

BILL ANALYSIS

C.S.H.B. 2364
By: Laubenberg
State Affairs
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Interested parties report that at 20 weeks post-fertilization, preborn children are capable of feeling pain because all the neuroreceptors for pain are in place and functioning. The parties report that a myriad of peer-reviewed studies have found anatomical, behavioral, and physiological evidence that a developing preborn child is capable of experiencing pain by 20 weeks post-fertilization. The parties point to one study in particular that found that fetuses undergoing intrauterine invasive procedures were reported to show coordinated responses signaling the avoidance of tissue injury, which the parties say is definitely illustrative of pain signaling. The parties also note that other states have passed preborn pain laws. C.S.H.B. 2364 seeks to establish provisions relating to protecting the lives of unborn children at a time when medical evidence indicates they are capable of feeling pain.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 2364 amends the Health and Safety Code to prohibit a physician from performing or inducing or attempting to perform or induce an abortion without, prior to the procedure, making a determination of the probable post-fertilization age of the unborn child or possessing and relying on a determination of the probable post-fertilization age of the unborn child made by another physician. The bill defines "post-fertilization age" as the age of the unborn child as calculated from the fusion of a human spermatozoon with a human ovum. The bill prohibits a person from performing or inducing or attempting to perform or induce an abortion on a woman if it has been determined, by the physician performing, inducing, or attempting to perform or induce the abortion or by another physician on whose determination that physician relies, that the probable post-fertilization age of the unborn child is 20 or more weeks.

C.S.H.B. 2364 requires a physician performing an abortion under certain exceptions established by the bill in which the probable post-fertilization age of the unborn child is 20 or more weeks or the probable post-fertilization age of the unborn child has not been determined but could reasonably be 20 or more weeks to terminate the pregnancy in the manner that, in the physician's reasonable medical judgment, provides the best opportunity for the unborn child to survive. The bill exempts from the bill's prohibitions and requirements an abortion performed if there exists a condition that, in the physician's reasonable medical judgment, so complicates the medical condition of the woman that, to avert the woman's death or a serious risk of substantial and irreversible physical impairment of a major bodily function, other than a psychological condition, it necessitates, as applicable, the immediate abortion of her pregnancy without the delay necessary to determine the probable post-fertilization age of the unborn child, the abortion of her pregnancy even though the post-fertilization age of the unborn child is 20 or more weeks, or the use of a method of abortion other than a method that provides the best opportunity for the unborn child to survive. The bill prohibits a physician from taking such an authorized action if

the risk of death or a substantial and irreversible physical impairment of a major bodily function arises from a claim or diagnosis that the woman will engage in conduct that may result in her death or in substantial and irreversible physical impairment of a major bodily function. The bill establishes that the bill's prohibitions and requirements do not apply to an abortion performed on an unborn child who has a profound and irremediable congenital anomaly that will result in the death of the infant not later than minutes to hours after birth regardless of the provision of lifesaving medical treatment.

C.S.H.B. 2364 establishes that in a civil or criminal proceeding or action involving an act prohibited under the bill the identity of the woman on whom an abortion has been performed or induced or attempted to be performed or induced is not subject to public disclosure if the woman does not give consent to disclosure. The bill requires the court, in such a proceeding or action, to issue orders to the parties, witnesses, and counsel and to direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to protect the woman's identity from public disclosure. The bill authorizes a court to order the disclosure of such confidential information if a motion is filed with the court requesting release of the information and a hearing on that request, notice of the hearing is served on each interested party, and the court determines after the hearing and an in camera review that disclosure is essential to the administration of justice and there is no reasonable alternative to disclosure.

C.S.H.B. 2364 requires the bill's provisions to be construed, as a matter of state law, to be enforceable up to but no further than the maximum possible extent consistent with federal constitutional requirements, even if that construction is not readily apparent, as such constructions are authorized only to the extent necessary to save the bill's provisions from judicial invalidation and establishes that judicial reformation of statutory language is explicitly authorized only to the extent necessary to save the statutory provision from invalidity.

C.S.H.B. 2364 requires any court that determines that a provision of the bill's provisions 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. The bill requires the Supreme Court of Texas, if a federal court finds any provision of the bill's provisions or its application to any person, group of persons, or circumstances to be unconstitutionally vague and declines to impose the bill's saving construction so described by the bill, 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 to agree to answer any question certified from a federal appellate court regarding the statute.

C.S.H.B. 2364 prohibits a state executive or administrative official from declining to enforce the bill's provisions, or from adopting a construction of the provisions in a way that narrows the bill's applicability, based on the official's own beliefs about what the state or federal constitution requires, unless the official is enjoined by a state or federal court from enforcing the bill's provisions. The bill prohibits its provisions from being construed as authorizing the prosecution of or a cause of action to be brought against a woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of the bill's provisions. The bill requires the probable post-fertilization age of the unborn child, rather than period of gestation, to be included in the annual report required to be submitted to the Department of State Health Services by an abortion facility on each abortion performed at the abortion facility.

