

BILL ANALYSIS

C.S.H.B. 3760
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Public Health
Committee Report (Substituted)

BACKGROUND AND PURPOSE

C.S.H.B. 3760 seeks to revise certain provisions of state abortion law, including by making changes in three principal areas. The bill abolishes discriminatory abortions motivated by the race, gender, ethnicity, sex, or disability of the preborn child and establishes a related criminal offense and civil remedies. Another group of changes, enforceable only through private civil actions, prohibits abortion after the developmental point when a preborn child's heartbeat is detectable, subject to medical emergency exceptions. Finally, either contingent on certain events or effective in 2025, the bill prohibits abortion in the state except in cases of medical emergency. The different effective dates will allow various legal challenges to current abortion jurisprudence to be sequentially considered by courts of competent jurisdiction and will allow the legislature and the office of the attorney general to respond appropriately to applicable court rulings.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill expressly does one or more of the following: creates a criminal offense, increases the punishment for an existing criminal offense or category of offenses, or changes the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the executive commissioner of the Health and Human Services Commission in SECTION 5.01 of this bill.

ANALYSIS

C.S.H.B. 3760 revises state abortion law to prohibit discriminatory abortion, provide for the availability of perinatal palliative care, prohibit abortions after a preborn child's heartbeat is detectable by standard medical methods, and provide for civil and criminal enforcement of certain provisions. The bill, with delayed effect, prohibits abortion in Texas except in certain medical emergencies.

C.S.H.B. 3760 defines "preborn child" by reference as an offspring of human beings from conception until birth and replaces references to an unborn child with references to a preborn child in provisions relating to the following:

- the prohibition of post-viability abortion;
- informed consent to an abortion;
- certain prohibited practices under the Medical Practice Act; and
- the Preborn Pain Act.

The bill updates various references to performing an abortion to clarify that the applicable provisions also apply to an induced abortion.

Perinatal Palliative Care

C.S.H.B. 3760 amends the Health and Safety Code to require the Health and Human Services Commission (HHSC) to develop and post on its website informational materials about perinatal palliative care, defined by the bill as the provision of comprehensive, supportive care to reduce the suffering of a pregnant woman, her preborn child, and her family from diagnosis of the preborn child's life-threatening disability through the delivery and possible death of the child as a result of the disability. The term includes medical, social, and mental health care, including counseling and health care provided by specified professionals.

C.S.H.B. 3760 requires the informational materials to include a description of the health care and other services available through perinatal palliative care and information about Medicaid benefits that may be available for prenatal care, childbirth, and perinatal palliative care. The bill requires HHSC also to develop, regularly update, and publish a geographically indexed list of all perinatal palliative care providers and programs in Texas and does the following with respect to the list and the instructional materials:

- requires HHSC to post the list, including contact information, on its website and to note the listed providers and programs that provide services free of charge;
- authorizes HHSC to include on the list perinatal palliative care providers and programs in other states that provide care to Texas residents but prohibits HHSC from including an abortion provider or an affiliate of an abortion provider, as those terms are defined by certain state law;
- requires HHSC to develop the perinatal palliative care informational materials and list of providers and programs not later than December 1, 2021; and
- requires HHSC, not later than December 1, 2021, to develop a form on which a pregnant woman certifies that she has received the informational materials and the list of the providers and programs.

C.S.H.B. 3760 requires a health care provider who diagnoses a pregnant woman's preborn child as having a life-threatening disability to do the following at the time of the diagnosis:

- provide the woman with a written copy of the perinatal palliative care informational materials, the list of providers and programs, and the certification form; and
- obtain from the woman the signed certification form and place the form in the woman's medical records.

C.S.H.B. 3760 exempts a health care provider from the requirement to provide the informational materials or certification form if the provider verifies that the pregnant woman's medical record contains a signed certification form for that pregnancy.

