

By: Hefner

H.B. No. 4876

A BILL TO BE ENTITLED

AN ACT

imposing liability on those who perform or assist unlawful abortions.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 71.001, Civil Practice And Remedies Code, is amended to read as follows:

Sec. 71.001. DEFINITIONS. In this subchapter:

(1) "Corporation" means a municipal, private, public, or quasi-public corporation other than a county or a common or independent school district.

(2) "Person" means an individual, association of individuals, joint-stock company, or corporation or a trustee or receiver of an individual, association of individuals, joint-stock company, or corporation.

(3) "Death" includes, for an individual who is an unborn child, the failure to be born alive.

(4) "Individual" includes an unborn child at every stage of gestation from fertilization until birth.

(5) "Wrongful act" includes, but is not limited to:

(A) The violation of any state or federal law, including 18 U.S.C. §§ 1461-1462;

(B) The manufacture, marketing, mailing, distribution, transportation, delivery, provision, or possession of mifepristone; and

1 (C) The marketing, mailing, distribution,
2 transportation, delivery, provision, or possession of misoprostol
3 with the intent of facilitating an unlawful abortion.

4 (6) "Abortion" means the act of using, prescribing,
5 administering, procuring, or selling any instrument, medicine,
6 drug, or any other substance, device, or means with the purpose to
7 terminate the pregnancy of a woman, with knowledge that the
8 termination by any of those means will with reasonable likelihood
9 cause the death of a living human being in the womb. The term does
10 not include:

11 (A) In vitro fertilization or fertility
12 treatments of any type;

13 (B) The use, prescription, administration,
14 procuring, or selling of Plan B, morning-after pills, intrauterine
15 devices, or any other type of contraception or emergency
16 contraception;

17 (C) An act performed with the purpose to:
18 (i) Save the life or preserve the health of
19 the unborn child;
20 (ii) Remove a dead unborn child caused by
21 spontaneous abortion; or
22 (iii) Remove or treat an ectopic pregnancy,
23 the implantation of a fertilized egg or embryo outside of the
24 uterus.

25 (7) "Unlawful abortion" includes, but is not limited
26 to:

27 (A) An abortion performed in violation of any

1 state or federal statute or any local or municipal ordinance,
2 regardless of whether the executive or the judiciary is enforcing
3 that statute or ordinance; and

4 (B) A drug-induced abortion in which any part of
5 the drug regimen is swallowed, ingested, administered, or
6 self-administered in a jurisdiction where the abortion is
7 prohibited by statute or ordinance.

8 SECTION 2. Section 71.003, Civil Practice And Remedies
9 Code, is amended to read as follows:

10 Sec. 71.003. APPLICATION; CERTAIN CONDUCT EXCEPTED. (a)
11 This subchapter applies only if the individual injured would have
12 been entitled to bring an action for the injury if the individual
13 had lived or had been born alive.

14 (b) This subchapter applies whether the injury occurs
15 inside or outside this state.

16 (c) This subchapter does not apply to a claim for the death
17 of an individual who is an unborn child that is brought against:

18 (1) the mother of the unborn child;

19 (2) a physician or other licensed health care
20 provider, if the death is the intended result of a lawful medical
21 procedure performed by the physician or health care provider with
22 the requisite consent; or

23 ~~(3) a person who dispenses or administers a drug in~~
24 ~~accordance with law, if the death is the result of the dispensation~~
25 ~~or administration of the drug; or~~

26 ~~(4) a physician or other health care provider licensed~~
27 in this state, if the death directly or indirectly is caused by,

1 associated with, arises out of, or relates to a lawful medical or
2 health care practice or procedure of the physician or the health
3 care provider.

4 SECTION 3. Section 71.007, Civil Practice And Remedies
5 Code, is amended to read as follows:

6 Sec. 71.007. INEFFECTIVE AGREEMENT. (a) An agreement
7 between the owner of a railroad, street railway, steamboat,
8 stagecoach, or other vehicle for the transportation of goods or
9 passengers, of an industrial or public utility plant, or of other
10 machinery and an individual, corporation, trustee, receiver,
11 lessee, joint-stock association, or other entity in control of or
12 operating the vehicle, plant, or other machinery does not release
13 the owner or the entity controlling or operating the vehicle,
14 plant, or other machinery from liability provided by this
15 subchapter.

16 (b) Notwithstanding any other law, any agreement to waive or
17 limit the right to sue or recover for the death of a pregnant woman
18 or unborn child resulting from an unlawful abortion is void as
19 against public policy, is not enforceable in any court, and does not
20 release any person from liability under this subchapter.

