

By: Hegar

S.B. No. 5

A BILL TO BE ENTITLED

AN ACT

relating to the regulation of abortion procedures, providers, and facilities; providing penalties.

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

SECTION 1. (a) The legislature finds that:

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

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

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

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

(A) the woman has adequate time to decide whether

1 to have an abortion in the first 20 weeks after fertilization; and

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

6 (b) The legislature intends that every application of this
7 statute to every individual woman shall be severable from each
8 other. In the unexpected event that the application of this statute
9 is found to impose an impermissible undue burden on any pregnant
10 woman or group of pregnant women, the application of the statute to
11 those women shall be severed from the remaining applications of the
12 statute that do not impose an undue burden, and those remaining
13 applications shall remain in force and unaffected, consistent with
14 Section 10 of this Act.

15 SECTION 2. Subchapter A, Chapter 171, Health and Safety
16 Code, is amended by adding Section 171.0031 to read as follows:

17 Sec. 171.0031. REQUIREMENTS OF PHYSICIAN; OFFENSE. (a) A
18 physician performing or inducing an abortion:

19 (1) must, on the date the abortion is performed, have
20 active admitting privileges at a hospital that:

21 (A) is located not further than 30 miles from the
22 location at which the abortion is performed or induced; and

23 (B) provides obstetrical or gynecological health
24 care services; and

25 (2) shall provide the pregnant woman with:

26 (A) a telephone number by which the pregnant
27 woman may reach the physician, or other health care personnel

1 employed by the physician or by the facility at which the abortion
2 was performed with access to the woman's relevant medical records,
3 24 hours a day to request assistance for any complications that
4 arise from the performance of the abortion or ask health-related
5 questions regarding the abortion; and

6 (B) the name and telephone number of the nearest
7 hospital to the home of the pregnant woman at which an emergency
8 arising from the abortion would be treated.

9 (b) A physician who violates Subsection (a) commits an
10 offense. An offense under this section is a Class A misdemeanor
11 punishable by a fine only, not to exceed \$4,000.

12 SECTION 3. Chapter 171, Health and Safety Code, is amended
13 by adding Subchapters C and D to read as follows:

14 SUBCHAPTER C. ABORTION PROHIBITED AT OR AFTER 20 WEEKS

15 POST-FERTILIZATION

16 Sec. 171.041. SHORT TITLE. This subchapter may be cited as
17 the Preborn Pain Act.

18 Sec. 171.042. DEFINITIONS. In this subchapter:

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

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

27 Sec. 171.043. DETERMINATION OF POST-FERTILIZATION AGE

1 REQUIRED. Except as otherwise provided by Section 171.046, a
2 physician may not perform or induce or attempt to perform or induce
3 an abortion without, prior to the procedure:

4 (1) making a determination of the probable
5 post-fertilization age of the unborn child; or

6 (2) possessing and relying on a determination of the
7 probable post-fertilization age of the unborn child made by another
8 physician.

9 Sec. 171.044. ABORTION OF UNBORN CHILD OF 20 OR MORE WEEKS
10 POST-FERTILIZATION AGE PROHIBITED. Except as otherwise provided by
11 Section 171.046, a person may not perform or induce or attempt to
12 perform or induce an abortion on a woman if it has been determined,
13 by the physician performing, inducing, or attempting to perform or
14 induce the abortion or by another physician on whose determination
15 that physician relies, that the probable post-fertilization age of
16 the unborn child is 20 or more weeks.

17 Sec. 171.045. METHOD OF ABORTION. (a) This section applies
18 only to an abortion authorized under Section 171.046(a)(1) or (2)
19 in which:

20 (1) the probable post-fertilization age of the unborn
21 child is 20 or more weeks; or

22 (2) the probable post-fertilization age of the unborn
23 child has not been determined but could reasonably be 20 or more
24 weeks.

25 (b) Except as otherwise provided by Section 171.046(a)(3),
26 a physician performing an abortion under Subsection (a) shall
27 terminate the pregnancy in the manner that, in the physician's

1 reasonable medical judgment, provides the best opportunity for the
2 unborn child to survive.

3 Sec. 171.046. EXCEPTIONS. (a) The prohibitions and
4 requirements under Sections 171.043, 171.044, and 171.045(b) do not
5 apply to an abortion performed if there exists a condition that, in
6 the physician's reasonable medical judgment, so complicates the
7 medical condition of the woman that, to avert the woman's death or a
8 serious risk of substantial and irreversible physical impairment of
9 a major bodily function, other than a psychological condition, it
10 necessitates, as applicable:

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

14 (2) the abortion of her pregnancy even though the
15 post-fertilization age of the unborn child is 20 or more weeks; or

16 (3) the use of a method of abortion other than a method
17 described by Section 171.045(b).

