

BILL ANALYSIS

Senate Research Center

C.S.S.B. 1647
By: Perry et al.
State Affairs
3/16/2021
Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

S.B. 1647 abolishes discriminatory abortions motivated by the race, gender, ethnicity, sex, or disability of the preborn child and further protects post-viability abortions. The bill also abolishes elective abortions after the point when the preborn child's heartbeat is detectable by the most common methods. It also sets in mechanisms to abolish remaining elective abortion in Texas.

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

C.S.S.B. 1647 amends current law relating to information regarding perinatal palliative care, regulation of abortion, and the availability of certain defenses to prosecution for homicide and assault offenses; provides an administrative penalty; 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 3.01 (Sections 171.203 and 171.212, Health and Safety Code) and SECTION 3.04 (Section 171.012, Health and Safety Code) of this bill.

SECTION BY SECTION ANALYSIS

ARTICLE 1. LEGISLATIVE FINDINGS

SECTION 1.01. 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.

ARTICLE 2. PROVISIONS EFFECTIVE SEPTEMBER 1, 2021

SECTION 2.01. 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 to 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 2.02. 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; POST-VIABILITY ABORTION
PROHIBITED**

SECTION 2.03. 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 2.04. 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 or inducing, rather than 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 or inducing, rather than 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 2.05. Amends Chapter 170, Health and Safety Code, by adding Subchapter B, as follows:

SUBCHAPTER B. PREBORN NONDISCRIMINATION ACT

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 inducing or attempting to perform or induce 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 inducement or attempted performance or inducement 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 prosecution of a woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of Section 170.052 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 may 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 induced or attempted to be performed or induced in violation of Section 170.052;

(2) the father of the preborn child for an abortion performed or induced or attempted to be performed or induced 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 induced or attempted to be performed or induced 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 induced or attempted to be performed or induced in violation of Section 170.052 resides; and

(2) not later than the sixth anniversary of the date the abortion was performed or induced or attempted to be performed or induced 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 induced or attempted to be performed or induced in violation of Section 170.052.

SECTION 2.06. 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 2.07. Amends Subchapter A, Chapter 171, Health and Safety Code, by adding Section 171.008, as follows:

Sec. 171.008. REQUIRED DOCUMENTATION. (a) Requires the 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:

(A) specifies the medical condition the abortion is asserted to address; and

(B) 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 2.08. 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 or induce, rather than to perform, the abortion informs the pregnant woman on whom the abortion is to be performed or induced 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 or induced;

(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 based on 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) 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 HHSC, rather than by the Department of State Health Services (DSHS), are accessible on an Internet website sponsored by HHSC, rather than by DSHS, and describing the preborn, rather than unborn, child and listing agencies that offer alternatives to abortion;

(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 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;

(B) the physician who is to perform or induce 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 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; and

(D) the physician who is to perform or induce 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;

(5) before receiving a sonogram under Subdivision (4)(A) and before the abortion is performed or induced 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 in this subdivision;

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

(7) makes no changes to this subdivision.

Makes conforming and nonsubstantive changes.

(g) Requires the physician who is to perform or to induce the abortion, if the pregnant woman's preborn child has been diagnosed with a life-threatening disability, at least 24 hours before the abortion 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 or to induce 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 or to induce 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 2.09. 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 or induced until a certain time. Makes conforming and nonsubstantive changes.

SECTION 2.10. 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 Section 171.012(a)(1)(E) and the materials required by certain sections, including Section 161.703. Makes nonsubstantive changes.

SECTION 2.11. Amends the heading to Subchapter C, Chapter 171, Health and Safety Code, to read as follows:

**SUBCHAPTER C. ABORTION PROHIBITED AT OR AFTER 20 WEEKS PROBABLE
GESTATIONAL AGE**

SECTION 2.12. Amends Section 171.042, Health and Safety Code, by adding Subdivision (1 - a), as follows:

(1-a) Defines "probable gestational age" as the duration of a pregnancy measured by the number of weeks and days that have elapsed from the first day of the pregnant woman's last menstrual period out of an expected 40-week gestation.

SECTION 2.13. Amends Sections 171.043, 171.044, and 171.045, Health and Safety Code, as follows:

Sec. 171.043. New heading: **DETERMINATION OF PROBABLE GESTATIONAL 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 gestational age of the preborn child, rather than the probable post-fertilization age of the unborn child; or
- (2) possessing and relying on a determination of the probable gestational age of the preborn child, rather than the probable post-fertilization age of the unborn child, made by another physician.