C.S.H.B. 3760 establishes the purpose of its perinatal palliative care provisions, which apply to a diagnosis of a life-threatening disability of a pregnant woman's preborn child made on or after January 1, 2022. The bill requires the executive commissioner of HHSC, not later than December 1, 2021, to adopt any rules necessary to implement those provisions.

Prohibition of Post-Viability Abortion

C.S.H.B. 3760 extends the prohibition against a person intentionally or knowingly performing an abortion during the third trimester of pregnancy to include intentionally or knowingly inducing an abortion during that period. The bill revises an exemption to the prohibition for a physician who draws certain conclusions in good faith according to the physician's best medical judgment as follows:

- establishes as the only such medical conclusion constituting an exception to the prohibition a conclusion that the abortion is necessary due to a medical emergency, as defined by reference; and
- removes the following medical conclusions from the grounds on which the exception may be justified:

- 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.

The bill amends the Occupations Code to make certain conforming changes regarding disciplinary actions against licensed physicians. Those changes apply only to an abortion performed, induced, or attempted to be performed or induced, or other conduct that occurred, on or after January 1, 2022.

Preborn Nondiscrimination Act

C.S.H.B. 3760 prohibits a person from engaging in the following conduct:

- knowingly performing, inducing, or attempting to perform or induce an abortion based on the race, ethnicity, sex, or disability, including a probable diagnosis of a disability, of the woman's preborn child; or
- using force or the threat of force to intentionally injure or intimidate a person in order to coerce the performance, inducement, or attempted performance or inducement of an abortion based on any such factor.

The bill defines "disability" for purposes of its provisions relating to a prohibited discriminatory abortion as follows:

- a physical or mental impairment that would substantially limit one or more of an individual's major life activities;
- an assessment referencing such an impairment; or
- a physical disfigurement, scoliosis, dwarfism, Down syndrome, albinism, amelia, or any other type of physical, mental, or intellectual abnormality or disease.

C.S.H.B. 3760 creates a Class A misdemeanor offense for a person who violates the bill's prohibition of discriminatory abortion, except that a woman on whom a discriminatory abortion is performed, induced, or attempted to be performed or induced is exempt from prosecution for the violation or for conspiracy to commit the violation. The bill establishes that a violation by a physician constitutes unprofessional conduct for which the physician's license may be suspended or revoked under the Medical Practice Act.

C.S.H.B. 3760 authorizes a civil action to be brought against a person who violates the discriminatory abortion prohibition by the following persons:

- the woman on whom the abortion was performed, induced, or attempted;
- the father of the preborn child, unless the woman's pregnancy resulted from the father's criminal conduct; or
- a maternal grandparent of the preborn child, if the pregnant woman was less than 18 years of age at the time of the abortion or attempted abortion and unless the woman's pregnancy resulted from the maternal grandparent's criminal conduct.

The bill authorizes as remedies in such a civil action injunctive relief, damages, or both injunctive relief and damages. Damages include actual damages for all psychological, emotional, and physical injuries resulting from the violation, court costs, and reasonable attorney's fees. The bill provides for venue, requires the action to be brought not later than the sixth anniversary of the date of the violation, and prohibits such a civil action from being brought against a woman on whom a discriminatory abortion is performed, induced, or attempted. The remedies authorized by these provisions are in addition to any other remedy available by law.

The provisions of C.S.H.B. 3760 relating to the prohibition of discriminatory abortion apply only to an abortion performed, induced, or attempted to be performed or induced, or other conduct that occurred, on or after January 1, 2022.

General Provisions of the Woman's Right to Know Act

C.S.H.B. 3760 requires the attorney general to certify and submit a written report to the governor and the legislature not later than the 31st day after the date any of the following occurs:

- the issuance of a U.S. Supreme Court judgment in a decision overruling, wholly or partly, *Roe v. Wade*, 410 U.S. 113 (1973), as modified by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), thereby allowing the states to prohibit abortion;
- the issuance of any other U.S. Supreme Court judgment in a decision that recognizes, wholly or partly, the authority of states to prohibit abortion; or
- the adoption of an amendment to the U.S. Constitution that, wholly or partly, restores to the states the authority to prohibit abortion.

