

BILL ANALYSIS

Senate Research Center

H.B. 15
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Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Current Texas law allows an abortion to be performed with the voluntary and informed consent of the woman on whom the abortion is to be performed. H.B. 15 requires a physician performing an abortion to also perform a sonogram on the pregnant woman not more than 72 hours and not less than 24 hours before the procedure, except in cases where the mother's life is endangered. Under the bill's provisions, the physician is required to make the sonogram images and heart auscultation accessible to the patient and to describe the results in easy-to-understand language. H.B. 15 also requires the doctor to provide to the pregnant woman a list of agencies offering ultrasounds at no cost to the pregnant woman and that do not perform certain other abortion-related services. By providing a minimum 24-hour waiting period, the bill provides an expectant mother adequate time to review the sonogram and carefully weigh the impact of her decision.

H.B. 15 amends current law relating to providing a sonogram before an abortion, and provides penalties.

[**Note:** While the statutory reference in this bill is to the Texas Department of Health (TDH), the following amendments affect the Department of State Health Services, as the successor agency to TDH.]

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Chapter 171, Health and Safety Code, by adding Subchapter C, as follows:

SUBCHAPTER C. PERFORMANCE OF SONOGRAM BEFORE ABORTION

Sec. 171.051. **DEFINITIONS.** Defines, in this subchapter, "abortion provider," "medical emergency," and "sonogram."

Sec. 171.052. **INFORMATION REGARDING SONOGRAM PROVIDERS.** (a) Requires the physician who is to perform an abortion, not more than 72 hours and not less than 24 hours before the abortion begins, to in person and in a private, confidential setting:

(1) provide the pregnant woman on whom the abortion is to be performed with the informational materials described by Section 171.014 (Informational Materials) and orally provide the woman the information required by Section 171.012(a)(1) (relating to voluntary and informed consent to an abortion);

(2) orally inform the pregnant woman on whom the abortion is to be performed that the materials required by Section 171.014:

- (A) are provided by the Department of State Health Services (DSHS);
- (B) are accessible on an Internet website sponsored by the Texas Department of Health (TDH);
- (C) describe the unborn child; and
- (D) list agencies that offer alternatives to abortion; and

(3) provide the pregnant woman on whom the abortion is to be performed with a comprehensive list of health care providers, facilities, and clinics that offer obstetric sonogram services at no cost to the pregnant woman and that do not:

- (A) perform abortions or provide abortion-related services;
- (B) make referrals to any abortion provider; or
- (C) affiliate or contract with any entity that performs abortions, provides abortion-related services, or makes referrals to any abortion provider.

(b) Requires TDH to compile the list described by Subsection (a)(3) and to make the list available at no cost. Requires TDH to provide appropriate quantities of the list to an abortion provider and to any other person. Requires that the list include the name, address, hours of operation, and telephone number for each health care provider, facility, and clinic that satisfies the requirements of Subsection (a)(3) and be:

- (1) arranged by county;
- (2) printed in a typeface large enough to be clearly legible; and
- (3) published in English and Spanish.

(c) Provides that TDH is not required to republish the list described by Subsection (a)(3) because of a change in information described by Subsection (b) unless five percent or more of the information contained in the list changes.

Sec. 171.053. PERFORMANCE OF SONOGRAM. (a) Requires the physician who is to perform an abortion or a sonographer certified by a national registry of medical sonographers, not more than 72 hours and not less than 24 hours before an abortion begins and before any sedative or anesthesia is administered to the pregnant woman, to:

- (1) perform a live, real-time obstetric sonogram on the pregnant woman on whom the abortion is to be performed;
- (2) display the live, real-time obstetric sonogram images in a quality consistent with current medical practice in a manner that the pregnant woman may view them;
- (3) provide, in a manner understandable to a layperson, a simultaneous verbal explanation of the results of the live, real-time sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of arms, legs, external members, and internal organs; and
- (4) make audible the live, real-time heart auscultation, when present, for the pregnant woman to hear, in a quality consistent with current medical

practice, and provide, in a manner understandable to a layperson, a simultaneous verbal explanation of the live, real-time heart auscultation.

(b) Prohibits the facility and any person at the facility, during a visit made to a facility to fulfill the requirements of Subsection (a), from accepting any form of payment, deposit, or exchange or making any financial agreement for an abortion or abortion-related services other than for payment of a service required by Subsection (a). Prohibits the amount charged for a service required by Subsection (a) from exceeding the reimbursement rate established for the service by the Health and Human Services Commission for statewide medical reimbursement programs.

Sec. 171.054. CERTIFICATION OF SONOGRAM. (a) Requires the pregnant woman on whom the abortion is to be performed, after the live, real-time sonogram and the live, real-time heart auscultation required under Section 171.053 and before any sedative or anesthesia is administered to the pregnant woman and before the abortion begins, to certify by her signature that not more than 72 hours and not less than 24 hours before the abortion begins:

(1) she was provided with a live, real-time sonogram as required under Section 171.053;

(2) she had the opportunity to view the live, real-time sonogram images as required under Section 171.053;

(3) she was provided, in a manner understandable to a layperson, a simultaneous verbal explanation of the results of the sonogram images as required under Section 171.053; and

(4) she heard the live, real-time heart auscultation, when present, as required under Section 171.053.