Sec. 171.044. New heading: **ABORTION OF PREBORN CHILD OF 20 OR MORE WEEKS PROBABLE GESTATIONAL 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 gestational age of the preborn child, rather than the probable post-fertilization age of the unborn child, is 20 or more weeks. Makes conforming changes.

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 gestational age of the preborn child, rather than probable post-fertilization age of the unborn child, is 20 or more weeks; or
- (2) the probable gestational age of the preborn child, rather than the probable post-fertilization age of the unborn child, has not been determined but could reasonably be 20 or more weeks.

(b) Provides that except as otherwise provided by Section 171.046 (a)(3), a physician performing or inducing, rather than performing, an abortion under Subsection (a) is required 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 2.14. 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 or induced, rather than 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 gestational age of the preborn child, rather than the post-fertilization age of the unborn child;

(2) the abortion of her pregnancy even though the probable gestational age of the preborn child, rather than the post-fertilization age of the unborn child, is 20 or more weeks; or

(3) makes no changes to this paragraph.

SECTION 2.15. Amends Section 285.202(a), Health and Safety Code, to redefine "medical emergency" for purposes of Section 285.202 (Use of Tax Revenue for Abortions; Exception for Medical Emergency) by deleting existing text relating to a severe fetal abnormality.

SECTION 2.16. 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 or inducing or attempting to perform or induce 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 if that person performs or induces or attempts to perform or induce an abortion on an emancipated minor in certain circumstances, or engages 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 conforming and nonsubstantive changes.

SECTION 2.17. 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 2.18. (1) Repealer: Section 170.001(3) (relating to the definition of "viable"), Health and Safety Code;

(2) Repealers: Sections 171.042(1) (relating to the definition of "post-fertilization age") and (2) (relating to the definition of "severe fetal abnormality"), Health and Safety Code;

(3) Repealer: Section 171.046(c) (relating to the inapplicability of certain prohibitions and requirements to an unborn child with a severe fetal abnormality), Health and Safety Code; and

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

ARTICLE 3. PROVISIONS EFFECTIVE SEPTEMBER 1, 2023, OR EARLIER

SECTION 3.01. Amends Chapter 171, Health and Safety Code, by adding Subchapter H, as follows:

SUBCHAPTER H. DETECTION OF FETAL HEARTBEAT

Sec. 171.201. DEFINITIONS. Defines "fetal heartbeat," "gestational age," "gestational sac," "physician," "preborn child," "pregnancy," and "standard medical practice."

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 a preborn 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 preborn 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 preborn 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 preborn 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 preborn child has a detectable fetal heartbeat.
- (c) Requires a physician, in making a determination under Subsection (b), to use a test that is consistent with the physician's good faith and reasonable understanding of standard medical practice, consistent with rules adopted under this subchapter, and appropriate for the estimated gestational age of the preborn 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 preborn 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.
- (e) Authorizes the executive commissioner of HHSC (executive commissioner) to adopt rules specifying the appropriate tests to be used in determining the presence of a fetal heartbeat based on standard medical practice.

Sec. 171.204. PROHIBITED ABORTION OF PREBORN 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 preborn 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 this chapter 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 this subchapter 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 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; LIMITATION ON PUBLIC ENFORCEMENT. (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 (Abortion), Title 71 (Health–Public), Revised Statutes;

(3) legalize the conduct prohibited by this subchapter or by Chapter 6-1/2, Title 71, Revised Statutes;

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

(5) limit in any way or affect the availability of a remedy established by Section 171.208; or

(6) limit the enforceability of any other laws that regulate or prohibit abortion.

Sec. 171.207. ADMINISTRATIVE PENALTY. Requires the Texas Medical Board to take disciplinary action under Chapter 164 (Disciplinary Actions and Procedures), Occupations Code, and to assess an administrative penalty under Subchapter A (Administrative Penalties), Chapter 165 (Penalties), Occupations Code, against any physician who violates this subchapter.

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 a person who violates this subchapter.

(b) Requires the court, if a claimant prevails in an action brought under this section, to award injunctive relief, statutory damages in an amount of not less than \$10,000 for each violation or offense, and costs and attorney's fees.