The bill requires the attorney general to make available a copy of the report on the attorney general's website not later than the 31st day after the date the attorney general submits the report.

C.S.H.B. 3760 requires a physician who performs or induces an abortion 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. The bill requires the physician to place the document in the pregnant woman's medical record and maintain a copy of the document in the physician's practice records.

C.S.H.B. 3760 requires a physician who performs or induces an abortion on a pregnant woman to do the following:

- if the abortion is performed or induced to preserve the health of the pregnant woman, execute a written document that specifies the medical condition the abortion is asserted to address and provides the medical rationale for the physician's conclusion that the abortion is necessary to address the medical condition; or
- for an abortion other than an abortion to preserve the pregnant woman's health, specify in a written document that maternal health is not a purpose of the abortion.

The bill requires the physician to maintain a copy of the document in the physician's practice records.

Informed Consent to Abortion

C.S.H.B. 3760 makes the following revisions to provisions relating to the establishment of voluntary and informed consent to an abortion:

- clarifies that the informed consent provisions of the Woman's Right to Know Act apply to an induced abortion; and
- requires the physician who is to perform or induce the abortion to inform the pregnant woman of the bill's discriminatory abortion prohibition.

C.S.H.B. 3760 requires a physician who is to perform an abortion on a pregnant woman whose preborn child has been diagnosed with a life-threatening disability to inform the woman for purposes of the informed consent procedures, orally and in person, of the availability of perinatal palliative care and provide the woman with the related informational materials, list of care providers and programs, and certification form required by the bill. The bill sets the following deadlines for the fulfillment of this requirement:

- at least 24 hours before the abortion; or
- at least two hours before the abortion, if the pregnant woman waives the requirement by certifying that she currently lives 100 miles or more from the nearest licensed abortion provider or from a facility in which more than 50 abortions are performed in any 12-month period.

If the pregnant woman, after receiving the informational materials and certification form, chooses to have an abortion instead of continuing the pregnancy in perinatal palliative care, the physician may perform or induce the abortion only after the woman signs the certification form and the physician places the signed form in the woman's medical records. The bill requires the facility where the abortion is performed or induced to retain the signed certification form for the

same period as the abortion and sonogram election form required under the informed consent provisions.

C.S.H.B. 3760 requires HHSC to update any forms and instructional materials required under its provisions relating to informed consent not later than December 1, 2021, and requires the executive commissioner of HHSC, not later than December 1, 2021, to adopt any rules necessary to implement these provisions. The bill's informed consent provisions apply only to an abortion performed, induced, or attempted to be performed or induced, or other conduct that occurred, on or after January 1, 2022.

Preborn Pain Act

C.S.H.B. 3760 revises certain provisions of the Preborn Pain Act to replace the prohibition against performing, inducing, or attempting to perform or induce an abortion of an unborn child at or after 20 weeks of probable post-fertilization age with a prohibition against performing, inducing, or attempting to perform or induce an abortion of an preborn child at or after 20 weeks of probable gestational age, defined by the bill 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, and to update the language of those provisions accordingly.

The bill's changes to the Preborn Pain Act apply only to an abortion performed, induced, or attempted to be performed or induced, or other conduct that occurred, on or after January 1, 2022.

Detection of Fetal Heartbeat

C.S.H.B. 3760 prohibits a physician from knowingly performing or inducing an abortion on a pregnant woman unless the physician has determined whether the woman's unborn child has a detectable fetal heartbeat. In making that determination, the physician must use a test that is consistent with the physician's good faith and reasonable understanding of standard medical practice and that is appropriate for the estimated gestational age of the unborn child and the condition of the pregnant woman and her pregnancy. For purposes of determining the presence of a fetal heartbeat under the bill's applicable provisions, "standard medical practice" includes employing the appropriate means of detecting the heartbeat based on the estimated gestational age of the unborn child and the condition of the woman and her pregnancy. The bill requires the physician to record the following information in the pregnant woman's medical record:

- the estimated gestational age of the unborn 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.

