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DATE: April 10, 1997

HOUSE OF REPRESENTATIVES
COMMITTEE ON
HEALTH CARE SERVICES
BILL RESEARCH & ECONOMIC IMPACT STATEMENT

BILL #: CS/HB 1227

RELATING TO: Abortion Procedures

SPONSOR(S): Committee on Health Care Services, Rep. Ball and others

STATUTE(S) AFFECTED: Sections 390.001, 390.002, 390.011, F.S.

COMPANION BILL(S): SB 1398(s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) HEALTH CARE SERVICES YEAS 8 NAYS 3
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I. SUMMARY:

This bill prohibits a physician from performing a “partial-birth” abortion except to save a woman whose life is physically endangered.

“Partial-birth” abortion is defined to mean a termination of pregnancy in which the physician performing the termination of pregnancy partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

A physician who knowingly performs such a procedure is guilty of a third degree felony, and subject to a civil action by either the father and husband of the woman upon whom the procedure is performed, or the parents of the mother if she is a minor. Relief in the form of monetary damages for all psychological and physical injuries plus three times the cost of the partial-birth abortion may be awarded.

No direct fiscal impact is anticipated.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Medical Description: "Partial-birth" abortion refers to a procedure medically identified by the American College of Obstetricians and Gynecologists (ACOG) as "Intact Dilatation and Extraction (Intact D&X)." According to ACOG, the procedure is defined by the following elements performed in sequence:

1. Deliberate dilatation of the cervix, usually over a sequence of days;
2. Instrumental conversion of the fetus to a footling breech;
3. Breech extraction of the body excepting the head; and
4. Partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus.

When abortion is performed after 16 weeks, D&X is one method of terminating a pregnancy. Other later-term procedures include dilatation and evacuation (D&E), intrauterine saline instillation, prostaglandin instillation, and hysterotomies and hysterectomies. Proponents claim that the D&X procedure may often be the safest and most medically appropriate procedure in a particular case and caution against permitting political and moral beliefs to interfere in medical decision-making. Opponents argue that, given the availability of alternative procedures, partial birth abortion is never medically necessary to protect a woman's health or future fertility.

Statistics: National data on abortion is available from only two sources: the federal Centers for Disease Control and Prevention (CDC) and the Alan Guttmacher Institute. The most recent data from the CDC, which collects abortion statistics annually mainly from state health departments, reports a total of 1,267,415 legally induced abortions in 1994. The Guttmacher Institute, which directly surveys all known providers of abortion services estimates that there were 1.4 million abortions performed in 1994. For 1996, Florida's Office of Vital Statistics, Dept. of Health, recorded 80,040 abortions in Florida.

According to the Guttmacher Institute, approximately 4% of all abortions are performed between the 16th and 20th week, and about 1% at 21 weeks or more. CDC statistics are similar: 4.3% in the 16 to 20 week range, and 1.3% at 21 weeks or over. In Florida the data is categorized by trimester: up to 12 weeks = 91.4% (73,149); 13 to 24 weeks = 8.6% (6879); 25+ weeks = 0% (12). The CDC data also break the statistics down into broad categories of procedure. Curretage, the preferred procedure performed early in the pregnancy accounted for 99.1% of all reported procedures in 1994, and intrauterine instillation and "other" later term methods accounted for the remaining. Applying the .9% figure to Florida data, approximately 720 abortions would have been performed using a later term procedure. It is impossible to know specifically how many were performed using D & X in contrast to other procedures since that information is not collected.

Federal Proposals: On June 14, Representative Charles T. Canady (R-Fla.) introduced H.R. 1833, the Partial-Birth Abortion Ban Act of 1995 which would have outlawed "partial birth" abortions. On March 27, the House approved the bill as amended by the Senate

to permit an exception to save the life of the mother, and on April 10, 1996, President Clinton vetoed the Act stating that the bill "in curtailing the ability of women and their doctors to choose the procedure for sound medical reasons, violates the constitutional command that any law regulating abortion protect both the life and the health of the woman." Although the House was able to muster enough votes to override the President's veto, the Senate failed to raise the 2/3 majority needed to override.

