employing the appropriate means of detecting the heartbeat based on the estimated gestational age of the unborn child and the condition of the woman and her pregnancy.

(b) Prohibits a physician, except as provided by Section 171.205, from knowingly performing or inducing an abortion on a pregnant woman unless the physician has determined, in accordance with this section, whether the woman's unborn child has a detectable fetal heartbeat.

(c) Requires the physician, in making a determination under Subsection (b), to use a test that is:

- (1) consistent with the physician's good faith and reasonable understanding of standard medical practice; and

(2) appropriate for the estimated gestational age of the unborn child and the condition of the pregnant woman and her pregnancy.

(d) Requires a physician making a determination under Subsection (b) to record in the pregnant woman's medical record the estimated gestational age of the unborn child, 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.

Sec. 171.204. PROHIBITED ABORTION OF UNBORN CHILD WITH DETECTABLE FETAL HEARTBEAT; EFFECT. (a) Prohibits a physician, except as provided by Section 171.205, from knowingly performing or inducing an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child as required by Section 171.203 or failed to perform a test to detect a fetal heartbeat.

(b) Provides that a physician does not violate this section if the physician performed a test for a fetal heartbeat as required by Section 171.203 and did not detect a fetal heartbeat.

(c) Provides that this section does not affect the provisions of Chapter 171 (Abortion) that restrict or regulate an abortion by a particular method or during a particular stage of pregnancy or any other provision of state law that regulates or prohibits abortion.

Sec. 171.205. EXCEPTION FOR MEDICAL EMERGENCY; RECORDS. (a) Provides that Section 171.204 does not apply if a physician believes a medical emergency exists that prevents compliance with this subchapter.

(b) Requires a physician who performs or induces an abortion under circumstances described by Subsection (a) to make written notations in the pregnant woman's medical record of the physician's belief that a medical emergency necessitated the abortion and of the medical condition of the pregnant woman that prevented compliance with this subchapter.

(c) Requires a physician performing or inducing an abortion under this section to maintain in the physician's practice records a copy of the notations made under Subsection (b).

Sec. 171.206. CONSTRUCTION OF SUBCHAPTER. (a) Provides that this subchapter does not create or recognize a right to abortion before a fetal heartbeat is detected.

(b) Prohibits this subchapter from being construed to:

(1) authorize the initiation of a cause of action against or the prosecution of a woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of this subchapter;

(2) wholly or partly repeal, either expressly or by implication, any other statute that regulates or prohibits abortion, including Chapter 6-1/2, Title 71, Revised Statutes; or

(3) restrict a political subdivision from regulating or prohibiting abortion in a manner that is at least as stringent as the laws of this state.

Sec. 171.207. LIMITATIONS ON PUBLIC ENFORCEMENT. (a) Requires that the requirements of this subchapter be enforced exclusively through the private civil actions described in Section 171.208. Prohibits enforcement of this subchapter, and enforcement of Chapters 19 (Criminal Homicide) and 22 (Assaultive Offenses), Penal Code, in response to violations of this subchapter, from being taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative

officer or employee of this state or a political subdivision against any person, except as provided in Section 171.208.

(b) Prohibits Subsection (a) from being construed to:

- (1) legalize the conduct prohibited by this subchapter or by Chapter 6-1/2, Title 71, Revised Statutes;
- (2) limit in any way or affect the availability of a remedy established by Section 171.208; or
- (3) limit the enforceability of any other laws that regulate or prohibit abortion.

Sec. 171.208. CIVIL LIABILITY FOR VIOLATION OR AIDING OR ABETTING VIOLATION. (a) Authorizes any person, other than an officer or employee of a state or local governmental entity in this state, to bring a civil action against any person who:

- (1) performs or induces an abortion in violation of Chapter 171; or
- (2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of Chapter 171, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of Chapter 171.

(b) Requires the court, if a claimant prevails in an action brought under this section, to award:

- (1) injunctive relief sufficient to prevent the defendant from violating Chapter 171 or engaging in acts that aid or abet violations of Chapter 171;
- (2) statutory damages in an amount of not less than \$10,000 for each abortion that the defendant performed or induced in violation of Chapter 171, and for each abortion performed or induced in violation of Chapter 171 that the defendant aided or abetted; and
- (3) costs and attorney's fees.

(c) Prohibits a court, notwithstanding Subsection (b), from awarding relief under this section if the defendant demonstrates that the defendant previously paid statutory damages in a previous action for that particular abortion performed or induced in violation of Chapter 171, or for the particular conduct that aided or abetted an abortion performed or induced in violation of Chapter 171.

(d) Authorizes a person, notwithstanding Chapter 16 (Limitations), Civil Practice and Remedies Code, to bring an action under this section not later than the sixth anniversary of the date the cause of action accrues.

