



THE HEARTBEAT ACT



THE HEARTBEAT ACT BACKGROUND

Preborn Protection

PROBLEM:

In the wake of *Roe v. Wade*, states have been unable to protect children in the womb from abortion before viability. Yet unborn children are human and alive. Despite traditional legal roadblocks, each state should take steps to protect as many human lives as possible from death by abortion. According to the Center for Disease Control, 80% of abortions are performed before nine weeks gestation. For states that are unable to protect children from fertilization, the Heartbeat Act would be a meaningful place to start. The littlest and most vulnerable humans need protection.

PURPOSE:

The Heartbeat Act ("Act") protects preborn children after their fetal heartbeats are detected, which occurs between 5 ½ and 8 weeks gestation. The Act is enforceable regardless of a state's federal or state court makeup. The bill is enforced through private civil causes of action to overcome the significant enforcement barriers pro-life bills typically face. And it protects far more children than later-term abortion protections currently on the books.

RESULTS:

As the most accurate example, the Texas Heartbeat Act successfully protects children in the womb with a heartbeat. Abortions declined by 60% in the state after enactment. While thousands of legal abortions are still performed every month in the state, protecting children with a heartbeat has been proven to save lives. The Act and its enforcement mechanism also survived multiple court challenges before the U.S. and Texas Supreme Courts.

FUNCTION:

The Act prohibits anyone from performing an abortion after detecting a fetal heartbeat, except in the case of a medical emergency. It is enforced exclusively through private civil actions. Individuals, other than state officials, may bring a civil cause of action against anyone who performs or induces; aids or abets; or intends to perform or assist an illegal abortion. Women who obtain an abortion are exempt from liability.

CONSTITUTIONALITY:

By returning abortion to the states in *Dobbs v. Jackson Women's Health Organization*, the Supreme Court allows states to protect human life once again under a rational basis review standard. The state has a rational (arguably compelling) interest in protecting children from death by abortion as applied to the Act.

Notably, the Texas Heartbeat Act successfully overcame 50 years of enforcement and compliance challenges by surviving multiple court challenges—including at the U.S. Supreme Court and Texas Supreme Court. In *Whole Women's Health v. Jackson*, the Supreme Court upheld private causes of action as a lawful enforcement mechanism in the abortion context, as it is commonplace in other areas of the law. This Act, therefore, provides for similar



enforcement. By allowing Plaintiffs to sue abortion providers for wrongful death, the Act strategically overcomes enforcement and compliance roadblocks unique to abortion law.

Abortion protections are fraught with enforcement difficulties:

- District Attorneys and Attorneys General publicly commit to not enforcing abortion laws, even when *Roe v. Wade* is overturned. Most abortion clinics are located in these District Attorneys' jurisdictions;
- abortion providers enjoin laws as quickly as they are enacted through pre-enforcement challenges against the state;
- in a post-Roe world, many state and federal courts will continue to interpret laws narrowly to allow abortion; and
- abortion providers and chemical abortion pill distributors violate current abortion regulations, illegally mailing abortion pills to women.

The Act closes these enforcement gaps. By creating a private civil cause of action for wrongful death against abortion providers, they cannot enjoin the law through a pre-enforcement challenge against the state. Instead, the bill will be enacted regardless of the makeup of state or federal courts. The premise is that without government enforcement, there is no government action to enjoin. In other words, no *Younger Abstention Doctrine* exemption applies to the Act. Further, Texas proves abortion providers are reticent to incur civil liability because they complied with the Heartbeat Act without a single lawsuit being filed.

Under the Act, abortion providers illegally conducting abortions must litigate on the same basis as others by asserting their "rights" defensively, after being sued, rather than enjoining the law through a pre-enforcement challenge. The Supreme Court upheld this method in *Whole Women's Health v. Jackson* when Justice Gorsuch reiterated that the "Court has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court." 142 S. Ct. 522, 537–38 (2021). He also asserted that most litigants must wait to be sued and assert their rights—including abortion providers.

This legal framework withstood Supreme Court review and successfully produced compliance. It presents a strategic legal triumph for children in the womb, overcoming challenges pro-life protections faced for 50 years.

