

## **BILL ANALYSIS**

S.B. 8  
By: Hughes  
Public Health  
Committee Report (Unamended)

### **BACKGROUND AND PURPOSE**

In *Roe v. Wade*, the U.S. Supreme Court (SCOTUS) ruled that the U.S. Constitution protects a pregnant woman's right to choose to have an abortion without excessive government restriction. While current SCOTUS precedent prohibits states from banning or limiting abortion by imposing an undue burden on a woman, it has been argued that an unborn child is a life and abortion should be prohibited. Current state law permits abortions until 20 weeks of pregnancy, however, a fetal heartbeat can be detected as early as six weeks. S.B. 8 seeks to prohibit abortions from being performed or induced after detection of a fetal heartbeat and to authorize a private civil right of action against any person who performs an abortion in violation of applicable state law or knowingly engages in conduct that aids or abets the performance or inducement of the abortion.

### **CRIMINAL JUSTICE IMPACT**

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

### **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**

S.B. 8 amends the Health and Safety Code to set out provisions relating to the performance or inducement of abortions, including provisions prohibiting abortions after the detection of an unborn child's heartbeat and provisions authorizing a private civil right of action.

#### **Determination of Presence of Fetal Heartbeat Required; Record**

S.B. 8 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, including 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, and that is appropriate for the estimated gestational age of the unborn child and the condition of the pregnant 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.

## **Prohibited Abortion of Unborn Child with Detectable Fetal Heartbeat**

S.B. 8 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 the provisions of the Woman's Right to Know Act that restrict or regulate an abortion by a particular method or during a particular stage of pregnancy or any other provision of state law that regulates or prohibits abortion.

## **Exception for Medical Emergency; Records**

S.B. 8 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.

## **Limitations on Public Enforcement**

S.B. 8 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 authorized by the bill. 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 aiding or abetting a violation. That requirement 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 relating to abortion;
- limit in any way or affect the availability of an applicable remedy established under the bill's provisions; or
- limit the enforceability of any other laws that regulate or prohibit abortion.

S.B. 8 further provides that its provisions relating to the detection of a fetal heartbeat with respect to an abortion may not be enforced by the Health and Human Services Commission.

## **Civil Liability for Violation or Aiding or Abetting a Violation**

S.B. 8 authorizes any person, other than an officer or employee of a state or local governmental entity in Texas, 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 the Woman's Right to Know Act, regardless of whether the person knew or should have known that the abortion would be so performed or induced; or
- intends to commit such a violation or engage in such aiding or abetting 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 act;
- statutory damages in an amount of not less than \$10,000 for each abortion that the defendant performed or induced in violation of the Woman's Right to Know Act, and for each abortion performed or induced in violation of the act that the defendant aided or abetted; and
- costs and attorney's fees.

A court may not award such relief in an action brought against a person who committed a violation or aided or abetted a violation if the defendant demonstrates that the defendant previously paid the full amount of required statutory damages 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.

S.B. 8 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 the Woman's Right to Know Act are 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.

S.B. 8 establishes the following as affirmative defenses to the action:

- if a person sued for knowingly engaging in conduct that aids or abets the performance or inducement of an abortion that is performed or induced in violation of the Woman's Right to Know Act reasonably believed, after conducting a reasonable investigation, that the physician performing or inducing the abortion had complied or would comply with the act; or
- if a person sued for intending to engage in the performance or inducement of an abortion in violation of the Woman's Right to Know Act or intending to engage in conduct that aids or abets the performance or inducement of an abortion that is so performed or induced reasonably believed, after conducting a reasonable investigation, that the physician performing or inducing the abortion will comply with the act.

The bill establishes the defendant has the burden of proving such an affirmative defense by a preponderance of the evidence.

S.B. 8 sets out the following provisions:

- a prohibition against the bill's provisions relating to civil liability for a violation or aiding or abetting a violation from being construed to impose liability on any speech or conduct protected by the First Amendment of the U.S. Constitution, as made applicable to the states through the U.S. Supreme Court's interpretation of the Fourteenth Amendment of the U.S. Constitution, or by Section 8, Article I, Texas Constitution;
- a prohibition against the state, a state official, or a district or county attorney from intervening in an action brought under the bill's provisions relating to civil liability for a violation of the Woman's Right to Know Act or for aiding or abetting such a violation, but such a person is not prohibited from filing an amicus curiae brief in the action; 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.

### **Civil Liability: Undue Burden Defense Limitations**

S.B. 8 establishes that a defendant against whom a civil action is brought under the bill's provisions 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 courts of this state 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 the defendant who has standing to assert the third-party rights of a woman or 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 that 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 Supreme Court overruled either of those decisions. A court may not find an undue burden unless the defendant introduces evidence proving 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 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.

S.B. 8 establishes that nothing in its provisions relating to undue burden defense limitations 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.

### **Civil Liability: Venue**

S.B. 8 establishes that a civil action brought under the bill's provisions is to be brought in:

- the county in which all or a substantial part of the events or omissions giving rise to the claim occurred;
- the county of residence for any one of the natural person defendants at the time the cause of action accrued;
- the county of the principal office in this state of any one of the defendants that is not a natural person; or
- the county of residence for the claimant if the claimant is a natural person residing in this state.