C.S.H.B. 2364 amends the Occupations Code to make it a prohibited practice for a physician or an applicant for a license to practice medicine to perform or induce or attempt to perform or induce an abortion in violation of the bill's provisions. The bill exempts a violation of the bill's provisions from the criminal penalties provided under statutory provisions relating to practicing medicine in violation of the Medical Practice Act. The bill provides for the construction and severability of its provisions.

EFFECTIVE DATE

On passage, or, if the bill does not receive the necessary vote, September 1, 2013.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 2364 may differ from the original in minor or nonsubstantive ways, the following comparison is organized and highlighted in a manner that indicates the substantial differences between the introduced and committee substitute versions of the bill.

INTRODUCED

SECTION 1. (a) This Act may be cited as the Preborn Pain Act.

(b) The legislature finds that:

(1) substantial medical evidence recognizes that an unborn child is capable of experiencing pain by not later than 20 weeks after fertilization;

(2) the state has a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that these children are capable of feeling pain; and

(3) the compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that an unborn child is capable of feeling pain is intended to be separate from and independent of the compelling state interest in protecting the lives of unborn children from the stage of viability, and neither state interest is intended to replace the other.

HOUSE COMMITTEE SUBSTITUTE

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(b) The legislature finds that:

(1) substantial medical evidence recognizes that an unborn child is capable of experiencing pain by not later than 20 weeks after fertilization;

(2) the state has a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that these children are capable of feeling pain;

(3) the compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that an unborn child is capable of feeling pain is intended to be separate from and independent of the compelling state interest in protecting the lives of unborn children from the stage of viability, and neither state interest is intended to replace the other; and

(4) restricting elective abortions at or later than 20 weeks post-fertilization, as provided by this Act, does not impose an undue burden or a substantial obstacle on a woman's ability to have an abortion because:

(A) the woman has adequate time to decide whether to have an abortion in the first 20 weeks after fertilization; and

(B) this Act does not apply to abortions that are necessary to avert the death or substantial and irreversible physical impairment of a major bodily function of the pregnant woman.

(c) The legislature intends that every application of this statute to every individual woman shall be severable from each other. In the unexpected event that the application of this statute is found to impose an impermissible undue burden on any pregnant woman or group of pregnant

women, the application of the statute to those women shall be severed from the remaining applications of the statute that do not impose an undue burden, and those remaining applications shall remain in force and unaffected, consistent with Section 7 of this Act.

SECTION 2. Chapter 171, Health and Safety Code, is amended by adding Subchapter C to read as follows:

SUBCHAPTER C. ABORTION PROHIBITED AT OR AFTER 20 WEEKS POST-FERTILIZATION

Sec. 171.041. DEFINITION. In this subchapter, "post-fertilization age" means the age of the unborn child as calculated from the fusion of a human spermatozoon with a human ovum.

Sec. 171.042. DETERMINATION OF POST-FERTILIZATION AGE REQUIRED.

Sec. 171.043. ABORTION OF UNBORN CHILD OF 20 OR MORE WEEKS POST-FERTILIZATION AGE PROHIBITED.

Sec. 171.044. METHOD OF ABORTION.

Sec. 171.045. EXCEPTIONS. (a) The prohibitions and requirements under Sections 171.042, 171.043, and 171.044 do not apply to an abortion performed if there exists a condition that, in the physician's reasonable medical judgment, so complicates the medical condition of the woman that, to avert the woman's death or a serious risk of substantial or irreversible physical impairment of a major bodily function, other than a psychological condition, it necessitates, as applicable:

- (1) the immediate abortion of her pregnancy without the delay necessary to determine the probable post-fertilization age of the unborn child;
- (2) the abortion of her pregnancy even

SECTION 2. Chapter 171, Health and Safety Code, is amended by adding Subchapter C to read as follows:

SUBCHAPTER C. ABORTION PROHIBITED AT OR AFTER 20 WEEKS POST-FERTILIZATION

Sec. 171.041. DEFINITIONS. In this subchapter:

(1) "Post-fertilization age" means the age of the unborn child as calculated from the fusion of a human spermatozoon with a human ovum.

(2) "Profound and irremediable congenital anomaly" means a congenital anomaly that, in a physician's reasonable medical judgment, will result in the death of the infant not later than minutes to hours after birth regardless of the provision of lifesaving medical treatment.

Sec. 171.042. DETERMINATION OF POST-FERTILIZATION AGE REQUIRED.

Sec. 171.043. ABORTION OF UNBORN CHILD OF 20 OR MORE WEEKS POST-FERTILIZATION AGE PROHIBITED.

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- (1) the immediate abortion of her pregnancy without the delay necessary to determine the probable post-fertilization age of the unborn child;
- (2) the abortion of her pregnancy even

though the post-fertilization age of the unborn child is 20 or more weeks; or
(3) the use of a method of abortion other than a method described by Section 171.044(b).
(b) A physician may not take an action authorized under Subsection (a) if the risk of death or a substantial and irreversible physical impairment of a major bodily function arises from a claim or diagnosis that the woman will engage in conduct that may result in her death or in substantial and irreversible physical impairment of a major bodily function.