18 (b) A physician may not take an action authorized under
19 Subsection (a) if the risk of death or a substantial and
20 irreversible physical impairment of a major bodily function arises
21 from a claim or diagnosis that the woman will engage in conduct that
22 may result in her death or in substantial and irreversible physical
23 impairment of a major bodily function.

24 (c) The prohibitions and requirements under Sections
25 171.043, 171.044, and 171.045(b) do not apply to an abortion
26 performed on an unborn child who has a profound and irremediable
27 congenital anomaly.

1 Sec. 171.047. PROTECTION OF PRIVACY IN COURT PROCEEDINGS.

2 (a) Except as otherwise provided by this section, in a civil or
3 criminal proceeding or action involving an act prohibited under
4 this subchapter, the identity of the woman on whom an abortion has
5 been performed or induced or attempted to be performed or induced is
6 not subject to public disclosure if the woman does not give consent
7 to disclosure.

8 (b) Unless the court makes a ruling under Subsection (c) to
9 allow disclosure of the woman's identity, the court shall issue
10 orders to the parties, witnesses, and counsel and shall direct the
11 sealing of the record and exclusion of individuals from courtrooms
12 or hearing rooms to the extent necessary to protect the woman's
13 identity from public disclosure.

14 (c) A court may order the disclosure of information that is
15 confidential under this section if:

16 (1) a motion is filed with the court requesting
17 release of the information and a hearing on that request;

18 (2) notice of the hearing is served on each interested
19 party; and

20 (3) the court determines after the hearing and an in
21 camera review that disclosure is essential to the administration of
22 justice and there is no reasonable alternative to disclosure.

23 Sec. 171.048. CONSTRUCTION OF SUBCHAPTER. (a) This
24 subchapter shall be construed, as a matter of state law, to be
25 enforceable up to but no further than the maximum possible extent
26 consistent with federal constitutional requirements, even if that
27 construction is not readily apparent, as such constructions are

1 authorized only to the extent necessary to save the subchapter from
2 judicial invalidation. Judicial reformation of statutory language
3 is explicitly authorized only to the extent necessary to save the
4 statutory provision from invalidity.

5 (b) If any court determines that a provision of this
6 subchapter is unconstitutionally vague, the court shall interpret
7 the provision, as a matter of state law, to avoid the vagueness
8 problem and shall enforce the provision to the maximum possible
9 extent. If a federal court finds any provision of this subchapter or
10 its application to any person, group of persons, or circumstances
11 to be unconstitutionally vague and declines to impose the saving
12 construction described by this subsection, the Supreme Court of
13 Texas shall provide an authoritative construction of the
14 objectionable statutory provisions that avoids the constitutional
15 problems while enforcing the statute's restrictions to the maximum
16 possible extent, and shall agree to answer any question certified
17 from a federal appellate court regarding the statute.

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

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

SUBCHAPTER D. ABORTION-INDUCING DRUGS

Sec. 171.061. DEFINITIONS. In this subchapter:

(1) "Abortion" means the act of using, administering, prescribing, or otherwise providing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to terminate a clinically diagnosable pregnancy of a woman and with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the woman's unborn child. An act is not an abortion if the act is done with the intent to:

(A) save the life or preserve the health of an unborn child;

(B) remove a dead, unborn child whose death was caused by spontaneous abortion;

(C) remove an ectopic pregnancy; or

(D) treat a maternal disease or illness for which a prescribed drug, medicine, or other substance is indicated.

(2) "Abortion-inducing drug" means a drug, a medicine, or any other substance, including a regimen of two or more drugs, medicines, or substances, prescribed, dispensed, or administered with the intent of terminating a clinically diagnosable pregnancy of a woman and with knowledge that the termination will, with reasonable likelihood, cause the death of the woman's unborn child. The term includes off-label use of drugs, medicines, or other substances known to have abortion-inducing properties that are prescribed, dispensed, or administered with the intent of causing an abortion, including the Mifeprex regimen. The term does not include a drug, medicine, or other substance that may be known to

1 cause an abortion but is prescribed, dispensed, or administered for
2 other medical reasons.

3 (3) "Final printed label" or "FPL" means the
4 informational document approved by the United States Food and Drug
5 Administration for an abortion-inducing drug that:

6 (A) outlines the protocol authorized by that
7 agency and agreed to by the drug company applying for authorization
8 of the drug by that agency; and

9 (B) delineates how a drug is to be used according
10 to approval by that agency.

