Woman’s Right to Know Act in Texas (2003) [1]

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In 2003, the Texas state legislature passed the Woman’s Right to Know Act, hereafter the Act, as Chapter 171 of the state’s Health and Safety Code. The Act sets requirements that physicians must follow during the informed consent[6] process for abortion[7], or a medical procedure to terminate pregnancy[8], in Texas. Lawmakers amended the Act and added several additional regulations that restrict access to abortion[7] in 2011, 2013, 2015, and 2017. For instance, the Act requires that physicians perform abortions after sixteen weeks of pregnancy[8] in ambulatory surgical centers or hospitals and states that physicians must perform an ultrasound[9] to view images, called sonograms, of a developing fetus[10] inside a woman’s uterus[11] before a woman may receive an abortion[7]. The Act further requires practitioners and clinics to offer state-developed informational materials to women who seek an abortion[7]. The Act placed several restrictions on abortion[7] care in Texas, making it more difficult for women to access safe and legal abortion[7] care, which opponents have challenged in courts.

Prior to the introduction of the Act, in Roe v. Wade (1973)[12], the US Supreme Court decided that access to safe and legal abortion[7] is a constitutional right and allowed states the power to regulate access to abortion[7]. In Roe v. Wade[12], the US Supreme Court decided that states could not pass laws that make abortion[7] during the first trimester[9] of pregnancy[8] illegal. Following that decision, states began to pass laws that detail informed consent[6] for abortion[7]. Informed consent is standard practice for any medical procedure and generally requires physicians to tell patients about the medical procedure, its expected outcome, and its potential risks.

Later, the US Supreme Court decided on Planned Parenthood v. Casey (1992)[15], which upheld Roe v. Wade[13] but added that states may restrict abortion[7] after the point of viability[16] and established the undue burden standard. Viability is the point at which a fetus[10] can potentially survive outside the uterus[11]. According to the court, once the fetus[10] has reached the point of viability[16], states also have a compelling interest in the health of, what the court refers to as, the potentiality of human life. For that reason, the court allows states to regulate and criminalize abortion[7] at the point of viability[16], except when the pregnant woman’s health is at stake. Planned Parenthood v. Casey also established the undue burden standard for abortion[7] regulations. The undue burden standard asserts that states may regulate access to abortion[7] after fetal viability[16] as long as they do not infringe upon a person’s constitutional rights. The fetal viability[16] framework and undue burden standard determined the restrictions that the Texas state legislature could place on abortion[7] through the Act, as well as the state legislatures and similar laws in other states.

Frank Corte Jr., then Republican member of the Texas House of Representatives, was one of the lead authors of the Act. Corte Jr. initially introduced the Act into the Texas state legislature in 1997, but it did not pass committee. In 2003, Corte Jr. presented the Act as House Bill 15, which included several co-authors. The committee passed the bill and sent it to the Texas Senate, which approved the bill. Then governor of Texas Rick Perry later signed the bill into law on 20 June 2003. In response to Corte Jr.’s legislation that restricts access to abortion[7], the Bexar Country Christian Coalition and the American Family Association of Texas recognized Corte Jr. In 2004, one year after the Texas state legislature passed the Act, the Texas Christian Coalition awarded Corte the organization’s Friend of the Family Award. Though many states at the time imposed stricter regulations than the Texas state legislature’s regulations, The Los Angeles Times reported that Corte Jr.’s legislation included the most comprehensive set of abortion[7] regulations.

The Woman’s Right to Know Act is the short title of Chapter 171 of the Texas Health and Safety Code, under Subtitle H: Public Health Provisions. Chapter 171 provides requirements that physicians must following during the informed consent[6] process for abortion[7]. The Texas state legislature divides the chapter into seven subchapters, A through G, and further divides each subchapter into several sections. Subchapter A outlines the general provisions of the law and provides definitions for the terms used throughout the rest of the chapter. Subchapter B details the definition of and requirements for voluntary and informed consent[6] before a physician can perform an abortion[7]. Subchapter C, also called the Preborn Pain Act, prohibits abortion[7] at or after twenty weeks of pregnancy[8], because according to the Act, the fetus[10] is able to feel pain at that point of development. Subchapter D defines drugs that induce abortion[7] and their acceptable uses. Subchapter E requires all employees or volunteers at abortion[7] clinics or ambulatory surgical centers who have direct contact with patients to complete training on how to identify and assist victims of human trafficking. Lastly, Subchapters F and G define and prohibit what the law terms partial-birth abortions[17] and dismemberment abortions, respectively.