21 SECTION 4. Section 71.009, Civil Practice And Remedies
22 Code, is amended to read as follows:

23 Sec. 71.009. EXEMPLARY DAMAGES. (a) When the death is
24 caused by the wilful act or omission or gross negligence of the
25 defendant, exemplary as well as actual damages may be recovered.

26 (b) When the death is caused by an unlawful abortion, the
27 plaintiff shall be entitled to recover exemplary damages of not

1 less than five million dollars \$5,000,000 from each defendant that
2 acted with the intent of causing or facilitating the death of an
3 unborn child.

4 SECTION 5. Chapter 71, Civil Practice And Remedies Code, is
5 amended by adding sections 71.013, 71.014, 71.015, 71.0151,
6 71.0152, 71.0153, 71.0154, 71.016, 71.017, and 71.018 to read as
7 follows:

8 Sec. 71.013. MARKET-SHARE LIABILITY FOR MANUFACTURERS OF
9 MIFEPRISTONE. When the death is caused by an unlawful abortion in
10 which mifepristone was used, and the plaintiff is unable to
11 identify the manufacturer of the mifepristone that was used,
12 liability shall be apportioned among all manufacturers of
13 mifepristone in proportion to each manufacturer's share of the
14 market for mifepristone, in accordance with *Sindell v. Abbott*
15 *Laboratories*, 607 P.2d 924 (Cal. 1980).

16 Sec. 71.014. PERMISSIBLE AND IMPERMISSIBLE DEFENSES. (a)
17 Notwithstanding any other law, when the death is caused an unlawful
18 abortion the following are not a defense to an action brought under
19 this subchapter:

20 (1) ignorance or mistake of law;

21 (2) a defendant's belief that the requirements or
22 provisions of this subchapter are unconstitutional or were
23 unconstitutional;

24 (3) a defendant's reliance on any court decision that
25 has been vacated, reversed, or overruled on appeal or by a
26 subsequent court, even if that court decision had not been vacated,
27 reversed, or overruled when the cause of action accrued;

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

4 (5) a defendant's reliance on any federal statute,
5 agency rule or action, or treaty that has been repealed,
6 superseded, or declared invalid or unconstitutional, even if that
7 federal statute, agency rule or action, or treaty had not been
8 repealed, superseded, or declared invalid or unconstitutional when
9 the cause of action accrued;

10 (6) non-mutual issue preclusion or non-mutual claim
11 preclusion;

12 (7) the consent of the plaintiff or the unborn child's
13 mother to the abortion, or the consent of one or both of the parents
14 of the unborn child's mother, if she was an unemancipated minor, or
15 the consent of the legal guardian of the unborn child's mother;

16 (8) contributory or comparative negligence;

17 (9) assumption of risk;

18 (10) sovereign immunity, governmental immunity,
19 official immunity, or qualified immunity; or

20 (11) any claim that the enforcement of this subchapter
21 or the imposition of civil liability against the defendant will
22 violate the constitutional rights of third parties, except as
23 provided by Subsection (b).

24 (b) A defendant against whom an action is brought under this
25 subchapter may assert an affirmative defense to liability if:

26 (1) the imposition of civil liability on the defendant
27 will violate constitutional or federally protected rights that

1 belong to the defendant personally; or

2 (2) the defendant

3 (A) has standing to assert the rights of a third
4 party under the tests for third-party standing established by the
5 Supreme Court of the United States; and

6 (B) demonstrates that the imposition of civil
7 liability on the defendant will violate constitutional or federally
8 protected rights belonging to that third party.

9 The defendant shall bear the burden of proving the
10 affirmative defense in Subsection (a) by a preponderance of the
11 evidence.

12 (c) Notwithstanding any other law, when the death is caused
13 an unlawful abortion a civil action under this subchapter may not be
14 brought:

15 (1) against the mother of the aborted unborn child;

16 (2) against any person that acted at the behest of
17 federal agencies, contractors, or employees that are carrying out
18 duties under federal law, if the imposition of liability would
19 violate the doctrines of preemption or intergovernmental immunity;

20 (3) against any common carrier that transports a
21 pregnant woman to an abortion provider, if the common carrier is
22 unaware that the woman intends to abort her unborn child;

23 (4) against a provider or user of an interactive
24 computer service if such a lawsuit would be preempted by 47 U.S.C. §
25 230(c);

26 (5) by any person who impregnated the mother of the
27 aborted unborn child through an act of rape, sexual assault, or

1 incest, or by anyone who acts in concert or participation with such
2 a person; or

3 (6) against a manufacturer, marketer, mailer,
4 distributor, transporter, deliverer, provider, or possessor of
5 misoprostol, if the person did not act with the intent of
6 facilitating an unlawful abortion.