11 (4) "Gestational age" means the amount of time that
12 has elapsed since the first day of a woman's last menstrual period.

13 (5) "Medical abortion" means the administration or use
14 of an abortion-inducing drug to induce an abortion.

15 (6) "Mifeprex regimen," "RU-486 regimen," or "RU-486"
16 means the abortion-inducing drug regimen approved by the United
17 States Food and Drug Administration that consists of administering
18 mifepristone and misoprostol.

19 (7) "Physician" means an individual who is licensed to
20 practice medicine in this state, including a medical doctor and a
21 doctor of osteopathic medicine.

22 (8) "Pregnant" means the female reproductive
23 condition of having an unborn child in a woman's uterus.

24 (9) "Unborn child" means an offspring of human beings
25 from conception until birth.

26 Sec. 171.062. ENFORCEMENT BY TEXAS MEDICAL BOARD.

27 Notwithstanding Section 171.005, the Texas Medical Board shall

1 enforce this subchapter.

2 Sec. 171.063. DISTRIBUTION OF ABORTION-INDUCING DRUG.

3 (a) A person may not knowingly give, sell, dispense, administer,
4 provide, or prescribe an abortion-inducing drug to a pregnant woman
5 for the purpose of inducing an abortion in the pregnant woman or
6 enabling another person to induce an abortion in the pregnant woman
7 unless:

8 (1) the person who gives, sells, dispenses,
9 administers, provides, or prescribes the abortion-inducing drug is
10 a physician; and

11 (2) the provision, prescription, or administration of
12 the abortion-inducing drug satisfies the protocol tested and
13 authorized by the United States Food and Drug Administration as
14 outlined in the final printed label of the abortion-inducing drug.

15 (b) Before the physician gives, sells, dispenses,
16 administers, provides, or prescribes an abortion-inducing drug,
17 the physician must examine the pregnant woman and document, in the
18 woman's medical record, the gestational age and intrauterine
19 location of the pregnancy.

20 (c) The physician who gives, sells, dispenses, administers,
21 provides, or prescribes an abortion-inducing drug shall provide the
22 pregnant woman with:

23 (1) a copy of the final printed label of that
24 abortion-inducing drug; and

25 (2) a telephone number by which the pregnant woman may
26 reach the physician, or other health care personnel employed by the
27 physician or by the facility at which the abortion was performed

1 with access to the woman's relevant medical records, 24 hours a day
2 to request assistance for any complications that arise from the
3 administration or use of the drug or ask health-related questions
4 regarding the administration or use of the drug.

5 (d) The physician who gives, sells, dispenses, administers,
6 provides, or prescribes the abortion-inducing drug, or the
7 physician's agent, must schedule a follow-up visit for the woman to
8 occur not more than 14 days after the administration or use of the
9 drug. At the follow-up visit, the physician must:

10 (1) confirm that the pregnancy is completely
11 terminated; and

12 (2) assess the degree of bleeding.

13 (e) The physician who gives, sells, dispenses, administers,
14 provides, or prescribes the abortion-inducing drug, or the
15 physician's agent, shall make a reasonable effort to ensure that
16 the woman returns for the scheduled follow-up visit under
17 Subsection (d). The physician or the physician's agent shall
18 document a brief description of any effort made to comply with this
19 subsection, including the date, time, and name of the person making
20 the effort, in the woman's medical record.

21 (f) If a physician gives, sells, dispenses, administers,
22 provides, or prescribes an abortion-inducing drug to a pregnant
23 woman for the purpose of inducing an abortion as authorized by this
24 section and the physician knows that the woman experiences a
25 serious adverse event, as defined by the MedWatch Reporting System,
26 during or after the administration or use of the drug, the physician
27 shall report the event to the United States Food and Drug

1 Administration through the MedWatch Reporting System not later than
2 the third day after the date the physician learns that the event
3 occurred.

4 Sec. 171.064. ADMINISTRATIVE PENALTY. (a) The Texas
5 Medical Board may take disciplinary action under Chapter 164,
6 Occupations Code, or assess an administrative penalty under
7 Subchapter A, Chapter 165, Occupations Code, against a person who
8 violates Section 171.063.

9 (b) A penalty may not be assessed under this section against
10 a pregnant woman who receives a medical abortion.