(e) Provides that, notwithstanding any other law, the following are not a defense to an action brought under this section:

- (1) ignorance or mistake of law;
- (2) a defendant's belief that the requirements of Chapter 171 are unconstitutional or were unconstitutional;
- (3) a defendant's reliance on any court decision that has been overruled on appeal or by a subsequent court, even if that court decision had not been

overruled when the defendant engaged in conduct that violates Chapter 171;

(4) a defendant's reliance on any state or federal court decision that is not binding on the court in which the action has been brought;

(5) non-mutual issue preclusion or non-mutual claim preclusion;

(6) the consent of the unborn child's mother to the abortion; or

(7) any claim that the enforcement of Chapter 171 or the imposition of civil liability against the defendant will violate the constitutional rights of third parties, except as provided by Section 171.209.

(f) Provides that it is an affirmative defense if a person sued under Subsection (a)(2) reasonably believed, after conducting a reasonable investigation, that the physician performing or inducing the abortion had complied or would comply with Chapter 171. Provides that the defendant has the burden of proving the affirmative defense under this subsection by a preponderance of the evidence.

(g) Prohibits this section from being construed to impose liability on any speech or conduct protected by the First Amendment of the United States Constitution, as made applicable to the states through the United States Supreme Court's interpretation of the Fourteenth Amendment of the United States Constitution, or by Section 8 (Freedom of Speech and Press; Libel), Article I (Bill of Rights), Texas Constitution.

(h) Prohibits this state, a state official, or a district or county attorney, notwithstanding any other law, from intervening in an action brought under this section. Provides that this subsection does not prohibit a person described by this subsection from filing an amicus curiae brief in the action.

(i) Prohibits a court, notwithstanding any other law, from awarding costs or attorney's fees under the Texas Rules of Civil Procedure or any other rule adopted by the Supreme Court of Texas under Section 22.004 (Rules of Civil Procedure), Government Code, to a defendant in an action brought under this section.

Sec. 171.209. CIVIL LIABILITY: UNDUE BURDEN DEFENSE LIMITATIONS. (a) Provides that a defendant against whom an action is brought under Section 171.208 does not have standing to assert the rights of women seeking an abortion as a defense to liability under that section unless:

(1) the United States Supreme Court holds that the courts of this state are 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

(2) the defendant is an abortion provider, an employee of an abortion provider, or a physician who performs or incudes abortions.

(b) Authorizes a defendant in an action brought under Section 171.208 to assert an affirmative defense to liability under this section only if:

(1) the defendant has standing to assert the third-party rights of women seeking an abortion in accordance with Subsection (a); and

(2) the defendant demonstrates that the relief sought by the claimant will impose an undue burden on women seeking an abortion.

(c) Prohibits a court from finding an undue burden under Subsection (b) unless the defendant introduces evidence proving that:

(1) an award of relief will prevent an identifiable woman or an identifiable group of women from obtaining an abortion; or

(2) an award of relief will place a substantial obstacle in the path of an identifiable woman or an identifiable group of women who are seeking an abortion.

(d) Prohibits a defendant from establishing an undue burden under this section by:

(1) merely demonstrating that an award of relief will prevent women from obtaining support or assistance, financial or otherwise, from others in their effort to obtain an abortion; or

(2) arguing or attempting to demonstrate that an award of relief against other defendants or other potential defendants will impose an undue burden on women seeking an abortion.

(e) Provides that the affirmative defense under Subsection (b) is not available if the United States Supreme Court overrules *Roe v. Wade*, 410 U.S. 113 (1973) or *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), regardless of whether the conduct on which the cause of action is based under Section 171.208 occurred before the Supreme Court overruled either of those decisions.

Sec. 171.210. CIVIL LIABILITY: VENUE. Requires that a civil action brought under Section 171.208, notwithstanding any other law, including Section 15.002 (Venue: General Rule), Civil Practice and Remedies Code, be brought in:

(1) the county in which all or a substantial part of the events or omissions giving rise to the claim occurred;

(2) the county of residence for any one of the natural person defendants at the time the cause of action accrued;

(3) the county of the principal office in this state of any one of the defendants that is not a natural person; or

(4) the county of residence for the claimant if the claimant is a natural person residing in this state.

Sec. 171.211. SOVEREIGN, GOVERNMENTAL, AND OFFICIAL IMMUNITY PRESERVED. (a) Provides that this section prevails over any conflicting law, including the Uniform Declaratory Judgments Act and Chapter 37 (Declaratory Judgments), Civil Practice and Remedies Code.

(b) Provides that this state has sovereign immunity, a political subdivision has governmental immunity, and each officer and employee of this state or a political subdivision has official immunity in any action, claim, or counterclaim or any type of legal or equitable action that challenges the validity of any provision or application of Chapter 171, on constitutional grounds or otherwise.