(c) Prohibits a court, notwithstanding Subsection (b), from awarding relief under this section in response to a violation of this subchapter if the defendant demonstrates that the defendant previously paid statutory damages in a previous action for that particular violation or offense.

(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 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 this subchapter are unconstitutional or were unconstitutional;

(3) a defendant's reliance on any court decision that has been overruled by the applicable final appellate court, even if that court decision had not been overruled when the defendant engaged in conduct that violates this subchapter; or

(4) the consent of the preborn child's mother to the abortion.

(f) 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.

(g) 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 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 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.

(b) Authorizes a defendant in an action brought under Section 171.208 to assert an affirmative defense to liability only if the defendant has standing to assert the third-party rights of women seeking an abortion in accordance with Subsection (a) and 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 an award of relief will prevent an identifiable woman or an identifiable group of women from obtaining an abortion or that 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, 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 this subchapter, 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 this subchapter, and every application of the provisions in this subchapter, are severable from each other.

(b) Provides that if any application of any provision in this subchapter 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 are required to be severed and is prohibited from being affected. Requires that all constitutionally valid applications of this subchapter 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 this subchapter 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 this subchapter, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this subchapter, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this subchapter, were to be declared unconstitutional or to represent an undue burden.

(d) Provides that if any provision of this subchapter is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force.

(e) Prohibits any 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, if any federal or state court declares unconstitutional or enjoins the enforcement of a provision in this subchapter 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 this subchapter 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 3.02. 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, notwithstanding any other law, any person, including an entity, attorney, or law firm, 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 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 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 and that the court in the underlying action declined to recognize or enforce the requirements of this section.

SECTION 3.03. 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 that regulates or prohibits abortion 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 if any statute that regulates or prohibits abortion is found by any court to be unconstitutional, either on its face or as applied, then all applications of that statute that do not violate the constitutional rights of women seeking abortions are to be severed from the unconstitutional applications and to remain enforceable, notwithstanding any other law.

SECTION 3.04. Amends Section 171.012, Health and Safety Code, by amending Subsection (a) and adding Subsection (i), 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 perform, the abortion informs the pregnant woman on whom the abortion is to be performed or induced, rather than 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 or to be induced;

(D) the medical risks associated with carrying the preborn child, rather than child, to term; and

(E) the state law prohibiting abortion of a preborn child solely based on 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) the physician who is to perform or induce the abortion or the physician's agent informs the pregnant woman of certain information;

(3) the physician who is to perform or induce the abortion or the physician's agent provides the pregnant woman with certain materials or informs her of certain information.

(4) before any sedative or anesthesia is administered to the pregnant woman and 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 or a facility that performs or induces, rather than performs, more than 50 abortions in any 12-month period:

(A) - (D) makes conforming and nonsubstantive changes to these paragraphs;

(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 preborn child to term to the best of the physician's knowledge, based on the gestational age of the preborn child, or as provided by HHSC rule;

(5) and (6) makes conforming changes to these subdivisions; and

(7) makes no changes to this subdivision.

Makes conforming and nonsubstantive changes.

(i) Authorizes the executive commissioner to adopt rules that specify the information required under Subsection (a)(4)(E) regarding the statistical probability of bringing a preborn 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 3.05. Amends Section 245.011(c), Health and Safety Code, as follows:

(c) Requires that the required report relating to abortions performed at an abortion facility include:

(1) whether the abortion facility at which the abortion is performed or induced, rather than is performed, is licensed under Chapter 245 (Abortion Facilities);

(2) and (3) makes no changes to these paragraphs;

(4) makes a conforming change to this paragraph;

(5) makes no changes to this paragraph;

(6) the probable post-fertilization age of the preborn, rather than unborn, child based on the best medical judgment of the attending physician at the time of the procedure;

(7) makes no change to this paragraph;

(8) and (9) makes nonsubstantive changes to these paragraphs;

(10) whether the abortion was performed or induced because of a medical emergency and any medical condition of the pregnant woman that required the abortion;

(11) whether the physician made a determination of the presence of a fetal heartbeat in accordance with Section 171.203; and

(12) whether the physician performed or induced the abortion under circumstances described by Section 171.205.

