

BILL ANALYSIS

Senate Research Center

S.B. 8
By: Schwertner et al.
Health & Human Services
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Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

In 2003, the United States (U.S.) Congress enacted a ban on the practice known as "partial-birth abortion," a procedure in which labor is induced and a live fetus is partially delivered in the breach presentation (feet-first), allowing a doctor to sever its spinal cord before the fetus fully emerges from the birth canal. This federal ban was later challenged and subsequently upheld by the U.S. Supreme Court in 2007.

Without a concurrent prohibition in state law, Texas law enforcement lacks the authority to enforce the ban on partial-birth abortion, leaving federal law enforcement with the sole authority to assert criminal charges in these cases. By aligning state and federal statute, Texas law enforcement will have the clear authority to investigate and prosecute any violations of the partial-birth abortion ban.

In addition, existing federal law states that it is "unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce." However, this prohibition, by itself, is inadequate since these offenses must affect interstate commerce in order to be considered unlawful. Federal law also forbids providing incentives to persuade a woman to become pregnant for the purposes of selling fetal tissue, but similarly, this provision can only be enforced if it affects interstate commerce.

State and federal statute currently allow for "valuable consideration" to be paid to abortion providers for the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue. However, detailed accounting of these reimbursements is not required, allowing abortion providers to potentially overstate these permissible expenses and sell human fetal tissue for what amounts to a profit.

Key Provisions

- Prohibits the donation of human fetal tissue acquired as a result of an elective abortion.
- Codifies federal statute to ban partial-birth abortion.
- Creates a criminal offense for the receipt of any payment made in exchange for human fetal tissue.
- Prohibits the solicitation or acceptance of tissue from fetuses gestated for research purposes.
- Increases criminal penalties for buying or selling human fetal tissue.
- Prohibits the offering of incentives to undergo an abortion procedure or donate fetal tissue.
- Clarifies that hospitals, ambulatory surgical centers, or birthing centers are only permitted to donate fetal tissue from a non-elective abortion (including the umbilical cord and placenta) to an accredited public institution of higher education for the purpose of academic research.

- Requires doctors to certify that no alteration of the timing, method, or procedures used to terminate the pregnancy was made for the purposes of obtaining the tissue.
- Creates a reporting requirement for eligible entities to inform the Department of State Health Services (DSHS) about instances of fetal tissue donation.
- Requires records maintenance for abortion providers for a period of seven years after consent was given, or if the woman is under 18 years of age, the later of the woman's 23rd birthday or seven years after the date of consent.
- Allows the Office of the Attorney General (OAG) to assist DSHS and local law enforcement with investigations and for local county and district attorneys to request assistance in prosecution from OAG.
- Increases the penalty for incentivizing an abortion for fetal tissue donation from a Class C misdemeanor to a Class A misdemeanor with a maximum fine of \$10,000.
- Changes the term "valuable consideration" to "economic benefit" to align this section with the Penal Code.
- Changes the university employee exception from prosecution to a defense from prosecution.
- Clarifies that this bill does not apply to human fetal tissue obtained for diagnostic or pathological testing, for a criminal investigation, for the disposition of human remains, and for anything unrelated to fetal tissue.
- Removes the donation restrictions for supporting cells or tissue derived from a pregnancy, associated maternal tissue not related to the unborn child, the placenta, and the umbilical cord. The clarification was added for donated placenta and umbilical cords because these are considered human tissue, not fetal tissue, and are used for research. Also the blood from the umbilical cord can be donated to blood banks.
- Gives the Texas Medical Board 60 days instead of 30 to determine if a physician followed the standard of care and applicable laws when performing an abortion.
- Adds that a teaching hospital is also an authorized facility to donate fetal tissue since they were left out of the filed version of S.B. 8.
- Clarifies what types of internal research oversight a university can use to conduct research on fetal tissue from non-elective abortions as authorized by this bill.
- Clarifies that an authorized facility collecting and releasing donated fetal tissue keeps a record of the university that receives the fetal tissue.