LEGISLATIVE HISTORY:

During the 87th Texas Legislature, Texas introduced the Heartbeat Act as Senate Bill 8. The Texas Legislature passed the bill and Governor Greg Abbott signed it into law in May 2021. It went into effect on September 1, 2021. Additionally, the state legislatures of Oklahoma and Idaho passed versions of the Heartbeat Act in 2022. Governor Kevin Stitt signed Oklahoma's Heartbeat Act into law on May 7, 2022. The law is now in effect. Governor Brad Little signed Idaho's Heartbeat Act into law on March 23, 2022. The Idaho Supreme Court temporarily stayed the law until arguments are heard.

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THE HEARTBEAT ACT

Unborn Advocacy

Relating to abortion, including abortions after detection of a human child's heartbeat; authorizing a private civil right of act.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF [STATE]:

SECTION 1. This Act shall be known as the [state] Heartbeat Act.

SECTION 2. Chapter [number], [state abortion regulation code], is amended by adding Subchapter [number] to read as follows:

SECTION 3. DEFINITIONS. As used in this subchapter:

(1) "Abortion" means the act of using, prescribing, administering, procuring, or selling of any instrument, medicine, drug, or any other substance, device, or means with the purpose to terminate the pregnancy of a woman, with knowledge that the termination by any of those means will with reasonable likelihood cause the death of an unborn child. The term does not include:

- (A) the use, prescription, administration, procuring, or selling of Plan B, morning-after pills, or any other type of contraception or emergency contraception;
- (B) an act intended to save the life or preserve the health of the unborn child;
- (C) removing a dead unborn child caused by spontaneous abortion; or
- (D) treatment for an ectopic pregnancy, the implantation of a fertilized egg or embryo outside of the uterus.

(2) "Heartbeat" means cardiac activity or the steady and repetitive rhythmic contraction of the embryonic or fetal heart tissue within the gestational sac.

(3) "Gestational age" means the amount of time that has elapsed from the first day of a woman's last menstrual period.

(4) "Gestational sac" means the structure comprising the extraembryonic membranes that envelop the unborn child and that is typically visible by ultrasound after the fourth week of pregnancy.

(5) "Physician" means an individual licensed to practice medicine in this state, including a medical doctor and a doctor of osteopathic medicine.

(6) "Pregnancy" means the human female reproductive condition that:

- (A) begins with fertilization;
- (B) occurs when the woman is carrying the developing human offspring; and

(C) is calculated from the first day of the woman's last menstrual period.

(7) "Standard medical practice" means the degree of skill, care, and diligence that an obstetrician of ordinary judgment, learning, and skill would employ in like circumstances.

(8) "Unborn child" means a human fetus or embryo in any stage of gestation from fertilization until birth.

(9) "Woman" and "women" include any person whose biological sex is female, including any person with XX chromosomes and any person with a uterus.

SECTION 4. DETERMINATION OF PRESENCE OF UNBORN HEARTBEAT REQUIRED; RECORD. (A) For the purposes of determining the presence of an unborn heartbeat under this section, "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.

(B) Except as provided by Sections 5 and 6, an abortion may not be performed or induced on a pregnant woman unless a physician has determined, in accordance with this section, whether the woman's unborn child has a detectable heartbeat.

(C) In making a determination under Subsection (B), the physician must use a test that is:

(1) consistent with the physician's good faith and reasonable understanding of standard medical practice; and

(2) appropriate for the estimated gestational age of the unborn child and the condition of the pregnant woman and her pregnancy.

(D) A physician making a determination under Subsection (B) shall record in the pregnant woman's medical record:

(1) the estimated gestational age of the unborn child;

(2) the method used to estimate the gestational age; and

(3) the test used for detecting an unborn heartbeat, including the date, time, and results of the test.

SECTION 5. PROHIBITED ABORTION OF UNBORN CHILD WITH DETECTABLE HEARTBEAT; EFFECT. (A) Except as provided by Sections 5 and 6, an abortion may not be performed or induced on a pregnant woman if a person detected a heartbeat for the unborn child as required by Section 4 or failed to perform a test to detect the heartbeat of an unborn child.

(B) A physician does not violate this section if the physician performed a test for an unborn heartbeat as required by Section 4 and did not detect an unborn heartbeat.