ARTICLE 4. PROVISIONS EFFECTIVE SEPTEMBER 1, 2025, OR EARLIER

SECTION 4.01. Amends Chapter 170, Health and Safety Code, by adding Subchapter C, as follows:

SUBCHAPTER C. PROHIBITION OF ABORTION

Sec. 170.101. **ABORTION PROHIBITED.** Prohibits a person, notwithstanding any other law, from performing, inducing, or attempting to perform or induce an abortion unless the abortion is performed, induced, or attempted to be performed or induced by a physician because of a medical emergency as defined by Section 171.002.

Sec. 170.102. **CIVIL REMEDY.** (a) Authorizes a civil action to be brought against a person who violated Section 170.101 by:

- (1) the woman on whom an abortion was performed, induced, or attempted in violation of Section 170.101;
- (2) the father of the preborn child for an abortion performed, induced, or attempted on a pregnant woman in violation of Section 170.101, 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, induced, or attempted in violation of Section 170.101 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 170.101 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, induced, or attempted in violation of Section 170.101 resides; and
- (2) not later than the sixth anniversary of the date the abortion was performed, induced, or attempted in violation of Section 170.101.

(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, induced, or attempted in violation of Section 170.101.

Sec. 170.103. **REVOCAION OR SUSPENSION OF LICENSE.** Provides that a physician who violates Section 170.101 engages in unprofessional conduct and

authorizes suspension or revocation of the physician's license under Chapter 164, Occupations Code.

SECTION 4.02. Amends Section 19.06, Penal Code, as follows:

Sec. 19.06. **APPLICABILITY TO CERTAIN CONDUCT.** Provides that, notwithstanding any other law, Chapter 19 (Criminal Homicide) applies to the death of a preborn child unless the conduct charged is:

- (1) conduct committed by the mother of the preborn, rather than unborn, child; or
- (2) an abortion performed, induced, or attempted to be performed or induced by a physician because of a medical emergency as defined by Section 171.002 (Definitions), Health and Safety Code.

Deletes existing text providing that this chapter does not apply to the death of an unborn child if the conduct charged relates to certain lawful medical procedures or the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with law. Makes nonsubstantive changes.

SECTION 4.03. Amends Section 22.12, Penal Code, as follows:

Sec. 22.12. **APPLICABILITY TO CERTAIN CONDUCT.** Provides that Chapter 22 (Assaultive Offenses), notwithstanding any other law, applies to conduct charged as having been committed against an individual who is a preborn, rather than unborn, child, unless the conduct charged is:

- (1) committed by the mother of the preborn, rather than an unborn, child; or
- (2) an abortion performed, induced, or attempted to be performed or induced by a physician because of a medical emergency as defined by Section 171.002, Health and Safety Code.

Deletes existing text relating to certain lawful medical procedures and the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with law. Makes conforming and nonsubstantive changes.

SECTION 4.04. (1) Repealer: Section 33.002(b) (relating to a physician's authority to perform an abortion on an unemancipated minor if the physician made a reasonable effort to give 48 hours constructive notice to certain persons), Family Code; and

(2) Repealer: Section 171.063(b) (relating to the authority of a person to provide, prescribe, or administer an abortion-inducing drug in certain amounts), Health and Safety Code.

SECTION 4.05. (a) Requires that Subchapter C, Chapter 170, Health and Safety Code, as added by this article, and Sections 19.06 and 22.12, Penal Code, as amended by this article, be construed, as a matter of state law, to be enforceable to the maximum possible extent consistent with but not further than 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, if any court determines that a provision described by Subsection (a) of this section is unconstitutionally vague, 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. Requires the Texas Supreme Court, if a federal court finds any provision described by Subsection (a) of this section 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 section, 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 requires the Texas Supreme Court to agree to answer any question certified from a federal appellate court regarding the statute.

(c) Prohibits an executive or administrative state official from declining to enforce a provision described by Subsection (a) of this section, or adopting a construction of that provision or this section in a way that narrows its applicability, based on the official's own beliefs concerning the requirements of the state or federal constitution, unless the official is enjoined by a state or federal court from enforcing that provision.

(d) Prohibits Sections 19.06 and 22.12, Penal Code, as amended by this article, 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, induced, or attempted to be performed or induced in violation of Section 170.101, Health and Safety Code, as added by this article.