7 (d) Nothing in this section or subchapter shall limit or
8 preclude a defendant from asserting the unconstitutionality of any
9 provision or application of this subchapter as a defense to
10 liability, or from asserting any other defense that might be
11 available under any other source of law.

12 Sec. 71.015. LIMITATIONS. Notwithstanding any other law,
13 including Chapter 16, Civil Practice and Remedies Code, when death
14 is caused by an unlawful abortion, a person may bring an action
15 under this subchapter not later than the tenth anniversary of the
16 date the cause of action accrues.

17 Sec. 71.0151. LONG-ARM JURISDICTION. Notwithstanding any
18 other law, including Chapter 17, Civil Practice and Remedies Code,
19 when death is caused by an unlawful abortion, the courts of this
20 state shall have personal jurisdiction over any defendant sued
21 under this subchapter to the maximum extent permitted by the
22 Fourteenth Amendment to the United States Constitution.

23 Sec. 71.0152. VENUE. (a) Notwithstanding any other law,
24 including Chapter 15, Civil Practice and Remedies Code, when death
25 is caused by an unlawful abortion, a civil action brought under this
26 subchapter may be brought in:

27 (1) the county in which all or a substantial part of

1 the events or omissions giving rise to the claim occurred;

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

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

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

8 (b) Notwithstanding any other law, if a civil action is
9 brought under this subchapter in response to a death caused by an
10 unlawful abortion in any one of the venues described by Subsection
11 (a), then the action may not be transferred to a different venue
12 without the written consent of all parties.

13 (c) Any contractual choice-of-forum provision that purports
14 to require a civil action under this subchapter to be litigated in
15 another forum is void as against public policy, and may not be
16 enforced in any state or federal court.

17 Sec. 71.0153. CHOICE OF LAW. (a) Notwithstanding any other
18 law, the law of Texas shall apply to any abortion performed or
19 induced by or upon a resident or citizen of Texas, regardless of
20 where that abortion occurs, and to any civil action brought under
21 this subchapter, to the maximum extent permitted by the
22 Constitution of the United States and the Texas Constitution.

23 (b) Notwithstanding any other law, no court may apply the
24 law of another state or jurisdiction to any civil action brought
25 under this subchapter, unless the Constitution of the United States
26 or the Texas Constitution compels it to do so.

27 (c) Any contractual choice-of-law provision that purports

1 to require the law of another jurisdiction to govern a civil action
2 brought under this subchapter is void as against public policy, and
3 may not be enforced in any state or federal court.

4 Sec. 71.0154. ANTI-SLAPP AND TEXAS RFRA EXCLUSIONS.

5 Notwithstanding any other law, a civil action under this subchapter
6 shall not be subject to any provision of Chapter 27, Civil Practice
7 and Remedies Code, or Chapter 110, Civil Practice and Remedies
8 Code.

9 Sec. 71.016. PRIVATE ENFORCEMENT EXCLUSIVE. (a)

10 Notwithstanding any other law, the requirements of this subchapter
11 shall be enforced exclusively through the private civil actions
12 established in this subchapter. No direct or indirect enforcement
13 of this subchapter may be taken or threatened by the state or a
14 political subdivision, by any means whatsoever, and no violation of
15 this subchapter may be used to justify or trigger the enforcement of
16 any other law or any type of adverse consequence under any other
17 law, except as provided in this subchapter. This section does not
18 preclude or limit the enforcement of any other law or regulation
19 against conduct that is independently prohibited by such other law
20 or regulation, and that would remain prohibited by such other law or
21 regulation in the absence of this subchapter.

22 (b) Notwithstanding any other law, neither the state nor any
23 of its political subdivisions may:

24 (1) act in concert or participation with anyone who
25 brings suit under this subchapter;

26 (2) establish or attempt to establish any type of
27 agency or fiduciary relationship with a person who brings suit

1 under this subchapter;

2 (3) make any attempt to control or influence a person's
3 decision to bring suit under this subchapter or that person's
4 conduct of the litigation; or

5 (4) intervene in any action brought under this
6 subchapter.

7 This subsection does not prohibit a person or entity
8 described by this subsection from filing an amicus curiae brief in
9 the action, so long as that person or entity does not act in concert
10 or participation with the plaintiff or plaintiffs who sue under
11 this subchapter or violate any provision of Subsection (b)(1)-(4).