(C) This section does not affect:

(1) the provisions of this chapter that restrict or regulate an abortion by a particular method or during a particular stage of pregnancy; or

(2) any other provision of state law that regulates or prohibits abortion.

Section 6. EXCEPTION FOR MEDICAL EMERGENCY; RECORDS. (A) Sections 4 and 5 do not apply if a physician believes a medical emergency exists that prevents compliance with this subchapter.

(B) A physician who performs or induces an abortion under circumstances described by Subsection (A) shall make written notations in the pregnant woman's medical record of:

- (1) the physician's belief that a medical emergency necessitated the abortion; and
- (2) the medical condition of the pregnant woman that prevented compliance with this subchapter.

(C) A physician performing or inducing an abortion under this section shall maintain in the physician's practice records a copy of the notations made under Subsection (B).

SECTION 7. EXEMPTION FOR PREEMPTION AND INTERGOVERNMENTAL IMMUNITY. Sections 4 and 5 do not apply to an abortion performed at the behest of federal agencies, contractors, or employees that are carrying out duties under federal law, if a prohibition on that abortion would violate the doctrines of preemption or intergovernmental immunity.

SECTION 8. CONSTRUCTION OF SUBCHAPTER. Nothing in this subchapter may be construed to:

- (A) create or recognize a right to abortion before an unborn heartbeat is detected.
- (B) 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 this subchapter;
- (C) wholly or partly repeal, either expressly or by implication, any other statute that regulates or prohibits abortion; or
- (D) restrict a political subdivision from regulating or prohibiting abortion in any manner.

SECTION 9. LIMITATIONS ON PUBLIC ENFORCEMENT. Notwithstanding any other law, the requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 10. No direct or indirect enforcement of this subchapter, may be taken or threatened by the state, a political subdivision, a district or county attorney, or any executive or administrative officer or employee of this state or a political subdivision against any person or entity, in any manner whatsoever, except as provided in Section 10, and no violation of this subchapter may be used to justify or trigger the enforcement of any other law or any type of adverse consequence under any other law, except as provided in Section 10, PROVIDED, that this section does not preclude enforcement of any other law or regulation against conduct that is independently prohibited by such other law or regulation, and that would remain prohibited by such other law or regulation in the absence of this subchapter.

SECTION 10. CIVIL LIABILITY. (A) Any person, other than the state, its political subdivisions, and any officer or employee of a state or local governmental entity in this state, has standing to bring and may bring a civil action against any person or entity that:

- (1) performs or induces an abortion in violation of any provision or requirement of this subchapter;
- (2) 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 any provision or requirement of this subchapter, regardless of whether the person or entity knew or should have known that the abortion would be performed or induced in violation of this subchapter; or
- (3) intends to engage in the conduct described by Subsections (A)(1) or (A)(2).

(B) If a claimant prevails in an action brought under this section, the court shall award:

- (1) injunctive relief sufficient to prevent the defendant from violating this subchapter or engaging in acts that aid or abet violations of this subchapter;
- (2) statutory damages in an amount of not less than \$10,000 for each abortion that the defendant performed or induced or aided or abetted in violation of this subchapter;
- (3) nominal and compensatory damages if the plaintiff has suffered harm from the defendant's conduct, including but not limited to loss of consortium and emotional distress; and
- (4) costs and attorney's fees.

(C) Notwithstanding Subsection (B), a court may not award relief under Subsection (B)(2) or (B)(4) in response to a violation of Subsection (A)(1) or (A)(2) if the defendant demonstrates that a court has already ordered the defendant to pay the full amount of statutory damages under Subsection (B)(2) in another action for that particular violation of this subchapter, or for the particular conduct that aided or abetted an abortion performed or induced in violation of this subchapter.

(D) Notwithstanding any other law, a person may bring an action under this section not later than the sixth anniversary of the date the cause of action accrues.