Sec. 171.046. PROTECTION OF PRIVACY IN COURT PROCEEDINGS.

Sec. 171.047. CONSTRUCTION OF SUBCHAPTER.

though the post-fertilization age of the unborn child is 20 or more weeks; or
(3) the use of a method of abortion other than a method described by Section 171.044(b).
(b) A physician may not take an action authorized under Subsection (a) if the risk of death or a substantial and irreversible physical impairment of a major bodily function arises from a claim or diagnosis that the woman will engage in conduct that may result in her death or in substantial and irreversible physical impairment of a major bodily function.
(c) The prohibitions and requirements under Sections 171.042, 171.043, and 171.044 do not apply to an abortion performed on an unborn child who has a profound and irremediable congenital anomaly.

Sec. 171.046. PROTECTION OF PRIVACY IN COURT PROCEEDINGS.

Sec. 171.047. CONSTRUCTION OF SUBCHAPTER. (a) This subchapter shall be construed, as a matter of state law, to be enforceable up to but no further than the maximum possible extent consistent with 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. Judicial reformation of statutory language is explicitly authorized only to the extent necessary to save the statutory provision from invalidity.
(b) If any court determines that a provision of this subchapter is unconstitutionally vague, the court shall interpret the provision, as a matter of state law, to avoid the vagueness problem and shall enforce the provision to the maximum possible extent. If a federal court finds any provision of this subchapter 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 subsection, the Supreme Court of Texas shall 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 shall agree to answer any question certified from a federal

This subchapter may not be construed to authorize the prosecution of or a cause of action to be brought against a woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of this subchapter.

SECTION 3. Section 245.011(c), Health and Safety Code, is amended.

SECTION 4. Section 164.052(a), Occupations Code, is amended.

SECTION 5. Section 164.055(b), Occupations Code, is amended.

SECTION 6. This Act may not be construed to repeal, by implication or otherwise, Section 164.052(a)(18), Occupations Code, Section 170.002, Health and Safety Code, or any other provision of Texas law regulating or restricting abortion not specifically addressed by this Act. An abortion that complies with this Act but violates any other law is unlawful. An abortion that complies with another state law but violates this Act is unlawful as provided in this Act.

SECTION 7. (a) If some or all of the provisions of this Act are ever temporarily or permanently restrained or enjoined by judicial order, all other provisions of Texas law regulating or restricting abortion shall be enforced as though the restrained or enjoined provisions had not been adopted; provided, however, that whenever the temporary or permanent restraining order or injunction is stayed or dissolved, or otherwise ceases to have effect, the provisions shall have full force and effect. (b) Mindful of Leavitt v. Jane L., 518 U.S. 137 (1996), in which in the context of

appellate court regarding the statute.

(c) A state executive or administrative official may not decline to enforce this subchapter, or adopt a construction of this subchapter in a way that narrows its applicability, based on the official's own beliefs about what the state or federal constitution requires, unless the official is enjoined by a state or federal court from enforcing this subchapter.

(d) This subchapter may not be construed to authorize the prosecution of or a cause of action to be brought against a woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of this subchapter.

SECTION 3. Same as introduced version.

SECTION 4. Same as introduced version.

SECTION 5. Same as introduced version.

SECTION 6. Same as introduced version.

SECTION 7. (a) If some or all of the provisions of this Act are ever temporarily or permanently restrained or enjoined by judicial order, all other provisions of Texas law regulating or restricting abortion shall be enforced as though the restrained or enjoined provisions had not been adopted; provided, however, that whenever the temporary or permanent restraining order or injunction is stayed or dissolved, or otherwise ceases to have effect, the provisions shall have full force and effect. (b) 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 **noted** that an explicit statement of legislative intent **specifically made applicable to a particular statute is of greater weight than a general savings or severability clause,** it is the intent of the legislature that if any provision, section, subsection, sentence, clause, phrase, or word of this Act or the application thereof to any person or circumstance is found to be unconstitutional, the provision, section, subsection, sentence, clause, phrase, or word is hereby declared to be severable and the balance of this Act remains effective notwithstanding such unconstitutionality. Moreover, the legislature declares that it would have passed this Act, and each provision, section, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or any of their applications, were to be declared unconstitutional.

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 Act, and every application of the provisions in this Act, are severable from each other.

If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this Act shall 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. Even if a reviewing court finds a provision of this Act to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining provisions and shall remain in force, and shall 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. The legislature further declares that it would have passed this Act, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this Act, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this Act, were to

be declared unconstitutional or to represent an undue burden.

(c) If Subchapter C, Chapter 171, Health and Safety Code, as added by this Act, prohibiting abortions performed on an unborn child 20 or more weeks after fertilization is found by any court to be invalid or to impose an undue burden as applied to any person, group of persons, or circumstances, the prohibition shall apply to that person or group of persons or circumstances on the earliest date on which the subchapter can be constitutionally applied.

(d) If any provision of this Act 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.

SECTION 8. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2013.

SECTION 8. Same as introduced version.