S.B. 8 amends current law relating to certain prohibited abortions and the treatment and disposition of a human fetus, human fetal tissue, and embryonic and fetal tissue remains; creates a civil cause of action; imposes a civil penalty; and creates criminal offenses.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the executive commissioner of the Texas Health and Human Services Commission in SECTION 13 (Section 697.009, Health and Safety Code) and SECTION 18 of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 33.001(1), Family Code, to redefine "abortion."

SECTION 2. Amends Section 161.006(b), Family Code, to redefine "abortion."

SECTION 3. Amends Section 170.001(1), Health and Safety Code, to redefine "abortion."

SECTION 4. Amends Section 171.002(1), Health and Safety Code, to redefine "abortion."

SECTION 5. Amends Section 171.061(1), Health and Safety Code, to redefine "abortion."

SECTION 6. Amends Chapter 171, Health and Safety Code, by adding Subchapters F and G, as follows:

SUBCHAPTER F. PARTIAL-BIRTH ABORTIONS

Sec. 171.101. DEFINITIONS. Defines "partial-birth abortion" and "physician."

Sec. 171.102. PARTIAL-BIRTH ABORTIONS PROHIBITED. (a) Prohibits a physician or other person from knowingly performing a partial-birth abortion.

(b) Provides that Subsection (a) does not apply to a physician who performs a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy.

Sec. 171.103. CRIMINAL PENALTY. Provides that a person who violates Section 171.102 commits an offense. Provides that an offense is a state jail felony.

Sec. 171.104. CIVIL LIABILITY. (a) Authorizes, except as provided by Subsection (b), the father of the fetus or a parent of the mother of the fetus, if the mother is younger than 18 years of age at the time of the partial-birth abortion, to bring a civil action to obtain appropriate relief, including money damages for physical injury, mental anguish, and emotional distress, and exemplary damages equal to three times the cost of the partial-birth abortion.

(b) Prohibits a person from bringing or maintaining an action under this section if the person consented to the partial-birth abortion, or the person's criminally injurious conduct resulted in the pregnancy.

Sec. 171.105. HEARING. (a) Authorizes a physician who is the subject of a criminal or civil action for a violation of Section 171.102 to request a hearing before the Texas Medical Board (TMB) on whether the physician's conduct was necessary to save the life of a mother whose life was endangered by certain physical conditions.

(b) Provides that TMB's findings under Subsection (a) are admissible in any court proceeding against the physician arising from that conduct. Requires the court, on the physician's motion, to delay the beginning of a criminal or civil trial for not more than 60 days for the hearing to be held under Subsection (a).

Sec. 171.106. APPLICABILITY. Prohibits a woman on whom a partial-birth abortion is performed or attempted in violation of this subchapter from being prosecuted under this subchapter or for conspiracy to commit a violation of this subchapter.

SUBCHAPTER G. DISMEMBERMENT ABORTIONS

Sec. 171.151. DEFINITION. Defines "dismemberment abortion."

Sec. 171.152. DISMEMBERMENT ABORTIONS PROHIBITED. (a) Prohibits a person from intentionally performing a dismemberment abortion unless the dismemberment abortion is necessary in a medical emergency.

(b) Provides that a woman on whom a dismemberment abortion is performed, an employee or agent acting under the direction of a physician who performs a

dismemberment abortion, or a person who fills a prescription or provides equipment used in a dismemberment abortion does not violate Subsection (a).

Sec. 171.153. CRIMINAL PENALTY. (a) Provides that a person who violates Section 171.152 commits an offense.

(b) Provides that an offense under this section is a state jail felony.

Sec. 171.154. CONSTRUCTION OF SUBCHAPTER. (a) Requires that this subchapter 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 of this subchapter is unconstitutionally vague, to interpret the provision, as a matter of 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 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 subdivision, 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) Prohibits a state executive or administrative official from declining to enforce this subchapter, or adopting a construction of this subchapter 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 this subchapter.

(d) Prohibits this subchapter 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 or induced in violation of this subchapter or from creating or recognizing a right to abortion or a right to a particular method of abortion.