C.S.H.B. 3760 prohibits a physician from knowingly performing or inducing an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child or failed to perform a test to detect a fetal heartbeat. The physician does not violate that prohibition if the physician performed a test for a fetal heartbeat and did not detect a fetal heartbeat. These provisions do not affect applicable state law restricting or regulating 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.

C.S.H.B. 3760 establishes that its provisions relating to determination of the presence of a fetal heartbeat and to prohibited abortion of an unborn child with a detectable fetal heartbeat do not apply if a physician believes a medical emergency exists that prevents compliance with the bill's provisions relating to the detection of a fetal heartbeat with respect to an abortion. The bill requires a physician who performs or induces an abortion under those emergency circumstances to make written notations in the pregnant woman's medical record of the physician's belief that

a medical emergency necessitated the abortion and of the medical condition of the pregnant woman that prevented compliance with those provisions. The bill requires the physician to maintain a copy of those notations in the physician's practice records.

C.S.H.B. 3760 establishes that its provisions relating to the detection of a fetal heartbeat with respect to an abortion do not create or recognize a right to abortion before a fetal heartbeat is detected and that those provisions may not be construed to do the following:

- authorize the initiation of a cause of action against or the prosecution of a woman on whom an abortion is performed, induced, or attempted to be performed or induced in violation of those provisions;
- wholly or partly repeal, either expressly or by implication, any other statute that regulates or prohibits abortion, including the applicable Revised Statutes; or
- restrict a political subdivision from regulating or prohibiting abortion in a manner that is at least as stringent as state law.

For purposes of those provisions, the bill defines the following terms:

- "fetal heartbeat" as cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac;
- "gestational age" as the amount of time that has elapsed from the first day of a woman's last menstrual period;
- "gestational sac" as the structure comprising the extraembryonic membranes that envelop the unborn child and that is typically visible by ultrasound after the fourth week of pregnancy;
- "physician" as an individual licensed to practice medicine in this state, including a medical doctor and a doctor of osteopathic medicine;
- "pregnancy" as the human female reproductive condition that begins with fertilization, occurs when the woman is carrying the developing human offspring, and is calculated from the first day of the woman's last menstrual period;
- "standard medical practice" as the degree of skill, care, and diligence that an obstetrician of ordinary judgment, learning, and skill would employ in like circumstances; and
- "unborn child" as a human fetus or embryo in any stage of gestation from fertilization until birth.

C.S.H.B. 3760 requires the requirements of its provisions relating to the detection of a fetal heartbeat with respect to an abortion to be enforced exclusively through the applicable private civil actions. No enforcement of those bill provisions, and no enforcement of Penal Code provisions relating to criminal homicide and to assaultive offenses in response to violations of those bill provisions, may be taken or threatened by the state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of the state or a political subdivision against any person, except as provided by the bill's provisions relating to civil liability for a violation or an aiding or abetting violation. These provisions may not be construed to do the following:

- legalize the conduct prohibited by the bill's provisions relating to the detection of a fetal heartbeat with respect to an abortion or by the applicable Revised Statutes;
- limit in any way or affect the availability of an applicable remedy; or
- limit the enforceability of any other laws that regulate or prohibit abortion.

C.S.H.B. 3760 authorizes any person, other than an officer or employee of a state or local governmental entity, to bring a civil action against any person who:

- performs or induces an abortion in violation of the Woman's Right to Know Act;
- knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of that state law, regardless of whether the person knew or should have known that the abortion would be so performed or induced; or
- intends to engage in such conduct.

