

STATE OF OKLAHOMA

2nd Session of the 58th Legislature (2022)

HOUSE BILL 3700

By: Russ

AS INTRODUCED

An Act relating to abortion; defining terms; prohibiting performance of abortion except under certain conditions; requiring certain test to meet specified criteria; requiring physician to record certain information; prohibiting performance of abortion under certain conditions; clarifying allowed conduct; specifying effect of certain provisions; providing exception for medical emergency; requiring physician to record certain information; providing for and prohibiting certain enforcement; allowing certain persons to bring certain civil action; requiring and prohibiting certain civil relief; establishing deadline for filing of civil action; allowing and disallowing certain defenses; prohibiting certain intervention in civil action; prohibiting certain persons from bringing civil action; limiting standing for defendants; allowing for affirmative defense under certain conditions; stipulating criteria for undue burden defense; specifying venue for civil action; prohibiting certain transfer of venue; specifying control of certain provisions; granting specified entities certain immunities; establishing liability for court costs and attorney fees; defining term; establishing statute of limitation for bringing certain actions; prohibiting use of certain defenses; providing certain construction; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.31 of Title 63, unless there is created a duplication in numbering, reads as follows:

As used in this act:

1. "Fetal heartbeat" means cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac;

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

3. "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;

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

5. "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;

6. "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; and

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

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.32 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. For the purposes of determining the presence of a fetal 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 Section 4 of this act, a physician shall not knowingly perform or induce an abortion on a pregnant woman unless the physician has determined, in accordance with this section, whether the woman's unborn child has a detectable fetal heartbeat.

C. In making a determination under subsection B of this section, 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 of this section 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 a fetal heartbeat, including the date, time, and results of the test.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.33 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Except as provided by Section 4 of this act, a physician shall not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child as required by Section 2 of this act or failed to perform a test to detect a fetal heartbeat.

B. A physician shall not be in violation of this section if the physician performed a test for a fetal heartbeat as required by Section 2 of this act and did not detect a fetal heartbeat.

C. This section shall not affect any provision of state law that regulates or prohibits abortion, including, but not limited to, any provision that restricts or regulates an abortion by a particular method or during a particular stage of pregnancy.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.34 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Sections 2 and 3 of this act shall not apply if a physician believes a medical emergency exists that prevents compliance with this act.

B. A physician who performs or induces an abortion under circumstances described by subsection A of this section 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 act.

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 of this section.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.35 of Title 63, unless there is created a duplication in numbering, reads as follows:

This act shall not be construed to:

1. Create or recognize a right to abortion before a fetal heartbeat is detected;

2. 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 act;

3. Wholly or partly repeal, either expressly or by implication, any other statute that regulates or prohibits abortion; or

4. Restrict a political subdivision from regulating or prohibiting abortion in a manner that is at least as stringent as the laws of this state.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.36 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Notwithstanding any other law, the requirements of this act shall be enforced exclusively through the private civil actions described in Section 7 of this act. No enforcement of this act, and no enforcement of any statute with criminal or administrative penalties, in response to violations of this act, shall be taken or threatened by this state, a political subdivision, a district attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 7 of this act.

B. Subsection A of this section shall not be construed to:

1. Legalize the conduct prohibited by this act;
2. Limit in any way or affect the availability of a remedy established by Section 7 of this act; or
3. Limit the enforceability of any other laws that regulate or prohibit abortion.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.37 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person who:

1. Performs or induces an abortion in violation of this act;

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 this act, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this act; or

3. Intends to engage in the conduct described by paragraph 1 or 2 of this subsection.

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 act or engaging in acts that aid or abet violations of this act;

2. Statutory damages in an amount of not less than Ten Thousand Dollars (\$10,000.00) for each abortion that the defendant performed or induced in violation of this act, and for each abortion performed or induced in violation of this act that the defendant aided or abetted; and

3. Court costs and attorney fees.

C. Notwithstanding subsection B of this section, a court shall not award relief under this section in response to a violation of paragraph 1 or 2 of subsection A of this section if the defendant demonstrates that the defendant previously paid not less than Ten Thousand Dollars (\$10,000.00) of statutory damages as provided in paragraph 2 of subsection B of this section in a previous action for that particular abortion performed or induced in violation of this act, or for the particular conduct that aided or abetted an abortion performed or induced in violation of this act.

D. Notwithstanding any other law, a person may bring an action under this section not later than four (4) years after 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 of this act are unconstitutional or were unconstitutional;
3. A defendant's reliance on any court decision that has been overruled on appeal or by a subsequent court, even if that court decision had not been overruled when the defendant engaged in conduct that violates this act;
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. Nonmutual issue preclusion or nonmutual claim preclusion;

6. The consent of the unborn child's mother to the abortion; or

7. Any claim that the enforcement of this act or the imposition of civil liability against the defendant will violate the constitutional rights of third parties, except as provided by Section 8 of this act.