SECTION 7. Amends Subtitle H, Title 2, Health and Safety Code, by adding Chapter 173, as follows:

CHAPTER 173. DONATION OF HUMAN FETAL TISSUE

Sec. 173.001. DEFINITIONS. Defines "authorized facility" and "human fetal tissue."

Sec. 173.002. APPLICABILITY. Provides that this chapter does not apply to:

- (1) human fetal tissue obtained for diagnostic or pathological testing;
- (2) human fetal tissue obtained for a criminal investigation;
- (3) human fetal tissue or human tissue obtained during pregnancy or at delivery of a child, provided the tissue is obtained by an accredited public or private institution of higher education (IHE) for use in research approved by an institutional review board or another appropriate board, committee, or body charged with oversight applicable to the research; or
- (4) cell lines derived from human fetal tissue or human tissue existing on September 1, 2017, that are used by an accredited public or private IHE in

research approved by an institutional review board or another appropriate board, committee, or body charged with oversight applicable to the research.

Sec. 173.003. ENFORCEMENT. (a) Requires the Texas Department of State Health Services (DSHS) to enforce this chapter.

(b) Authorizes the Texas attorney general (attorney general) to, on request of DSHS or a local law enforcement agency, assist in the investigation of a violation of this chapter.

Sec. 173.004. PROHIBITED DONATION. Prohibits a person from donating human fetal tissue except as authorized by this chapter.

Sec. 173.005. DONATION BY AUTHORIZED FACILITY. (a) Authorizes only an authorized facility to donate human fetal tissue. Authorizes an authorized facility to donate human fetal tissue only to an accredited public or private IHE for use in research approved by an institutional review board or another appropriate board, committee, or body charged with oversight applicable to the research.

(b) Prohibits an authorized facility from donating human fetal tissue obtained from an elective abortion.

Sec. 173.006. INFORMED CONSENT REQUIRED. Prohibits an authorized facility from donating human fetal tissue under this chapter unless the facility has obtained the written, voluntary, and informed consent of the woman from whose pregnancy the fetal tissue is obtained. Requires that the consent be provided on a standard form prescribed by DSHS.

Sec. 173.007. CRIMINAL PENALTY. (a) Provides that a person commits an offense if the person offers a woman monetary or other consideration to have an abortion for the purpose of donating human fetal tissue or to consent to the donation of human fetal tissue, or if the person knowingly or intentionally solicits or accepts tissue from a fetus gestated solely for research purposes.

(b) Provides that an offense under this section is a Class A misdemeanor punishable by a fine of not more than \$10,000.

(c) Provides that the attorney general, with the consent of the appropriate local county or district attorney, has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this section.

Sec. 173.008. RECORD RETENTION. Prohibits, unless another law requires a longer period of record retention, an authorized facility from disposing of any medical record relating to a woman who consents to the donation of human fetal tissue before certain dates.

Sec. 173.009. ANNUAL REPORT. Requires an authorized facility that donates human fetal tissue under this chapter to submit an annual report to DSHS that includes for each donation the specific type of fetal tissue donated and the accredited public or private IHE that received the donation.

SECTION 8. Amends Section 245.002, Health and Safety Code, by amending Subdivisions (1) and (4-a) and adding Subdivision (4-b), as follows:

(1) Redefines "abortion."

(4-a) Defines "ectopic pregnancy."

(4-b) Redesignates existing text under Subdivision (4-a) as Subdivision (4-b).

SECTION 9. Amends Section 245.005(e), Health and Safety Code, to delete existing text including the report required under Section 245.011 as a condition for renewal of an abortion facility license.

SECTION 10. Amends the heading to Section 245.011, Health and Safety Code, to read as follows:

Sec. 245.011. PHYSICIAN REPORTING REQUIREMENTS; CRIMINAL PENALTY.

SECTION 11. Amends Section 245.011, Health and Safety Code, by amending Subsections (a), (b), (d), and (e) and adding Subsections (f) and (g), as follows:

(a) Requires a physician who performs an abortion at an abortion facility to complete and submit a monthly, rather than an annual, report to DSHS on each abortion performed by the physician at the abortion facility. Makes nonsubstantive changes.

(b) Prohibits the report from identifying by any means the patient, rather than the physician performing the abortion or the patient.