(E) Notwithstanding any other law, the following are not a defense to an action brought under this section:

- (1) ignorance or mistake of law;
- (2) a defendant's belief that the requirements or provisions of this subchapter are unconstitutional or were unconstitutional;
- (3) a defendant's reliance on any court decision that has been vacated, reversed, or overruled on appeal or by a subsequent court, even if that court decision had not been vacated, reversed, or overruled when the defendant violated Subsection (A);
- (4) a defendant's reliance on any state or federal court decision that is not binding on the court in which the action has been brought;
- (5) non-mutual issue preclusion or non-mutual claim preclusion;
- (6) the consent of the unborn child's mother to the abortion; or
- (7) any claim that the enforcement of this subchapter or the imposition of civil liability against the defendant will violate the constitutional rights of third parties, except as provided by Section 11.

(F)(1) It is an affirmative defense if a person or entity sued under Subsection (A)(2) or (A)(3) reasonably believed, after conducting a reasonable investigation, that the individuals and organizations involved with performing or facilitating the abortion would comply with every requirement and provision of this subchapter;

- (2) The defendant has the burden of proving an affirmative defense under Subsection (F)(1) by a preponderance of the evidence.

(G) This section may not be construed to impose liability on any speech or conduct protected by the First Amendment of the United States Constitution, as made applicable to the states through the United States Supreme Court's interpretation of the Fourteenth Amendment of the United States Constitution, or by [state constitution's free-speech provision] of the [name of state] Constitution.

(H)(1) Notwithstanding any other law, neither the state, nor any of its political subdivisions, nor any district or

county attorney, nor any executive or administrative officer or employee of this state or a political subdivision may:

- (a) act in concert or participation with anyone who brings suit under this section;
- (b) establish or attempt to establish any type of agency or fiduciary relationship with a person who brings suit under this section;
- (c) make any attempt to control or influence a person's decision to bring suit under this section or that person's conduct of the litigation; or
- (d) intervene in any action brought under this section.

(2) This subsection does not prohibit a person or entity described by this subsection from filing an amicus curiae brief in the action, so long as that person or entity does not act in concert or participation with the plaintiff or plaintiffs who sue under this section or violate any other provision of Subsection (H)(1).

(I)(1) Notwithstanding any other law, a court may not award costs or attorney's fees to a defendant in an action brought under this section unless the plaintiff's claim that the defendant violated Subsection (A) is frivolous, malicious, or brought in bad faith.

(2) A court may not find that an action brought under this section is frivolous, malicious, or brought in bad faith within the meaning of Subsection (I)(1) if the plaintiff:

- (a) reasonably believed that the defendant performed or induced an abortion in violation of any requirement or provision of this subchapter, engaged in conduct that aided or abetted the performance or inducement of such an abortion, or intended to engage in any such conduct, regardless of whether a previous court decision declared invalid or unconstitutional a requirement or provision of this subchapter or declared the defendant's behavior protected by the state or federal constitutions or by federal law; or
- (b) brings suit to seek the overruling of any previous court decision that had pronounced unconstitutional a requirement or provision of this subchapter or any other law that regulates or restricts abortion, or that declared the defendant's behavior protected by the state or federal constitutions or by federal law.

(J) Notwithstanding any other law, a civil action under this section shall not be subject to any provision of [the state's anti-SLAPP law, if it has one], and shall not be subject to any provision of [the state's Religious Freedom Restoration Act, if it has one].

(K) Notwithstanding any other law, a civil action under this section may not be brought:

- (1) against the woman upon whom an abortion was performed or induced or attempted to be performed or induced in violation of this subchapter, or against a pregnant woman who intends or seeks to abort her unborn child in violation of this subchapter;
- (2) against any person or entity that performs, aids or abets, or attempts or intends to perform or aid or abet an abortion at the behest of federal agencies, contractors, or employees that are carrying out duties under federal law, if a prohibition on that abortion would violate the doctrines of preemption or intergovernmental immunity;
- (3) against any common carrier that transports a pregnant woman to an abortion provider, if the common carrier is unaware that the woman intends to abort her unborn child; or
- (4) by any person who impregnated a woman seeking an abortion through an act of rape, sexual assault, or

incest, or by anyone who acts in concert or participation with such a person.

SECTION 11. CIVIL LIABILITY: DEFENSES. (A) Nothing in this section or subchapter shall limit or preclude a defendant from asserting the defendant's personal statutory or constitutional rights as a defense to liability under Section 10, and a court may not award relief under Section 10 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.

(B) Nothing in this section or subchapter shall limit or preclude a defendant from asserting the unconstitutionality of any provision of this subchapter as a defense to liability under Section 10.