If a claimant prevails in such an action, the court must award the following relief:

- injunctive relief sufficient to prevent the defendant from violating the Woman's Right to Know Act or engaging in acts that aid or abet violations of that state law;
- statutory damages in an amount of not less than \$10,000 for each abortion that the defendant performed or induced in violation of that state law, and for each abortion performed or induced in violation of that state law that the defendant aided or abetted; and
- costs and attorney's fees.

A court may not award such relief if the defendant demonstrates that the defendant previously paid the full amount of required statutory damages, costs, and attorney's fees in a previous action for the applicable abortion or for the applicable conduct that aided or abetted an abortion in violation of the Woman's Right to Know Act. The bill authorizes a person to bring the action not later than the sixth anniversary of the date the cause of action accrues.

C.S.H.B. 3760 establishes that the following circumstances are not considered a defense to the action:

- ignorance or mistake of law;
- a defendant's belief that requirements of applicable state law are unconstitutional or were unconstitutional;
- a defendant's reliance on any court decision overruled on appeal or by a subsequent court, even if that decision had not been overruled when the conduct occurred;
- a defendant's reliance on any state or federal court decision not binding on the court in which the action is brought;
- non-mutual issue preclusion or non-mutual claim preclusion;
- the consent of the unborn child's mother to the abortion; or
- any claim that enforcement of the Woman's Right to Know Act or the imposition of civil liability against the defendant will violate the constitutional rights of third parties, unless excepted by the bill's provisions relating to undue burden defense limitations.

The bill provides for certain affirmative defenses to the action. The bill sets out provisions relating to the following:

- a prohibition against these provisions from being construed to impose liability on any speech or conduct protected by the First Amendment of the U.S. Constitution;
- a prohibition against the state, a state official, or a district or county attorney from intervening in an action brought under these provisions; and
- a prohibition against a court awarding costs or attorney's fees under the Texas Rules of Civil Procedure or any other applicable rule adopted by the Texas Supreme Court to a defendant in the action.

C.S.H.B. 3760 establishes that a defendant against whom the action is brought does not have standing to assert the rights of women seeking an abortion as a defense to liability unless:

- the U.S. Supreme Court holds that Texas courts must 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; or
- the defendant has standing to assert the rights of women seeking an abortion under the tests for third-party standing established by the U.S. Supreme Court.

The bill provides for an affirmative defense to liability to be asserted by a defendant who has standing to assert the third-party rights of a woman or a group of women seeking an abortion and who demonstrates that the relief sought by the claimant will impose an undue burden on that woman or a group of women seeking an abortion. That affirmative defense is not available if the U.S. 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 occurred before the U.S. Supreme Court overruled either of those decisions. A court may not find an undue burden unless the defendant introduces evidence proving that an award of relief will prevent a woman or group of women from obtaining an abortion or will place a substantial obstacle in the path of a woman or group of women seeking an abortion. A defendant may not establish an undue burden by merely demonstrating 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 by 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.

C.S.H.B. 3760 establishes that nothing in these provisions limiting undue burden defenses in any way limits or precludes a defendant from asserting the defendant's personal constitutional rights as a defense to liability and prohibits a court from awarding relief if the conduct for which the defendant has been sued was an exercise of state or federal constitutional rights that personally belong to the defendant.

C.S.H.B. 3760 provides for the following:

- the venue for the action;
- a prohibition against the action being transferred to a different venue without the written consent of all parties; and
- sovereign, governmental, and 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 the Woman's Right to Know Act, on constitutional grounds or otherwise.

The bill sets out certain legislative findings relating to medical research with regard to the fetal heartbeat as a predictor that an unborn child will reach live birth, when cardiac activity begins, the interests of the state in protecting the health of a woman and unborn child from the outset of a pregnancy, and the information required for a pregnant woman to make an informed choice about continuing a pregnancy. The bill provides for the severability of applicable state law, for the application of provisions of applicable state law if the application of any provision is found by a court to be invalid or unconstitutional, the enforcement of discrete applications of a provision otherwise declared or found to be facially unconstitutional, the declaration of the legislature with regard to the enactment of the bill's provisions and force of the bill's provisions if any provision is declared or found to be facially unconstitutional, unconstitutionally vague, or to represent an undue burden. The bill prohibits a court from declining to enforce these severability requirements on the ground that severance would rewrite the statute or involve the court in legislative or lawmaking activity. The bill establishes that its provisions relating to the detection of a fetal heartbeat with respect to an abortion are required to be enforced exclusively through the bill's private civil enforcement actions and may not be enforced by HHSC. Those provisions apply only to an abortion performed, induced, or attempted to be performed or induced on or after January 1, 2022.