12 Sec. 71.017. IMMUNITY FROM SUIT AND LIMITS ON STATE-COURT
13 JURISDICTION. (a) Notwithstanding any other law, the state and
14 each of its officers and employees shall have sovereign immunity,
15 its political subdivisions and each of their officers and employees
16 shall have governmental immunity, and each officer and employee of
17 this state or a political subdivision shall have official immunity
18 (as well as sovereign or governmental immunity, as appropriate) in
19 any action, claim, counterclaim, or any type of legal or equitable
20 action that challenges the validity of any provision or application
21 of this subchapter, on constitutional grounds or otherwise, or that
22 seeks to prevent or enjoin the state, its political subdivisions,
23 or any officer or employee of this state or a political subdivision
24 from enforcing any provision or application of this subchapter, or
25 from hearing, adjudicating, or docketing a civil action brought
26 under this subchapter, unless that immunity has been abrogated or
27 preempted by federal law in a manner consistent with the

1 Constitution of the United States. The sovereign immunity
2 conferred by this section upon the state and each of its officers
3 and employees includes the constitutional sovereign immunity
4 recognized by the Supreme Court of the United States in *Seminole*
5 *Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and *Alden v. Maine*,
6 527 U.S. 706 (1999), which applies in both state and federal court
7 and which may not be abrogated by Congress or by any state or
8 federal court except pursuant to legislation authorized by section
9 5 of the Fourteenth Amendment, by the Bankruptcy Clause of Article
10 I, or by Congress's powers to raise and support Armies and to
11 provide and maintain a Navy.

12 (b) Notwithstanding any other law, the immunities conferred
13 by Subsection (a) shall apply in every court, both state and
14 federal, and in every adjudicative proceeding of any type
15 whatsoever.

16 (c) Notwithstanding any other law, no provision of state law
17 may be construed to waive or abrogate an immunity described in
18 Subsection (a) unless it expressly waives or abrogates immunity
19 with specific reference to this section.

20 (d) Notwithstanding any other law, no attorney representing
21 the state, its political subdivisions, or any officer or employee
22 of this state or a political subdivision is authorized or permitted
23 to waive an immunity described in Subsection (a) or take any action
24 that would result in a waiver of that immunity, and any such action
25 or purported waiver shall be regarded as a legal nullity and an
26 ultra vires act.

27 (e) Notwithstanding any other law, including Chapter 37,

1 Civil Practice and Remedies Code, and sections 22.002, 22.221, and
2 24.007 through 24.011, Government Code, no court of this state may
3 award declaratory or injunctive relief, or any type of writ, that
4 would pronounce any provision or application of this subchapter
5 invalid or unconstitutional, or that would restrain the state, its
6 political subdivisions, any officer, employee, or agent of this
7 state or a political subdivision, or any person from enforcing any
8 provision or application of this subchapter, or from hearing,
9 adjudicating, docketing, or filing a civil action brought under
10 this subchapter, and no court of this state shall have jurisdiction
11 to consider any action, claim, or counterclaim that seeks such
12 relief.

13 (f) Nothing in this section or subchapter shall be construed
14 to prevent a litigant from asserting the invalidity or
15 unconstitutionality of any provision or application of this
16 subchapter as a defense to any action, claim, or counterclaim
17 brought against that litigant.

18 (g) Notwithstanding any other law, any judicial relief
19 issued by a court of this state that disregards the immunities
20 conferred by Subsection (a), or the jurisdictional limitations
21 imposed by Subsection (e), shall be regarded as a legal nullity
22 because it was issued by a court without jurisdiction, and may not
23 be enforced or obeyed by any officer or employee of this state or a
24 political subdivision, judicial or otherwise.

25 (h) Notwithstanding any other law, any writ, injunction, or
26 declaratory judgment issued by a court of this state that purports
27 to restrain the state, its political subdivisions, any officer or

1 employee of this state or a political subdivision, or any person
2 from hearing, adjudicating, docketing, or filing a civil action
3 brought under this subchapter shall be regarded as a legal nullity
4 and a violation of the Due Process Clause of the Fourteenth
5 Amendment, and may not be enforced or obeyed by any officer or
6 employee of this state or a political subdivision, judicial or
7 otherwise.

8 (i) Notwithstanding any other law, any officer or employee
9 of this state or a political subdivision, judicial or otherwise,
10 who issues, enforces, or obeys a writ, injunction, or declaratory
11 judgment described in Subsection (h) shall be subject to suit by any
12 person who is prevented from or delayed in bringing a civil action
13 under this subchapter, and a claimant who prevails in an action
14 brought under this section shall recover:

- 15 (1) injunctive relief;
- 16 (2) compensatory damages;
- 17 (3) punitive damages of not less than \$100,000; and
- 18 (4) costs and reasonable attorney's fees.