In 2011, the Texas state legislature passed House Bill 15, which amended the Act, mandating physicians to perform an ultrasound[8] before they are able to perform an abortion[7]. According to the amendment, the physician must display and describe the sonogram to the woman, including the dimensions and features of the embryo or fetus[10], before the physician can
perform an abortion. Also, the physician must describe and make the heartbeat of the fetus audible so that the woman can hear if a heartbeat is present. The pregnant woman can only opt out of viewing the sonogram or hearing the heartbeat in cases of medical emergencies. Further, the amendment adds that the provider of the ultrasound may not accept any form of payment for an abortion procedure in the same visit during which the woman receives an ultrasound. That means that the woman must make an additional visit to pay for the abortion procedure and receive the abortion. In 2011, House Bill 15 also amended another law, the Texas Occupations Code, to revoke the license of physicians who violate the provisions added to the Woman’s Right to Know Act.

In 2011, the Center for Reproductive Rights, hereafter the Center, filed a lawsuit that challenged House Bill 15’s ultrasound mandate. In that case, called Texas Medical Providers Performing Abortion v. David Lakey (2012), the Center argued that the ultrasound mandate violated the First Amendment of the US Constitution, which protects the right to free speech. According to the Center, the ultrasound mandate violated physicians’ rights to free speech, compelling them to deliver information to women regardless of whether the woman wanted to hear it. The Center argued that the ultrasound mandate serves no medical purpose and delivers an ideological message from the state in opposition to abortion. In August 2011, a district court judge, Sam Sparks, temporarily blocked the ultrasound requirement because of the Center’s free speech concerns.

The State of Texas appealed the decision to a higher court, the US Court of Appeals for the Fifth Circuit Court, in New Orleans, Louisiana. The judges on the Fifth Circuit Court disagreed with Sparks and argued in opposition to the Center’s argument that the ultrasound requirements violated physicians’ free speech rights. They supported their claim, citing Planned Parenthood v. Casey, that the ultrasound requirement did not impose an undue burden on a woman’s constitutional right to an abortion. The Fifth Circuit Court further stated that physicians may consider the ultrasound mandate to be relevant in the woman’s decision to have an abortion. According to the court, the ultrasound mandate may further help ensure that the woman provides fully informed consent to have an abortion. Though Sparks disagreed with the court’s opinion, the court permitted the ultrasound mandate to take effect.

In 2013, Texas lawmakers passed House Bill 2, which further amended the Act and added Subchapters C and D. Lawmakers amended Subchapter A to include the provision that a physician who performs an abortion must have admitting privileges, or the ability to admit their patients to hospitals located within thirty miles of their clinic, which local hospitals are not required to grant physicians who perform abortions. Subchapter C, called also the Preborn Pain Act, prohibits abortion at or after twenty weeks of pregnancy, except when the life of the pregnant woman is at risk or when the fetus has a severe fetal abnormality. The lawmakers define a severe fetal abnormality as a life-threatening physical condition that compromises a fetus’s viability. Then, Subchapter D defines abortion-inducing drugs and their acceptable uses. Subchapter D defines an abortion-inducing drug as any substance that a physician prescribes or administers, intending to terminate pregnancy and knowing that the drug will cause the death of the fetus or embryo. That definition does not apply to drugs that may have the ability to induce abortion but are prescribed for other reasons.

Some of the amendments that House Bill 2 added to the Act faced legal challenges after their passage. In September 2013, the American Civil Liberties Union, or the ACLU, among other reproductive rights organizations, filed a lawsuit on behalf of women’s healthcare providers. The ACLU challenged the admitting privileges requirement and restrictions that the amendments placed on abortion-inducing drugs in Subchapter D. In the case Planned Parenthood of Greater Texas v. Abbott (2014), the ACLU argued that the admitting privileges requirement would force many of the state’s abortion clinics to close. Though a district court judge blocked enforcement of the admitting privileges requirement, the Fifth Circuit Court upheld both the admitting privileges requirement and the abortion-inducing drugs restrictions as constitutional. The court argued that neither placed an undue burden on a woman or her right to legislation.