11 SECTION 4. Section 245.010(a), Health and Safety Code, is
12 amended to read as follows:

13 (a) The rules must contain minimum standards to protect the
14 health and safety of a patient of an abortion facility and must
15 contain provisions requiring compliance with the requirements of
16 Subchapter B, Chapter 171. On and after September 1, 2014, the
17 minimum standards for an abortion facility must be equivalent to
18 the minimum standards adopted under Section 243.010 for ambulatory
19 surgical centers.

20 SECTION 5. Section 245.011(c), Health and Safety Code, is
21 amended to read as follows:

22 (c) The report must include:

23 (1) whether the abortion facility at which the
24 abortion is performed is licensed under this chapter;

25 (2) the patient's year of birth, race, marital status,
26 and state and county of residence;

27 (3) the type of abortion procedure;

- 1 (4) the date the abortion was performed;
- 2 (5) whether the patient survived the abortion, and if
3 the patient did not survive, the cause of death;
- 4 (6) the probable post-fertilization age of the unborn
5 child [~~period of gestation~~] based on the best medical judgment of
6 the attending physician at the time of the procedure;
- 7 (7) the date, if known, of the patient's last menstrual
8 cycle;
- 9 (8) the number of previous live births of the patient;
- 10 and
- 11 (9) the number of previous induced abortions of the
12 patient.

13 SECTION 6. Section 164.052(a), Occupations Code, is amended
14 to read as follows:

15 (a) A physician or an applicant for a license to practice
16 medicine commits a prohibited practice if that person:

- 17 (1) submits to the board a false or misleading
18 statement, document, or certificate in an application for a
19 license;
- 20 (2) presents to the board a license, certificate, or
21 diploma that was illegally or fraudulently obtained;
- 22 (3) commits fraud or deception in taking or passing an
23 examination;
- 24 (4) uses alcohol or drugs in an intemperate manner
25 that, in the board's opinion, could endanger a patient's life;
- 26 (5) commits unprofessional or dishonorable conduct
27 that is likely to deceive or defraud the public, as provided by

1 Section 164.053, or injure the public;

2 (6) uses an advertising statement that is false,
3 misleading, or deceptive;

4 (7) advertises professional superiority or the
5 performance of professional service in a superior manner if that
6 advertising is not readily subject to verification;

7 (8) purchases, sells, barter, or uses, or offers to
8 purchase, sell, barter, or use, a medical degree, license,
9 certificate, or diploma, or a transcript of a license, certificate,
10 or diploma in or incident to an application to the board for a
11 license to practice medicine;

12 (9) alters, with fraudulent intent, a medical license,
13 certificate, or diploma, or a transcript of a medical license,
14 certificate, or diploma;

15 (10) uses a medical license, certificate, or diploma,
16 or a transcript of a medical license, certificate, or diploma that
17 has been:

18 (A) fraudulently purchased or issued;

19 (B) counterfeited; or

20 (C) materially altered;

21 (11) impersonates or acts as proxy for another person
22 in an examination required by this subtitle for a medical license;

23 (12) engages in conduct that subverts or attempts to
24 subvert an examination process required by this subtitle for a
25 medical license;

26 (13) impersonates a physician or permits another to
27 use the person's license or certificate to practice medicine in

1 this state;

2 (14) directly or indirectly employs a person whose
3 license to practice medicine has been suspended, canceled, or
4 revoked;

5 (15) associates in the practice of medicine with a
6 person:

7 (A) whose license to practice medicine has been
8 suspended, canceled, or revoked; or

9 (B) who has been convicted of the unlawful
10 practice of medicine in this state or elsewhere;

11 (16) performs or procures a criminal abortion, aids or
12 abets in the procuring of a criminal abortion, attempts to perform
13 or procure a criminal abortion, or attempts to aid or abet the
14 performance or procurement of a criminal abortion;

15 (17) directly or indirectly aids or abets the practice
16 of medicine by a person, partnership, association, or corporation
17 that is not licensed to practice medicine by the board;

18 (18) performs an abortion on a woman who is pregnant
19 with a viable unborn child during the third trimester of the
20 pregnancy unless:

21 (A) the abortion is necessary to prevent the
22 death of the woman;

23 (B) the viable unborn child has a severe,
24 irreversible brain impairment; or

25 (C) the woman is diagnosed with a significant
26 likelihood of suffering imminent severe, irreversible brain damage
27 or imminent severe, irreversible paralysis; [~~or~~]

1 (19) performs an abortion on an unemancipated minor
2 without the written consent of the child's parent, managing
3 conservator, or legal guardian or without a court order, as
4 provided by Section 33.003 or 33.004, Family Code, authorizing the
5 minor to consent to the abortion, unless the physician concludes
6 that on the basis of the physician's good faith clinical judgment, a
7 condition exists that complicates the medical condition of the
8 pregnant minor and necessitates the immediate abortion of her
9 pregnancy to avert her death or to avoid a serious risk of
10 substantial impairment of a major bodily function and that there is
11 insufficient time to obtain the consent of the child's parent,
12 managing conservator, or legal guardian; or

13 (20) performs or induces or attempts to perform or
14 induce an abortion in violation of Subchapter C, Chapter 171,
15 Health and Safety Code.