19 (j) Notwithstanding any other law, any person who violates
20 Subsections (e) or (h):

21 (1) may not assert and shall not be entitled to any
22 type of immunity defense, including sovereign immunity,
23 governmental immunity, official immunity, or judicial immunity;

24 (2) may not and shall not be indemnified for any award
25 of damages or costs and attorneys' fees entered against them, or for
26 the costs of their legal defense; and

27 (3) may not and shall not receive or obtain legal

1 representation from the attorney general of this state in any
2 action brought under Subsection (i).

3 (k) Notwithstanding any other law, any person who sues and
4 seeks any writ, injunction, or declaratory judgment that would
5 restrain any person from hearing, adjudicating, docketing, or
6 filing a civil action brought under this subchapter, shall pay the
7 costs and attorneys' fees of the person sued. A person may bring a
8 civil action to recover these costs and attorneys' fees in state or
9 federal court. It shall not be defense to a civil action brought
10 under this Subsection that:

11 (1) the plaintiff failed to seek recovery of costs or
12 attorney's fees in the underlying action;

13 (2) the court in the underlying action declined to
14 recognize or enforce the requirements of this Section; or

15 (3) the court in the underlying action held that any
16 provisions of this Section are invalid, unconstitutional, or
17 preempted by federal law, notwithstanding the doctrines of issue or
18 claim preclusion.

19 Sec. 71.018. SEVERABILITY. (a) Mindful of *Leavitt v. Jane*
20 *L.*, 518 U.S. 137 (1996), in which in the context of determining the
21 severability of a state statute the Supreme Court of the United
22 States held that an explicit statement of legislative intent is
23 controlling, it is the intent of the legislature that every
24 provision, section, subsection, sentence, clause, phrase, or word
25 in this subchapter, and every application of the provisions in this
26 subchapter to every person, group of persons, or circumstances, are
27 severable from each other.

1 (b) If any application of any provision in this subchapter
2 to any person, group of persons, or circumstances is found by a
3 court to be invalid, preempted, or unconstitutional, for any reason
4 whatsoever, then the remaining applications of that provision to
5 all other persons and circumstances shall be severed and preserved,
6 and shall remain in effect. All constitutionally valid
7 applications of the provisions in this subchapter shall be severed
8 from any applications that a court finds to be invalid, preempted,
9 or unconstitutional, because it is the legislature's intent and
10 priority that every single valid application of every statutory
11 provision be allowed to stand alone.

12 (c) The legislature further declares that it would have
13 enacted this subchapter, and each provision, section, subsection,
14 sentence, clause, phrase, or word, and all constitutional
15 applications of the provisions of this subchapter, irrespective of
16 the fact that any provision, section, subsection, sentence, clause,
17 phrase, or word, or applications of this subchapter were to be
18 declared invalid, preempted, or unconstitutional.

19 (d) If any provision of this subchapter is found by any
20 court to be unconstitutionally vague, then the applications of that
21 provision that do not present constitutional vagueness problems
22 shall be severed and remain in force, consistent with the
23 severability requirements of Subsections (a), (b), and (c).

24 (e) No court may decline to enforce the severability
25 requirements of Subsections (a), (b), (c), and (d) on the ground
26 that severance would "rewrite" the statute or involve the court in
27 legislative or lawmaking activity. A court that declines to

1 enforce or enjoins a state official from enforcing a statutory
2 provision is never rewriting a statute or engaging in legislative
3 or lawmaking activity, as the statute continues to contain the same
4 words as before the court's decision. A judicial injunction or
5 declaration of unconstitutionality:

6 (1) is nothing more than an edict prohibiting
7 enforcement of the disputed statute against the named parties to
8 that lawsuit, which may subsequently be vacated by a later court if
9 that court has a different understanding of the requirements of the
10 Texas State Constitution or United States Constitution;

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

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

16 (f) If any state or federal court disregards any of the
17 severability requirements in Subsections (a), (b), (c), (d), or
18 (e), and declares or finds any provision of this subchapter
19 facially invalid, preempted, or unconstitutional, when there are
20 discrete applications of that provision that can be enforced
21 against a person, group of persons, or circumstances without
22 violating federal law or the federal or state constitutions, then
23 that provision shall be interpreted, as a matter of state law, as if
24 the legislature had enacted a provision limited to the persons,
25 group of persons, or circumstances for which the provision's
26 application will not violate federal law or the federal or state
27 constitutions, and every court shall adopt this saving construction

1 of that provision until the court ruling that pronounced the
2 provision facially invalid, preempted, or unconstitutional is
3 vacated or overruled.

4 SECTION 6. This Act takes effect September 1, 2023.