In the US Supreme Court case, Whole Woman’s Health v. Hellerstedt (2016), the Center for Reproductive Rights, or the Center, filed a lawsuit that challenged the admitting privileges requirement on behalf of two clinics in El Paso, Texas. The Center also challenged another provision of House Bill 2, which would have amended another chapter of the Texas Health and Safety Code to require all abortion clinics to comply with the standards for physicians to perform abortions after sixteen weeks of pregnancy in ambulatory surgical centers. The Center argued that those two restrictions would cause many abortion providers to close their clinics and leave many women very far away from their nearest abortion providers. A US district court initially blocked both provisions, but the Fifth Circuit Court of Appeals overturned the lower court’s decision and upheld both provisions. The US Supreme Court heard the case in 2015 and ruled in June 2016 that both provisions violated the undue burden standard that Planned Parenthood v. Casey established and were unconstitutional.

In 2015, lawmakers passed House Bill 416, which amended the Act and added Subchapter E. That subchapter requires all employees or volunteers at abortion clinics or ambulatory surgical centers to complete training on how to identify and assist victims of human trafficking. Organizations in Texas that oppose abortion supported the amendment, because they stated that it was an important step toward preventing victims of sex trafficking from being coerced into having an abortion. For example, the Texas Alliance for Life encouraged support for the amendment, saying it would protect women and minors from sex trafficking. However, another one of those organizations, Texas Right to Life, criticized the measure, arguing that it would not truly protect victims of sex trafficking from being coerced into having an abortion. According to Texas Right to Life, the
amendment did not hold {abortion} providers accountable if they fail to comply with the provisions of the Act. Another organization, National Abortion and Reproductive Rights Action League, or NARAL, Pro-Choice Texas, opposed House Bill 416, arguing that {abortion} providers already provide training to their staff on human trafficking, domestic violence, and coercion. NARAL Pro-Choice Texas argued that to truly address the issue of human trafficking, the amendment should mandate such training for other healthcare providers rather than {abortion} providers.

In 2017, lawmakers amended the Act and passed House Bill 13 and House Bill 215, both of which amended Subchapter A. House Bill 13 required {abortion} providers to report additional details about the abortions that they perform to the government and established a fine for {abortion} providers who do not comply. House Bill 215 added additional reporting requirements for doctors who perform abortions on minors. Democratic legislators in Texas criticized both measures, arguing that they imposed unnecessary burdens on {abortion} providers and were not essential to {abortion} care. Proponents of the law, including Republican state legislators, argued that the amendments would better public health and give the government more knowledge of how often abortions occur.

In 2017, lawmakers passed Senate Bill 8 and Senate Bill 415, which amended the Act and added Subchapters F and G, which respectively prohibit, except in cases of medical emergency, what the law termed, partial-birth abortions and dismemberment abortions. Both partial-birth {abortion} and dismemberment {abortion} are nonmedical terms, respectively referring to intact dilation and extraction and dilation and evacuation, which are medical procedures that physicians use to perform abortions after the first twelve weeks of pregnancy. Intact dilation and extraction is a procedure in which a physician dilates the woman’s cervix and removes the fetus intact through the uterus. Dilation or evacuation is a procedure in which a physician dilates the woman’s cervix and uses forceps, clamps, and other surgical instruments to remove the fetus from the woman’s uterus through the cervix. In contrast to dilation and extraction, the physician does not remove the fetus intact from the woman’s uterus due to insufficient dilation of her cervix. According to the Centers for Disease Control and Prevention, or CDC, second trimester abortions are rare. In 2014, the CDC found that, on average, only 1.4 percent of abortions occur at or after twenty-one weeks of pregnancy, while ninety-one percent of abortions occur within the first thirteen weeks of pregnancy. Prior to the passage of those amendments, the US Supreme Court case Gonzalez v. Carhart upheld a federal ban on, what the law called, partial-birth {abortion}.

In August 2017, US district court judge Lee Yeakel temporarily blocked the ban on dilation and evacuation. In November 2017, a US district court judge permanently overturned the ban, Yeakel stating that the ban would force women who seek an abortion during the second trimester of pregnancy to resort to less safe alternatives. At the time, the State of Texas said that they planned to appeal to the Fifth Circuit Court, which had previously upheld the constitutionality of the several other amendments to the Act. In October 2020, the court struck down the appeal, preventing the State of Texas from enforcing the ban on dilation and evacuation.

As of 2021, {abortion} providers in Texas must adhere to the requirements that the Texas state legislature detail in the Woman’s Right to Know Act, as well as the various amendments that modified the Act and restrict access to {abortion} for women.

Sources

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