C.S.H.B. 3760 amends the Civil Practice and Remedies Code to provide for an award of attorney's fees in actions challenging abortion laws by establishing that any person, including an entity, attorney, or law firm, who seeks declaratory or injunctive relief to prevent the state, a political subdivision, or any governmental entity or public official in Texas 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.

C.S.H.B. 3760 amends the Code Construction Act, Government Code, to provide for the construction and severability of statutes that regulate or prohibit abortion.

C.S.H.B. 3760 amends the Health and Safety Code to require the monthly report submitted by a physician who performs an abortion at an abortion facility to include the following information:

- whether the abortion was performed or induced because of a medical emergency and any medical condition of the pregnant woman that required the abortion; and
- the required documentation by a physician who performs or induces an abortion on a pregnant woman because of a medical emergency and the required documentation regarding the purpose of the abortion.

Prohibition of Abortion

C.S.H.B. 3760 prohibits a person from performing, inducing, or attempting to perform or induce any abortion unless the actor is a physician who does so because of a medical emergency, as defined for purposes of the Woman's Right to Know Act.

C.S.H.B. 3760 authorizes a civil action to be brought against a person who violates this prohibition by the following persons:

- the woman on whom the abortion was performed, induced, or attempted in violation of the prohibition;
- the father of the preborn child, unless the woman's pregnancy resulted from the father's criminal conduct; or
- a maternal grandparent of the preborn child, if the pregnant woman was under 18 years of age at the time of the violation and unless the woman's pregnancy resulted from the maternal grandparent's criminal conduct.

The bill authorizes as remedies in such a civil action injunctive relief, damages, or both injunctive relief and damages. Damages include actual damages for all psychological, emotional, and physical injuries resulting from the violation, court costs, and reasonable attorney's fees. The bill provides for venue, requires the action to be brought not later than the sixth anniversary of the date of the violation, and prohibits such an action from being brought against a woman on whom an abortion is performed, induced, or attempted in violation of the prohibition. The remedies authorized by these provisions are in addition to any other remedy available by law. The bill establishes that a violation by a physician constitutes unprofessional conduct for which the physician's license may be suspended or revoked under the Medical Practice Act.

C.S.H.B. 3760 amends the Penal Code to extend the applicability of provisions relating to criminal homicide, with respect to the death of a preborn child, and to extend the applicability of provisions relating to assaultive offenses, with respect to conduct committed against a preborn child, by revising applicable exceptions as follows:

- removing exceptions for certain lawful medical procedures performed by a physician or health care provider with the requisite consent;
- removing an exception for the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with law; and
- establishing an exception for an abortion performed, induced, or attempted to be performed or induced by a physician because of a medical emergency.

C.S.H.B. 3760 sets out the following provisions for the interpretation and enforcement of the bill's provisions relating to the prohibition of abortion:

- requires those provisions to be construed 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 and only to the extent necessary to save those provisions from judicial invalidation;
- explicitly authorizes judicial reformation of those provisions' language only to the extent necessary to save the applicable provision from invalidity;
- provides for a court's interpretation of a provision found to be unconstitutionally vague and requires the Texas Supreme Court to provide an appropriate authoritative construction in the event of certain findings and interpretation by a federal court;
- prohibits an executive or administrative state official from declining to enforce any of those provisions or adopting a construction of such a provision or of applicable procedural provisions in a way that narrows the provision's applicability, based on the official's own beliefs concerning state or federal constitutionality, unless that enforcement is enjoined by a court; and
- prohibits its Penal Code provisions 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 the bill's prohibition of abortion.