(d) Prohibits the information from being released or made public on subpoena or otherwise, except that release may be made in certain circumstances.

(e) Provides that a person commits an offense if the person violates Subsection (b), (c), or (d), rather than this section.

(f) Requires a physician, not later than the 15th day of each month, to submit to DSHS the report required by this section for each abortion performed by the physician at an abortion facility in the preceding calendar month.

(g) Requires DSHS to establish and maintain a secure electronic reporting system for the submission of the reports required by this section. Requires DSHS to adopt procedures to enforce this section and to ensure that only physicians who perform one or more abortions during the preceding calendar month are required to file the reports under this section for that month.

SECTION 12. Amends Chapter 245, Health and Safety Code, by adding Sections 245.0115 and 245.0116, as follows:

Sec. 245.0115. NOTIFICATION. Requires the commissioner of state health services, not later than the seventh day after the date the report required by Section 245.011 is due, to notify TMB of a violation of that section.

Sec. 245.0116. DEPARTMENT REPORT. (a) Requires DSHS to publish on its Internet website a monthly report containing aggregate data of the information in the reports submitted under Section 245.011.

(b) Prohibits DSHS's monthly report from identifying by any means an abortion facility, a physician performing the abortion, or a patient.

SECTION 13. Amends Subtitle B, Title 8, Health and Safety Code, by adding Chapter 697, as follows:

CHAPTER 697. DISPOSITION OF EMBRYONIC AND FETAL TISSUE REMAINS

Sec. 697.001. PURPOSE. Sets forth legislative purpose.

Sec. 697.002. DEFINITIONS. Defines "cremation," "department," "embryonic and fetal tissue remains," "executive commissioner," "incineration," "interment," and "steam disinfection."

Sec. 697.003. **APPLICABILITY OF OTHER LAW.** Provides that embryonic and fetal tissue remains are not pathological waste under state law. Provides that unless otherwise provided by this chapter, Chapters 711 (General Provisions Relating to Cemeteries) and 716 (Crematories) of this code and Chapter 651 (Cemetery and Crematory Services, Funeral Directing, and Embalming), Occupations Code, do not apply to the disposition of embryonic and fetal tissue remains.

Sec. 697.004. **DISPOSITION OF EMBRYONIC AND FETAL TISSUE REMAINS.** (a) Requires that a health care facility in this state that provides health or medical care to a pregnant woman, subject to Section 241.010 (Disposition of Fetal Remains), dispose of embryonic and fetal tissue remains that are passed or delivered at the facility by interment, cremation, incineration followed by interment, or steam disinfection followed by interment.

(b) Provides that the ashes resulting from the cremation or incineration of embryonic and fetal tissue remains are authorized to be interred or scattered in any manner as authorized by law for human remains and are prohibited from being placed in a landfill.

(c) Authorizes a health care facility responsible for disposing of embryonic and fetal tissue remains to coordinate with an entity in the registry established under Section 697.005 in an effort to offset the cost associated with burial or cremation of the embryonic and fetal tissue remains of an unborn child.

(d) Authorizes the umbilical cord, placenta, gestational sac, blood, or other body fluids from a pregnancy terminating in the death of the embryo or fetus for which the issuance of a fetal death certificate is not required by state law, notwithstanding any other law, to be disposed of in the same manner as and with the embryonic and fetal tissue remains from that same pregnancy as authorized by this chapter.

Sec. 697.005. **BURIAL OR CREMATION ASSISTANCE REGISTRY.** Requires DSHS to:

(1) establish and maintain a certain registry;

(2) make the registry information available on request to a physician, health care facility, or agent of a physician or health care facility.

Sec. 697.006. **ETHICAL FETAL REMAINS GRANT PROGRAM.** Requires DSHS to develop a grant program that uses private donations to provide financial assistance for the costs associated with disposing of embryonic and fetal tissue remains.

Sec. 697.007. **SUSPENSION OR REVOCATION OF LICENSE.** Authorizes DSHS to suspend or revoke the license of a health care facility that violates this chapter or a rule adopted under this chapter.