F. 1. It is an affirmative defense if:

- a. a person sued under paragraph 2 of subsection A of this section reasonably believed, after conducting a reasonable investigation, that the physician performing or inducing the abortion had complied or would comply with this act, or
- b. a person sued under paragraph 3 of subsection A of this section reasonably believed, after conducting a reasonable investigation, that the physician performing or inducing the abortion will comply with this act.

2. The defendant has the burden of proving an affirmative defense under paragraph 1 of this subsection by a preponderance of the evidence.

G. This section shall 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 Section 3 or 22 of Article II of the Oklahoma Constitution.

H. Notwithstanding any other law, this state, a state official, or a district attorney shall not intervene in an action brought under this section. This subsection shall not prohibit a person described by this subsection from filing an amicus curiae brief in the action.

I. Notwithstanding any other law, a court shall not award court costs or attorney fees to a defendant in an action brought under this section.

J. Notwithstanding any other law, a civil action under this section shall not be brought by a person who impregnated the abortion patient through an act of rape, sexual assault, incest, or any other act prohibited by state law.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.38 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. A defendant against whom an action is brought under Section 7 of this act shall not have standing to assert the rights of women seeking an abortion as a defense to liability under that section unless:

1. The United States Supreme Court holds that the 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

2. The defendant has standing to assert the rights of women seeking an abortion under the tests for third-party standing established by the United States Supreme Court.

B. A defendant in an action brought under Section 7 of this act may assert an affirmative defense to liability under this section if:

1. The defendant has standing to assert the third-party rights of a woman or group of women seeking an abortion in accordance with subsection A of this section; and

2. The defendant demonstrates that the relief sought by the claimant will impose an undue burden on that woman or that group of women seeking an abortion.

C. A court shall not find an undue burden under subsection B of this section unless the defendant introduces evidence proving that:

1. An award of relief will prevent a woman or a group of women from obtaining an abortion; or

2. An award of relief will place a substantial obstacle in the path of a woman or a group of women who are seeking an abortion.

D. A defendant shall not establish an undue burden under this section by:

1. Merely demonstrating that 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

2. 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.

E. The affirmative defense under subsection B of this section shall not be available if the United States 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 under Section 7 of this act occurred before the Supreme Court overruled either of those decisions.

F. Nothing in this section shall in any way limit or preclude a defendant from asserting the defendant's personal constitutional rights as a defense to liability under Section 7 of this act, and a court shall not award relief under Section 7 of this act 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.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.39 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Notwithstanding any other law, a civil action brought under Section 7 of this act shall 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 7 of this act in any one of the venues described by subsection A of this section, the action shall not be transferred to a different venue without the written consent of all parties.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.40 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. This section prevails over any conflicting law.

B. This state has sovereign immunity, a political subdivision has governmental immunity, and each officer and employee of this 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 this act, on constitutional grounds or otherwise.

C. A provision of state law shall not be construed to waive or abrogate an immunity described by subsection A of this section unless it expressly waives immunity under this section.

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.41 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Notwithstanding any other law, any party including an entity, attorney, or law firm, who seeks declaratory or injunctive relief to prevent this state, a political subdivision, any governmental entity or public official in this state, or any person in this state 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, shall be liable for court costs and attorney fees of the prevailing party.

B. For purposes of this section, a party is considered a prevailing party if a state or federal court:

1. Dismisses any claim or cause of action brought against the party that seeks the declaratory or injunctive relief described by subsection A of this section, regardless of the reason for the dismissal; or

2. Enters judgment in the party's favor on any such claim or cause of action.

C. Regardless of whether a prevailing party sought to recover court costs or attorney fees in the underlying action, a prevailing party under this section may bring a civil action to recover court costs and attorney fees against a party including an entity, attorney, or law firm, that sought declaratory or injunctive relief described by subsection A of this section not later than three (3) years after the date on which, as applicable:

1. The dismissal or judgment described by subsection B of this section becomes final on the conclusion of appellate review; or

2. The time for seeking appellate review expires.

D. It is not a defense to an action brought under subsection C of this section that:

1. A prevailing party under this section failed to seek recovery of court costs or attorney fees in the underlying action;

2. The court in the underlying action declined to recognize or enforce the requirements of this section; or

3. The court in the underlying action held that any provisions of this section are invalid, unconstitutional, or preempted by federal law, notwithstanding the doctrines of issue or claim preclusion.

SECTION 12. This act shall become effective November 1, 2022.

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