(b) Requires TDH to prepare the form to be used to make the certification required under Subsection (a). Requires that the form include a space for the pregnant woman's signature and space for the woman to sign her initials beside each of certain required statements. Sets forth the language of the required form.

(c) Requires that a copy of the form required under this section, before the abortion begins, be given to the physician who is to perform the abortion, and placed in the pregnant woman's medical records.

(d) Requires that a copy of the form required under this section be retained by the abortion provider until:

(1) the seventh anniversary of the date it is signed; or

(2) if the pregnant woman is a minor, the later of the seventh anniversary of the date it is signed, or the woman's 21st birthday.

Sec. 171.055. RECEIVING INFORMATION DURING SONOGRAM. Provides that the physician and the pregnant woman are not subject to a penalty under this subchapter solely because the pregnant woman chooses not to receive the information required to be provided under Section 171.053.

Sec. 171.056. PATERNITY AND CHILD SUPPORT INFORMATION. Requires the physician or an agent of the physician, if, after being provided with a sonogram and the information required under this subchapter, the pregnant woman chooses not to have an abortion, to provide the pregnant woman with a publication developed by the Title IV-D agency that provides information about paternity establishment and child support, including:

- (1) the steps necessary for unmarried parents to establish legal paternity;
- (2) the benefits of paternity establishment for children;
- (3) the steps necessary to obtain a child support order;
- (4) the benefits of establishing a legal parenting order; and
- (5) financial and legal responsibilities of parenting.

Sec. 171.057. EXCEPTION FOR MEDICAL EMERGENCY. (a) Authorizes a physician to perform an abortion without providing the sonogram required under Section 171.053 only in a medical emergency. Requires a physician who performs an abortion in a medical emergency to:

- (1) include in the patient's medical records a statement signed by the physician certifying the nature of the medical emergency; and
- (2) not later than the seventh day after the date the abortion is performed, certify to DSHS the specific medical condition that constituted the emergency.

(b) Requires that the statement required under Subsection (a)(1) be placed in the patient's medical records and be kept by the abortion provider until:

- (1) the seventh anniversary of the date the abortion is performed; or
- (2) if the pregnant woman is a minor, the later of the seventh anniversary of the date the abortion is performed, or the woman's 21st birthday.

Sec. 171.058. VIOLATION. (a) Provides that a physician who performs an abortion in violation of this subchapter engages in unprofessional conduct for which the physician's license is required to be revoked under Chapter 164 (Disciplinary Actions and Procedures), Occupations Code.

(b) Requires TDH, in accordance with the procedures established under Chapter 241 (Hospitals), 243 (Ambulatory Surgical Centers), or 245 (Abortion Facilities), as applicable, to revoke the license of an abortion provider that violates this subchapter.

SECTION 2. Amends Subchapter A, Chapter 241, Health and Safety Code, by adding Section 241.007, as follows:

Sec. 241.007. COMPLIANCE WITH CERTAIN REQUIREMENTS REGARDING SONOGRAM BEFORE ABORTION. Requires a hospital to comply with Subchapter C, Chapter 171.

SECTION 3. Amends Subchapter A, Chapter 243, Health and Safety Code, by adding Section 243.017, as follows:

Sec. 243.017. COMPLIANCE WITH CERTAIN REQUIREMENTS REGARDING SONOGRAM BEFORE ABORTION. Requires an ambulatory surgical center to comply with Subchapter C, Chapter 171.

SECTION 4. Amends Section 245.006(a), Health and Safety Code, to require, rather than authorize, TDH to inspect an abortion facility at reasonable times as necessary to ensure compliance with this chapter and Subchapter C, Chapter 171.

SECTION 5. Amends Chapter 245, Health and Safety Code, by adding Section 245.024, as follows:

Sec. 245.024. COMPLIANCE WITH CERTAIN REQUIREMENTS REGARDING SONOGRAM BEFORE ABORTION. Requires an abortion facility to comply with Subchapter C, Chapter 171.

SECTION 6. Amends Subchapter B, Chapter 164, Occupations Code, by adding Section 164.0551, as follows:

Sec. 164.0551. COMPLIANCE WITH CERTAIN REQUIREMENTS REGARDING SONOGRAM BEFORE ABORTION. Requires a physician to comply with Subchapter C, Chapter 171, Health and Safety Code.

SECTION 7. Makes application of the change in law made by this Act prospective to an abortion performed on or after the 60th day after the effective date of this Act.

SECTION 8. Requires DSHS to compile the list required by Section 171.052, Health and Safety Code, as added by this Act, not later than the 60th day after the effective date of this Act.