C.S.H.B. 3760 repeals the following provisions:

- an authorization for a physician to perform an abortion on an unemancipated minor on the basis of constructive notice by certified mail to the last known address of the minor's parent, managing conservator, or guardian, as applicable, if that person cannot be notified after a reasonable effort; and
- an authorization for a person to provide, prescribe, or administer an abortion-inducing drug in the dosage amount prescribed by specified clinical management guidelines.

These provisions of C.S.H.B. 3760 relating to the prohibition of abortion take effect the earlier of the following dates:

- to the extent permitted, on the 30th day after any of the following occurrences:
 - the issuance of a U.S. Supreme Court judgment in a decision overruling, wholly or partly, *Roe v. Wade*, 410 U.S. 113 (1973), as modified by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992);
 - the issuance of any other U.S. Supreme Court judgment in a decision that recognizes, wholly or partly, the authority of the states to prohibit abortion; or
 - the adoption of an amendment to the U.S. Constitution that, wholly or partly, restores to the states the authority to prohibit abortion;
- the 91st day after the date the attorney general submits a report required by the bill's provisions on any of those occurrences that certifies that a court of competent jurisdiction has held provisions substantially similar to the applicable provisions of the bill to be constitutional; or
- September 1, 2025.

Other General Provisions

C.S.H.B. 3760 sets out legislative findings with regard to the state's compelling interest in protecting all Texans from discrimination, the enforcement of prohibitions against discrimination, and the unrepealed status of certain state law enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973).

C.S.H.B. 3760 sets out certain legislative intent regarding the severability of its provisions, the effect of a court's suspension of enforcement of any of those provisions, and the severability of the application of those provisions to each individual woman or specific group of pregnant women.

C.S.H.B. 3760 authorizes the attorney general, after any of the occurrences specified by the bill as positively affecting the authority of states to wholly or partly prohibit or regulate abortion, to apply to the appropriate state or federal court for a declaration that any one or more of the bill's provisions are constitutional or for a judgment or order lifting an injunction against the enforcement of any one or more of the bill's provisions.

Implementation of a provision of the bill by HHSC is mandatory only if a specific appropriation is made for that purpose.

Repealed Provisions

C.S.H.B. 3760 repeals the following provisions of the Health and Safety Code:

- Section 170.001(3);
- Sections 171.042(1) and (2);
- Section 171.046(c);
- Sections 285.202(a-1) and (a-2); and

- effective on the date the bill's provisions relating to the prohibition of abortion take effect, Section 171.063(b).

Effective on the date the bill's provisions relating to the prohibition of abortion take effect, C.S.H.B. 3760 repeals Section 33.002(b), Family Code.

EFFECTIVE DATE

Except as otherwise provided, September 1, 2021.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 3760 may differ from the original in minor or nonsubstantive ways, the following summarizes the substantial differences between the introduced and committee substitute versions of the bill.

The substitute includes an additional legislative finding which was not in the original regarding the status of certain state law enacted before the 1973 ruling in *Roe v. Wade*.

The substitute includes a requirement which was not in the original for the attorney general to certify and submit a report to the governor and legislature following specified occurrences, if applicable, that would affect state authority to prohibit abortion.

The substitute differs from the original as follows with regard to the bill's provisions relating to informed consent:

- revises the deadline by which a physician is required to inform a woman of available perinatal palliative care as part of informed consent procedures by including an alternative deadline for a woman who does not live near a qualifying abortion provider; and
- does not include provisions requiring informed consent procedures to include certain information regarding the statistical probability of bringing a preborn child to term, based on the gestational age of the child and the detection of a fetal heartbeat, and authorizing the executive commissioner to adopt associated rules.