16 SECTION 7. Section 164.055(b), Occupations Code, is amended
17 to read as follows:

18 (b) The sanctions provided by Subsection (a) are in addition
19 to any other grounds for refusal to admit persons to examination
20 under this subtitle or to issue a license or renew a license to
21 practice medicine under this subtitle. The criminal penalties
22 provided by Section 165.152 do not apply to a violation of Section
23 170.002 or Subchapter C, Chapter 171, Health and Safety Code.

24 SECTION 8. Effective September 1, 2014, Section 245.010(c),
25 Health and Safety Code, is repealed.

26 SECTION 9. This Act may not be construed to repeal, by
27 implication or otherwise, Section 164.052(a)(18), Occupations

1 Code, Section 170.002, Health and Safety Code, or any other
2 provision of Texas law regulating or restricting abortion not
3 specifically addressed by this Act. An abortion that complies with
4 this Act but violates any other law is unlawful. An abortion that
5 complies with another state law but violates this Act is unlawful as
6 provided in this Act.

7 SECTION 10. (a) If some or all of the provisions of this Act
8 are ever temporarily or permanently restrained or enjoined by
9 judicial order, all other provisions of Texas law regulating or
10 restricting abortion shall be enforced as though the restrained or
11 enjoined provisions had not been adopted; provided, however, that
12 whenever the temporary or permanent restraining order or injunction
13 is stayed or dissolved, or otherwise ceases to have effect, the
14 provisions shall have full force and effect.

15 (b) Mindful of Leavitt v. Jane L., 518 U.S. 137 (1996), in
16 which in the context of determining the severability of a state
17 statute regulating abortion the United States Supreme Court held
18 that an explicit statement of legislative intent is controlling, it
19 is the intent of the legislature that every provision, section,
20 subsection, sentence, clause, phrase, or word in this Act, and
21 every application of the provisions in this Act, are severable from
22 each other. If any application of any provision in this Act to any
23 person, group of persons, or circumstances is found by a court to be
24 invalid, the remaining applications of that provision to all other
25 persons and circumstances shall be severed and may not be affected.
26 All constitutionally valid applications of this Act shall be
27 severed from any applications that a court finds to be invalid,

1 leaving the valid applications in force, because it is the
2 legislature's intent and priority that the valid applications be
3 allowed to stand alone. Even if a reviewing court finds a provision
4 of this Act to impose an undue burden in a large or substantial
5 fraction of relevant cases, the applications that do not present an
6 undue burden shall be severed from the remaining provisions and
7 shall remain in force, and shall be treated as if the legislature
8 had enacted a statute limited to the persons, group of persons, or
9 circumstances for which the statute's application does not present
10 an undue burden. The legislature further declares that it would
11 have passed this Act, and each provision, section, subsection,
12 sentence, clause, phrase, or word, and all constitutional
13 applications of this Act, irrespective of the fact that any
14 provision, section, subsection, sentence, clause, phrase, or word,
15 or applications of this Act, were to be declared unconstitutional
16 or to represent an undue burden.

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

24 (d) If any provision of this Act is found by any court to be
25 unconstitutionally vague, then the applications of that provision
26 that do not present constitutional vagueness problems shall be
27 severed and remain in force.

1 SECTION 11. (a) The executive commissioner of the Health
2 and Human Services Commission shall adopt the standards required by
3 Section 245.010, Health and Safety Code, as amended by this Act, not
4 later than January 1, 2014.

5 (b) A facility licensed under Chapter 245, Health and Safety
6 Code, is not required to comply with the standards adopted under
7 Section 245.010, Health and Safety Code, as amended by this Act,
8 before September 1, 2014.

9 SECTION 12. This Act takes effect immediately if it
10 receives a vote of two-thirds of all the members elected to each
11 house, as provided by Section 39, Article III, Texas Constitution.
12 If this Act does not receive the vote necessary for immediate
13 effect, this Act takes effect on the 91st day after the last day of
14 the legislative session.