SECTION 9. Requires the Title IV-D agency to publish the information required by Section 171.056, Health and Safety Code, as added by this Act, not later than the 60th day after the effective date of this Act.

SECTION 10. (a) Provides that the legislature finds the following purposes and justifications for this law:

(1) States have "a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth," including mental health considerations. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 882 (1992). "It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible." Id.

(2) The consideration of an abortion's consequences to a fetus is not contingent on the consideration of the health of the mother. Rather, those considerations provide a stand-alone basis for informed consent legislation. There is "no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health." Id.

(3) In addition to the state's substantial interest in promoting the health and well-being of a pregnant woman, the state also has a "profound interest in potential life" of the unborn fetus. Id. at 878; see also Gonzales v. Carhart, 550 U.S. 124, 125 (2007) (recognizing that the state has a legitimate interest "in protecting the life of the fetus that may become a child").

(4) A statute furthering a state's "legitimate goal of protecting the life of the unborn" by "ensuring a decision that is mature and informed" is permitted "even when in so doing the State expresses a preference for childbirth over abortion." Planned Parenthood, 505 U.S. at 883.

(5) In addition, the Supreme Court has held that "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian

of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." Id. at 877. "Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal." Id. at 878.

(6) "The State also has an interest in protecting the integrity and ethics of the medical profession." Washington v. Glucksberg, 521 U.S. 702, 731 (1997). An abortion performed without a medical professional's full disclosure to a pregnant woman of the impact on the fetus and the potential health consequences of an abortion could undermine the woman's trust in medical professionals. This Act is intended to protect the integrity and ethics of the medical profession by establishing clear requirements that are designed to ensure the health and informed consent of a pregnant woman who is contemplating an abortion.

(b) Provides that, therefore, it is the legislature's intent in enacting this Act to further the purposes stated in Subsection (a) of this section.

(c) Provides that, furthermore, with regard to the severability clause contained in this Act, the legislature finds:

(1) As the United States Supreme Court has explained, when reviewing an abortion statute, "the proper means to consider exceptions is by as-applied challenge." Gonzales, 550 U.S. at 167. Moreover, when reviewing abortion statutes, "[t]he latitude given facial challenges in the First Amendment context is inapplicable." Id. See also U.S. v. Salerno, 481 U.S. 739, 745 (1987) ("The fact that [a legislative Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.").

(2) The United States Supreme Court has made the role of the court clear when reviewing statutes: "It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." Gonzales, 550 U.S. at 168. "[I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." Id. (quoting U.S. v. Raines, 362 U.S. 17, 21 (1960) (internal quotation marks omitted)). "For this reason, '[a]s-applied challenges are the basic building blocks of constitutional adjudication.'" Gonzales, 550 U.S. at 168 (quoting Richard Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 128 (2000)).

(3) Severability must be considered not only with respect to certain clauses or provisions of a statute but also with respect to applications of a statute or provision when some of the applications are unconstitutional. See Norman J. Singer, Statutes and Statutory Construction, Section 44.02 (4th ed. rev. 1986).

(4) Severability clauses in federal statutes treat severability of clauses and applications the same. See, e.g., 2 U.S.C. Section 1438 ("If any provision of this chapter or the application of such provision to any person or circumstance is held to be invalid, the remainder of this chapter and the application of the provisions of the remainder to any person or circumstance shall not be affected thereby."); Section 1103 of the Social Security Act (42 U.S.C. Section 1303); Section 15 of the National Labor Relations Act (29 U.S.C. Section 165); Section 11 of the Railway Labor Act (45 U.S.C. Section 161); Section 14 of the Agricultural Adjustment Act (7 U.S.C. Section 614).

(5) Courts have treated severability of clauses and applications the same. See Robert L. Stern, Separability and Separability Clauses in the Supreme Court, 51 Harv. L. Rev. 76 (1937).

SECTION 11. Provides that the purposes of this Act are to:

- (1) protect the physical and psychological health and well-being of pregnant women;
- (2) provide pregnant women access to information that would allow a pregnant woman to consider the impact an abortion would have on the pregnant woman's fetus; and
- (3) protect the integrity and ethical standards of the medical profession.

SECTION 12. Provides that every provision in this Act and every application of the provisions in this Act are severable from each other. Prohibits the remainder of this Act and application of the Act's provisions to all other persons and circumstances, if any application of any provision in this Act to any person or group of persons or circumstances is found by a court to be invalid, from being affected. 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 remaining valid applications, even if a reviewing court finds a provision of this Act invalid in a large or substantial fraction of relevant cases, be severed and allowed to remain in force.

SECTION 13. Requires that each provision of this Act and every application of this Act's provisions to any person or circumstance be construed as severable as a matter of state law. Requires that the valid applications, if any application of this Act to any person or circumstance is held invalid by any court, be severed and remain in force.

SECTION 14. Effective date: upon passage or September 1, 2011.