Sec. 697.008. **CIVIL PENALTY.** (a) Provides that a person that violates this chapter or a rule adopted under this chapter is liable for a civil penalty in an amount of \$1,000 for each violation.

(b) Authorizes the attorney general, at the request of DSHS, to sue to collect the civil penalty. Authorizes the attorney general to recover reasonable expenses incurred in collecting the civil penalty, including court costs, reasonable attorney's fees, investigation costs, witness fees, and disposition expenses.

Sec. 697.009. **RULES.** Requires the executive commissioner of the Texas Health and Human Services Commission (executive commissioner) to adopt rules to implement this chapter.

SECTION 14. Amends Section 164.052(a), Occupations Code, to include performing, inducing, or attempting to perform or induce an abortion in violation of Subchapter C (Abortion Prohibited at or After 20 Weeks Post-Fertilization), F, or G, Chapter 171 (Abortion), Health and Safety Code, in the list of certain prohibited practices for a physician or an applicant for a medical license.

SECTION 15. Amends Section 164.055(b), Occupations Code, to provide that the criminal penalties provided by Section 165.152 (Practicing Medicine in Violation of Subtitle) do not apply to a violation of Section 170.002 (Prohibited Acts; Exemption), Health and Safety Code, or Subchapter C, F, or G, Chapter 171, Health and Safety Code, rather than a violation of Section 170.002 or Subchapter C, Chapter 171, Health and Safety Code.

SECTION 16. Amends Section 48.02(a), Penal Code, to redefine "human organ."

SECTION 17. Amends Chapter 48, Penal Code, by adding Section 48.03, as follows:

Sec. 48.03. PROHIBITION ON PURCHASE AND SALE OF HUMAN FETAL TISSUE. (a) Defines "human fetal tissue."

(b) Provides that a person commits an offense if the person knowingly offers to buy, offers to sell, acquires, receives, sells, or otherwise transfers any human fetal tissue for economic benefit.

(c) Provides that an offense under this section is a state jail felony.

(d) Provides that it is a defense to prosecution under this section that the actor is an employee of or under contract with an accredited public or private IHE and acquires, receives, or transfers human fetal tissue solely for the purpose of fulfilling a donation authorized by Section 173.005, Health and Safety Code.

(e) Provides that this section does not apply to certain human fetal tissue or human tissue acquired, received, or transferred for certain purposes or to certain cell lines.

(f) Provides that the attorney general, with the consent of the appropriate local county or district attorney, has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this section.

SECTION 18. (a) Requires, not later than December 1, 2017, the executive commissioner to adopt any rules necessary to implement Section 245.011, Health and Safety Code, as amended by this Act, and Chapters 173 and 697, Health and Safety Code, as added by this Act.

(b) requires DSHS to:

(1) as soon as practicable after the effective date of this Act, develop the electronic reporting system required by Section 245.011, Health and Safety Code, as amended by this Act;

(2) not later than October 1, 2017, establish the grant program required by Section 697.006, Health and Safety Code, as added by this Act;

(3) not later than December 1, 2017, prescribe the standard consent form required by Section 173.006, Health and Safety Code, as added by this Act; and

(4) not later than February 1, 2018, begin to award grants under the grant program described by Subdivision (2) of this subsection.

SECTION 19. (a) Makes application of Subchapters F and G, Chapter 171, Health and Safety Code, as added by this Act, prospective.

(b) Provides that Sections 173.003, 173.004, 173.005, and 173.006, Health and Safety Code, as added by this Act, apply to a donation of human fetal tissue that occurs on or after the effective date of this Act, regardless of whether the human fetal tissue was acquired before, on, or after that date.

(c) Provides that an authorized facility is not required to make an initial annual report under Section 173.009, Health and Safety Code, as added by this Act, before January 1, 2019.

(d) Makes application of Chapter 697, Health and Safety Code, as added by this Act, prospective to February 1, 2018.

(e) Makes application of Chapter 48, Penal Code, as amended by this Act, prospective.

SECTION 20. Severability clause.

SECTION 21. (a) through (c) Sets forth additional provisions regarding severability.

SECTION 22. Effective date: September 1, 2017.