The substitute differs from the original as follows concerning the bill's provisions relating to the detection of a fetal heartbeat with respect to an abortion:

- changes the original's use of "preborn child" to "unborn child" in those provisions;
- does not include an authorization from the original for the executive commissioner to adopt rules specifying the appropriate tests used to determine the presence of a fetal heartbeat;
- includes a provision not in the original establishing that those provisions may only be enforced through the private civil actions authorized by the bill and that no enforcement action may be taken or threatened by state or local governmental entities;
- does not include provisions from the original requiring the executive commissioner to adopt certain rules in the event that a court declares unconstitutional a provision of the bill relating to the detection of a fetal heartbeat with respect to an abortion or enjoins the enforcement of such a provision; and
- includes a specification of January 1, 2022 as the date from which those provisions apply, whereas the original did not specify a date of applicability.

With regard to the civil enforcement actions established under the bill's provisions relating to the detection of a fetal heartbeat with respect to an abortion, the substitute differs from the original as follows:

- expands the conduct to which the civil enforcement actions apply to include certain aiding and abetting of a violation and certain intended conduct, but removes references that were in the original identifying the related criminal offense as a basis for a civil action;

- includes additional detail, compared with the original, regarding the amount of injunctive relief available and how violations are counted for purposes of statutory damages in such a civil action and adds a provision to prevent multiple awards of full statutory damages against the same defendant for the same abortion or other applicable conduct;
- expands the original itemization of factors that do not constitute a defense to such a civil action and includes provisions relating to certain affirmative defenses, which were not provided for in the original;
- includes a prohibition not in the original against a construction of the provisions governing the civil actions that would impose liability on certain constitutionally protected speech or conduct;
- with respect to the original's provisions limiting undue burden defenses, adds a condition under which a defendant has third-party standing to assert the rights of women seeking an abortion and adds a provision establishing that the assertion of a defendant's personal constitutional rights is not limited or precluded by those defense limitations; and
- includes a prohibition that was not in the original against transferring an action to a different venue without written consent.

The substitute changes the original applicability for certain severability provisions from the bill's provisions relating to the detection of a fetal heartbeat with respect to an abortion to the Woman's Right to Know Act as a whole and, for purposes of that act, includes a severability provision not included in the original relating to the enforcement of discrete applications of a provision that is declared or found to be facially unconstitutional by a court.

With regard to liability for the prevailing party's costs and attorney's fees in civil actions challenging state abortion laws, the substitute includes an additional consideration to those identified in the original as not constituting a defense to an action to recover those costs and fees.

With regard to the original's provisions amending the Code Construction Act and relating to severability for any state law regulating or prohibiting abortion, the substitute includes additional language regarding the interpretation of a statute found by a court to be unconstitutional.

The substitute revises certain details of the required contents of a monthly report submitted by a physician who performs an abortion at an abortion facility in a different way from the revisions of those contents made by the original.

The substitute includes an appropriations contingency provision which was not included in the original.

The substitute makes the following changes to the effective dates in the original:

- for the bill's Article 3 provisions, which relate to the detection of a fetal heartbeat with respect to an abortion:
 - the substitute applies the general effective date of September 1, 2021; whereas
 - the original provided an effective date of the earlier of September 1, 2023, or the 91st day after the date the attorney general submits a certain biennial report to the governor stating that a court of competent jurisdiction has held those provisions to be constitutional; and
- for the bill's Article 4 provisions, which relate to a prohibition of all abortion other than for reasons of medical emergency:
 - the substitute provides the following three possible effective dates, of which the earliest applies:
 - to the extent permitted, the 30th day after any of the specified occurrences that would affect states' authority to prohibit abortion;

- the 91st day after the date the attorney general submits a report as required by the bill stating that a court of competent jurisdiction has held those provisions to be constitutional; or
 - September 1, 2025; whereas
- the original provided an effective date of the earlier of September 1, 2025, or the 91st day after the date the attorney general submits a certain biennial report to the governor stating that a court of competent jurisdiction has held those provisions to be constitutional.