For a civil action brought in any one of those venues, the action may not be transferred to a different venue without the written consent of all parties.

### **Sovereign, Governmental, and Official Immunity Preserved**

S.B. 8 establishes that the state has sovereign immunity, a political subdivision has governmental immunity, and each officer and employee of the state or a political subdivision has official immunity in any action, claim, or counterclaim or any type of legal or equitable action that challenges the validity of any provision or application of the Woman's Right to Know Act, on constitutional grounds or otherwise. A provision of state law may not be construed to waive or abrogate such an immunity unless it expressly waives immunity under these bill provisions, which prevail over any conflicting law, including the Uniform Declaratory Judgments Act and Civil Practice and Remedies Code provisions relating to declaratory judgments.

## **Legislative Findings**

S.B. 8 sets out certain legislative findings relating to the unpealed status of state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger, medical research with regard to the fetal heartbeat as a predictor 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.

## **Definitions**

For purposes of the bill's provisions relating to the detection of a fetal heartbeat with respect to an abortion, S.B. 8 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.

## **Required Documentation**

S.B. 8 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 also 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.

S.B. 8 requires a physician who performs or induces an abortion 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.

## **Voluntary and Informed Consent**

S.B. 8 clarifies that the requirements for consent to be considered voluntary and informed under the Woman's Right to Know Act apply to an induced abortion.

## **Physician's Monthly Report**

S.B. 8 requires 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 by any physician who performs or induces an abortion specifying whether or not the abortion was for the purpose of preserving the health of the pregnant woman.

## **Award of Attorney's Fees**

S.B. 8 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, any state governmental entity or public official, or any person 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.

S.B. 8 establishes that a party is considered a prevailing party for purposes of an award of attorney's fees if a state or federal court:

- dismisses any claim or cause of action brought against the party that seeks the declaratory or injunctive relief, regardless of the reason for the dismissal; or
- enters judgment in the party's favor on any such claim or cause of action.

S.B. 8 authorizes a prevailing party to bring a civil action to recover costs and attorney's fees against any person, including an entity, attorney, or law firm, that sought applicable declaratory or injunctive relief not later than the third anniversary on which the following occurred, as applicable:

- the dismissal or judgment becomes final on the conclusion of appellate review; or
- the time for seeking appellate review expires.

That authorization applies regardless of whether a prevailing party sought to recover costs or attorney's fees in the underlying action. It is not a defense to an action brought to recover costs and attorney's fees that:

- a prevailing party failed to seek recovery of costs or attorney's fees in the underlying action;
- the court in the underlying action declined to recognize or enforce the requirements of the bill's provisions relating to the award of attorney's fees; or
- the court in the underlying action held that any of those bill provisions are invalid, unconstitutional, or preempted by federal law, notwithstanding the doctrines of issue or claim preclusion.

## **Construction and Severability**

S.B. 8 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 or 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 relating to abortion; or

- restrict a political subdivision from regulating or prohibiting abortion in a manner that is at least as stringent as state law.

With respect to the construction of abortion statutes generally, S.B. 8 provides for the following:

- a prohibition against a statute that regulates or prohibits abortion being construed to repeal any other statute that regulates or prohibits abortion, either wholly or partly, unless the repealing statute explicitly states that it is repealing the other statute;
- a prohibition against a statute being construed to restrict a political subdivision from regulating or prohibiting abortion in a manner that is at least as stringent as state law unless the statute explicitly states that political subdivisions are prohibited from regulating or prohibiting abortion in the manner described by the statute; and
- the severability of every statute that regulates or prohibits abortion in each of its applications to every person and circumstance, including severability of any application found by any court to be unconstitutional, either on its face or as applied, so that applications of a statute that do not violate the United States Constitution and Texas Constitution are to be severed from the unconstitutional applications and remain enforceable, notwithstanding any other law, and the statute is to be interpreted as if containing language limiting the statute's application to the persons, group of persons, or circumstances for which the statute's application will not violate the United States Constitution and Texas Constitution.

S.B. 8 provides for the severability of the Woman's Right to Know Act, for the application of provisions of the act 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. A court that declines to enforce or enjoins a state official from enforcing a statutory provision does not rewrite a statute, as the statute continues to contain the same words as before the court's decision. A judicial injunction or declaration of unconstitutionality:

- is nothing more than an edict prohibiting enforcement that may subsequently be vacated by a later court if that court has a different understanding of the requirements of the Texas Constitution or United States Constitution;
- is not a formal amendment of the language in a statute; and
- no more rewrites a statute than a decision by the executive not to enforce a duly enacted statute in a limited and defined set of circumstances.

S.B. 8 establishes that every provision in the bill and every application of the provision in the bill are severable from each other. If any provision or application of any provision in the bill to any person, group of persons, or circumstance is held by a court to be invalid, the invalidity does not affect the other provisions or applications of the bill.

### **Applicability**

S.B. 8 provides that the change in law under its provisions applies only to an abortion performed or induced on or after the bill's effective date.

### **EFFECTIVE DATE**

September 1, 2021.