(c) Prohibits a provision of state law from being construed to waive or abrogate an immunity described by Subsection (b) unless it expressly waives immunity under this section.

Sec. 171.212. SEVERABILITY. (a) 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 Chapter 171, and every application of the provisions in Chapter 171, are severable from each other.

(b) Provides that if any application of any provision in Chapter 171 to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, the remaining applications of that provision to all other persons and circumstances is required to be severed and is prohibited from being affected. Requires that all constitutionally valid applications of Chapter 171 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, even if a reviewing court finds a provision of Chapter 171 to impose an undue burden in a large or substantial fraction of relevant cases, 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.

(c) Provides that the legislature further declares that it would have enacted Chapter 171, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of Chapter 171, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of Chapter 171, were to be declared unconstitutional or to represent an undue burden.

(d) Requires that the applications of any provision that do not present constitutional vagueness problems, if any provision of Chapter 171 is found by any court to be unconstitutionally vague, be severed and remain in force.

(e) Prohibits a court from declining to enforce the severability requirements of Subsections (a), (b), (c), and (d) on the ground that severance would rewrite the statute or involve the court in legislative or lawmaking activity. Provides that a court that declines to enforce or enjoins a state official from enforcing a statutory provision does not rewrite a statute, as the statute continues to contain the same words as before the court's decision. Provides that a judicial injunction or declaration of unconstitutionality:

(1) is nothing more than an edict prohibiting enforcement that is authorized to subsequently be vacated by a later court if that court has a different understanding of the requirements of the Texas Constitution or United States Constitution;

(2) is not a formal amendment of the language in a statute; and

(3) no more rewrites a statute than a decision by the executive not to enforce a duly enacted statute in a limited and defined set of circumstances.

(f) Requires the executive commissioner of the Health and Human Services Commission (executive commissioner), if any federal or state court declares unconstitutional or enjoins the enforcement of a provision in Chapter 171 and fails to enforce the severability requirements of Subsections (a), (b), (c), (d), and (e), to:

(1) adopt rules that enforce the requirements described by Chapter 171 to the maximum possible extent while avoiding the constitutional problems or other problems identified by the federal or state court; and

(2) issue notice of those rules, not later than the 30th day after the date of the court ruling.

(g) Authorizes a person, if the executive commissioner fails to adopt the rules and issue notice under Subsection (f), to petition for a writ of mandamus requiring the executive commissioner to adopt the rules and issue notice.

SECTION 4. Amends Chapter 30, Civil Practice and Remedies Code, by adding Section 30.022, as follows:

Sec. 30.022. AWARD OF ATTORNEY'S FEES IN ACTIONS CHALLENGING ABORTION LAWS. (a) Provides that any person, including an entity, attorney, or law firm, notwithstanding any other law, who seeks declaratory or injunctive relief to prevent this state, a political subdivision, or any governmental entity or public official in this state from enforcing any statute, ordinance, rule, regulation, or any other type of law that regulates or restricts abortion or that limits taxpayer funding for individuals or entities that perform or promote abortions, in any state or federal court, or that represents any litigant seeking such relief in any state or federal court, is jointly and severally liable to pay the costs and attorney's fees of the prevailing party.

(b) Provides that for purposes of this section, a party is considered a prevailing party if a state or federal court:

(1) dismisses any claim or cause of action brought against the party that seeks the declaratory or injunctive relief described by Subsection (a), regardless of the reason for the dismissal; or

(2) enters judgment in the party's favor on any such claim or cause of action.

(c) Authorizes a prevailing party under this section, regardless of whether a prevailing party sought to recover costs or attorney's fees in the underlying action, to bring a civil action to recover costs and attorney's fees against a person, including an entity, attorney, or law firm, that sought declaratory or injunctive relief described by Subsection (a) not later than the third anniversary of the date on which, as applicable, the dismissal or judgment described by Subsection (b) becomes final on the conclusion of appellate review or the time for seeking appellate review expires.

(d) Provides that it is not a defense to an action brought under Subsection (c) that a prevailing party under this section failed to seek recovery of costs or attorney's fees in the underlying action or that the court in the underlying action declined to recognize or enforce the requirements of this section.

SECTION 5. Amends Subchapter C, Chapter 311, Government Code, by adding Section 311.036, as follows:

Sec. 311.036. CONSTRUCTION OF ABORTION STATUTES. (a) Prohibits a statute that regulates or prohibits abortion from being construed to repeal any other statute that regulates or prohibits abortion, either wholly or partly, unless the repealing statute explicitly states that it is repealing the other statute.

(b) Prohibits a statute from being construed to restrict a political subdivision from regulating or prohibiting abortion in a manner that is at least as stringent as the laws of this state unless the statute explicitly states that political subdivisions are prohibited from regulating or prohibiting abortion in the manner described by the statute.