ARTICLE 5. TRANSITIONS, SEVERABILITY, PREEMPTION, CONSTITUTIONALITY, AND EFFECTIVE DATE

SECTION 5.01. 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 5.02. (a) Provides that Subchapter X, Chapter 161, Health and Safety Code, as added by this Act, applies only to a diagnosis of a life-threatening disability of a pregnant woman's preborn child made on or after January 1, 2022.

(b) Makes application of Subchapter B, Chapter 170, Health and Safety Code, as added 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.

(c) Provides that Subchapter C, Chapter 170, Health and Safety Code, as added by this Act, applies only to an abortion that is performed, induced, or attempted to be performed or induced on or after the effective date of Article 4 of this Act.

(d) Provides that Subchapter H, Chapter 171, Health and Safety Code, as added by this Act, applies only to an abortion that is performed, induced, or attempted to be performed or induced on or after the effective date of Article 3 of this Act.

(e) Provides that Sections 19.06 and 22.12, Penal Code, as amended by this Act, apply only to conduct that occurs on or after the effective date of Article 4 of this Act. Provides that conduct that occurs before that date is governed by the law in effect on the date the conduct occurred, and that law is continued in effect for that purpose.

(f) Provides that Sections 19.06 and 22.12, Penal Code, as amended by this Act, apply only to an offense committed on or after the effective date of Article 4 of this Act. Provides that an offense committed before that date is governed by the law in effect when the offense was committed, and the former law is continued in effect for that purpose. Provides that, for purposes of this subsection, an offense is committed before the effective date of Article 4 of this Act if any element of the offense occurs before that date.

SECTION 5.03. (a) Provides that it is the intent of the legislature that if a court suspends enforcement of any provision of this Act, the suspension is not to be regarded as repealing that provision.

(b) Provides that if any provision of this Act is held invalid or if the application of any provision to any person or circumstance is held invalid, the invalidity of that provision or application does not affect any other provision or application of this Act that can be given effect without the invalid provision or application, and to this end, the provisions of this Act are severable. Provides that it is the intent of the legislature that any invalidity or potential invalidity of a provision of this Act does not impair the immediate and continuing enforceability of the remaining provisions. Provides that it is furthermore the intent of the legislature that the provisions of this Act do not have the effect of repealing or limiting any other laws of this state.

(c) Provides that the legislature intends that each provision of this Act as applicable to each individual woman is severable from each other provision of this Act. Provides that in the unexpected event that a court finds the application of any provision of this Act to impose an impermissible undue burden on any pregnant woman or group of pregnant women, the application of the provision to those women is severed from the application of the remaining provisions of this Act that do not impose an undue burden, and those remaining applications remain in force and unaffected, consistent with Section 5.02 of this article.

SECTION 5.04. (a) Authorizes the attorney general, after the issuance of a decision by the United States Supreme Court overruling any prior ruling that prohibits states from wholly or partly prohibiting abortion, the issuance of any court order or judgment restoring, expanding, or clarifying the authority of states to wholly or partly prohibit or regulate abortion, or the effective date of an amendment to the United States Constitution restoring, expanding, or clarifying the authority of states to wholly or partly prohibit or regulate abortion, to apply to the appropriate state or federal court for:

- (1) a declaration that any one or more provisions of this Act are constitutional; or
- (2) a judgment or order lifting an injunction against the enforcement of any one or more provisions of this Act.

(b) Authorizes any district attorney, if the attorney general fails to apply for the relief described by Subsection (a) of this section not later than the 30th day after the date an event described by that subsection occurs, to apply to the appropriate state or federal court for the relief described by that subsection.

SECTION 5.05. Requires HHSC to implement a provision of this Act only if the legislature appropriates money to HHSC specifically for that purpose. Provides that if the legislature does not appropriate money specifically for that purpose, HHSC may, but is not required to, implement a provision of this Act using other appropriations that are available for that purpose.

SECTION 5.06. (a) Effective date, this Act, except as otherwise provided by this section: September 1, 2021.

(b) Effective date, Article 3: the earlier of the 91st day after the date the attorney general submits a report required by Section 402.003 (Report), Government Code, that states a court of competent jurisdiction has held the provisions in Article 3 of this Act to be constitutional; or September 1, 2023.

(c) Effective date, Article 4: the earlier of the 91st day after the date the attorney general submits a report required by Section 402.003, Government Code, that states a court of competent jurisdiction has held the provisions in Article 3 of this Act to be constitutional; or September 1, 2025.