SECTION 12. CIVIL LIABILITY: VENUE. (A) Notwithstanding any other law, a civil action brought under Section 10 may be brought in:

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

(B) If a civil action is brought under Section 10 in any one of the venues described by Subsection (A), the action may not be transferred to a different venue without the written consent of all parties.

SECTION 13. SOVEREIGN, GOVERNMENTAL, AND OFFICIAL IMMUNITY PRESERVED; LIMITS ON JURISDICTION.

(A) Notwithstanding any other law, the state shall have sovereign immunity, each of its political subdivisions shall have governmental immunity, and each officer and employee of this state or a political subdivision shall have official immunity as well as sovereign or governmental immunity, as appropriate, in any action, claim, counterclaim, or any type of legal or equitable action that challenges the validity of any provision or application of this subchapter, on constitutional grounds or otherwise, or that seeks to prevent or enjoin the state, its political subdivisions, or any officer or employee of this state or a political subdivision from enforcing any provision or application of this subchapter, unless that immunity has been abrogated or preempted by federal law in a manner consistent with the Constitution of the United States.

(B) Notwithstanding any other law, no provision of state law may be construed to waive or abrogate an immunity described in Subsection (A) unless it expressly waives or abrogates immunity with specific reference to this section.

(C) Notwithstanding any other law, no attorney representing the state, its political subdivisions, or any officer or employee of this state or a political subdivision is authorized or permitted to waive an immunity described in Subsection (A) or take any action that would result in a waiver of that immunity, and any such action or purported waiver shall be regarded as a legal nullity.

(D) Notwithstanding any other law, no court of this state shall have jurisdiction to consider any action, claim, or counterclaim that seeks declaratory or injunctive relief that would pronounce any provision or application of this subchapter invalid or unconstitutional, or that would prevent the state, its political subdivisions, any officer or employee of this state or a political subdivision, or any person from enforcing any provision or application of this subchapter, or from filing a civil action under this subchapter.

(E) Nothing in this section or subchapter shall be construed to prevent a litigant from asserting the invalidity

or unconstitutionality of any provision or application of this subchapter as a defense to any action, claim, or counterclaim brought against that litigant.

SECTION 14. SEVERABILITY. (A) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the Supreme Court of the United States held that an explicit statement of legislative intent is controlling, it is the intent of the Legislature that every provision, section, subsection, sentence, clause, phrase, or word in this subchapter, and every application of the provisions in this subchapter to every person, group of persons, or circumstances, are severable from each other.

(B) If any application of any provision in this subchapter to any person, group of persons, or circumstances is found by a court to be invalid, preempted, or unconstitutional, then the remaining applications of that provision to all other persons and circumstances shall be severed and preserved, and shall remain in effect. All constitutionally valid applications of the provisions in this subchapter shall be severed from any applications that a court finds to be invalid, preempted, or unconstitutional because it is the Legislature's intent and priority that every valid application be allowed to stand alone.

(C) The Legislature further declares that it would have enacted this subchapter, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of the provisions of this subchapter, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this subchapter were to be declared invalid, preempted, or unconstitutional.

(D) If any provision of this subchapter is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force, consistent with the severability requirements of Subsections (A), (B), and (C).

(E) No court may decline to enforce the severability requirements of Subsections (A), (B), (C), and (D) 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 is never rewriting a statute or engaging in legislative or lawmaking activity, as the statute continues to contain the same words as before the court's decision. A judicial injunction or declaration of unconstitutionality:

(1) 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 [name of state] Constitution or United States Constitution;

(2) is not a formal amendment of the language in a statute; and

(3) 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.

(F) If any state or federal court disregards any of the severability requirements in Subsections (A), (B), (C), (D), or (E), and declares or finds any provision of this subchapter facially unconstitutional, when there are discrete applications of that provision can be enforced against a person, group of persons, or circumstances without violating federal law, or the federal or state constitutions then that provision shall be interpreted, as a matter of state law, as if the Legislature had enacted a provision limited to the persons, group of persons, or circumstances for which the provision's application will not violate federal law, or the federal or state constitutions and every court shall adopt this saving construction of that provision until the court ruling that