(c) Provides that every statute that regulates or prohibits abortion is severable in each of its applications to every person and circumstance. Requires that all

applications of a statute that do not violate the constitutional rights of women seeking abortions, if any statute that regulates or prohibits abortion is found by any court to be unconstitutional, either on its face or as applied, be severed from the unconstitutional applications and remain enforceable, notwithstanding any other law.

SECTION 6. Amends Subchapter A, Chapter 171, Health and Safety Code, by adding Section 171.008, as follows:

Sec. 171.008. REQUIRED DOCUMENTATION. (a) Requires a physician who performs or induces an abortion, if the abortion is performed or induced on a pregnant woman because of a medical emergency, to execute a written document that certifies the abortion is necessary due to a medical emergency and specifies the woman's medical condition requiring the abortion.

(b) Requires a physician to place the document described by Subsection (a) in the pregnant woman's medical record and to maintain a copy of the document described by Subsection (a) in the physician's practice records.

(c) Requires a physician who performs or induces an abortion on a pregnant woman to:

(1) if the abortion is performed or induced to preserve the health of the pregnant woman, execute a written document that specifies the medical condition the abortion is asserted to address and that provides the medical rationale for the physician's conclusion that the abortion is necessary to address the medical condition; or

(2) for an abortion other than an abortion described by Subdivision (1), specify in a written document that maternal health is not a purpose of the abortion.

(d) Requires the physician to maintain a copy of a document described by Subsection (c) in the physician's practice records.

SECTION 7. Amends Section 171.012, Health and Safety Code, by amending Subsection (a) and adding Subsection (g), as follows:

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

(1) the physician who is to perform or induce, rather than to perform, the abortion informs the pregnant woman on whom the abortion is to be performed or induced of certain information including the probable gestational age of the unborn child at the time the abortion is to be performed or induced;

(2) the physician who is to perform or induce, rather than to perform, the abortion or the physician's agent informs the pregnant woman of certain information;

(3) the physician who is to perform or induce, rather than to perform, the abortion or the physician's agent takes certain actions, including informing the pregnant woman that certain materials have been provided by the Health and Human Services Commission (HHSC), rather than the Department of State Health Services (DSHS) and are accessible on an Internet website sponsored by HHSC, rather than DSHS;

(4) before any sedative or anesthesia is administered to the pregnant woman and a certain amount of time before the abortion:

(A) the physician who is to perform or induce, rather than perform, the abortion or an agent of the physician who is also a sonographer certified

by a national registry of medical sonographers performs a sonogram on the pregnant woman on whom the abortion is to be performed or induced, rather than performed;

(B) the physician who is to perform or induce, rather than perform, the abortion displays the sonogram images in a quality consistent with current medical practice in a manner that the pregnant woman may view them;

(C) the physician who is to perform or induce, rather than perform, the abortion provides, in a manner understandable to a layperson, a verbal explanation of the results of the sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs;

(D) the physician who is to perform or induce, rather than perform, the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers makes audible the heart auscultation for the pregnant woman to hear, if present, in a quality consistent with current medical practice and provides, in a manner understandable to a layperson, a simultaneous verbal explanation of the heart auscultation; and

(E) if a fetal heartbeat is detected under Section 171.203, the physician who is to perform or induce the abortion informs the woman in writing of the statistical probability of bringing the unborn child to term to the best of the physician's knowledge, based on the gestational age of the unborn child or as provided by HHSC rule;

(5) before receiving a sonogram under Subdivision (4)(A) and before the abortion is performed or induced, rather than performed, and before any sedative or anesthesia is administered, the pregnant woman completes and certifies with her signature a certain election form relating to abortion and sonogram election set forth and amended in this subdivision;

(6) before the abortion is performed or induced, rather than performed, the physician who is to perform or induce, rather than perform, the abortion receives a copy of the signed, written certification required by Subdivision (5); and

(7) makes no changes to this subdivision.

(g) Authorizes the executive commissioner to adopt rules that specify the information required under Subsection (a)(4)(E) regarding the statistical probability of bringing an unborn child to term based on the gestational age of the child. Requires that the information in the rules be based on available medical evidence.

SECTION 8. Amends Section 245.011(c), Health and Safety Code, as follows:

(c) Requires that the report include certain information, including whether the abortion was performed or induced because of a medical emergency and any medical condition of the pregnant woman that required the abortion, whether the physician made a determination of the presence of a fetal heartbeat in accordance with Section 171.203, and whether the physician performed or induced the abortion under circumstances described by Section 171.205. Makes nonsubstantive changes.

SECTION 9. Severability clause.

SECTION 10. Makes application of this Act prospective.

SECTION 11. Effective date: September 1, 2021.