Reintroduced by Senator Santorum (S. 6), on January 21st, and Representative Canady (H.R. 929), on March 5, the Partial-Birth Ban Act of 1997 is virtually identical to the proposal which passed last year, only allowing an exception to save the life of the mother. On March 12, the House approved its version by a wide majority. Concerned about constitutional implications, the White House is seeking to broaden the bill to allow an exception to preserve the long-term health of the mother, and to restrict the ban to third trimester abortions.

State Actions: Since 1995, six states, Ohio, Michigan, Utah, South Dakota, South Carolina, and Georgia have enacted laws prohibiting specific abortion procedures.

- Ohio, the first state to prohibit a specific abortion procedure, banned "dilation and extraction" in June of 1995. This law was determined to be unconstitutional by a federal district court (see below).
- In 1996, Utah prohibited partial-birth/dilation and extraction procedures and saline abortion methods after viability. The Utah law provides an exception for cases in which all other procedures would threaten the woman's life or health.
- In 1996 Michigan prohibited "partial-birth" abortion that applies throughout the pregnancy and provides an exception "to save the life of the pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury and no other procedure will accomplish that purpose."
- South Dakota, the first state to pass the ban this year, also permits an exception "to save the life of the mother because her life is endangered by a physical disorder, illness, or injury, including a life-endangering condition caused by or arising from the pregnancy itself, provided that no other procedure will suffice to save the mother's life."
- South Carolina, passed this year, is similar to the federal legislation, only permitting an exception "to save the life of the pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury and no other procedure will accomplish that purpose."
- The Georgia act permits an exception "to save the life of the mother because her life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering condition caused by or arising from the pregnancy itself, provided that no other procedure will suffice to save the mother's life."

While bills have been filed in many states, partial-birth abortion bans are being actively considered in New Hampshire, Maine, New York, and Virginia. Arkansas is also considering a bill. However, that bill has been amended to make the act operative and enforceable to the extent permitted by the federal Constitution and laws. In addition to states which have passed the ban, legislative initiatives have failed in Washington and Maryland.

Legal Background: Arguments opposing partial birth legislation have raised two constitutional issues. First, pre-viability abortions may only be regulated to protect the mother's health - not the fetus. Second, post-viability abortions can be prohibited except

if necessary to protect the *health* as well as the life of the mother. The proposed ban would forbid a described medical procedure regardless of whether the fetus being aborted was viable or the procedure was medically determined to be the safest for the mother.

The United States Supreme Court's 1973 decision in *Roe v. Wade* was premised upon the right of privacy which the *Roe* court held to be a "fundamental right" encompassing a woman's decision whether or not to terminate her pregnancy. Where a "fundamental right" is involved, regulations limiting that right are subject to strict scrutiny, justified only by a "compelling state interest" which must be narrowly drawn to express only that interest. The court found that two interests might be compelling: protecting the health of the mother, and protecting the viability of the fetus. Since the health of the mother would only be compelling after the first trimester (when abortion-related dangers outweigh the live-birth-related ones), the court held that during the first trimester, a state may not ban, or even closely regulate, abortions. Second trimester abortions could be restricted only to protect the woman's safety.

Interest in the fetus only applied during the last trimester when the fetus became viable. Consequently states could restrict or prohibit abortions entirely subsequent to fetal viability "except when necessary, in appropriate medical judgment, for the preservation of the life or health" of the woman. In *Doe v. Bolton*, the 1973 companion to *Roe*, the Court explained that the health of the mother represents a medical judgment that "may be exercised in light of all factors - physical, emotional, psychological, familial, and the woman's age - relevant to the well-being of the patient."

Nineteen years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)* , the U.S. Supreme Court partially retreated from that position. Abandoning the trimester system, the Court upheld the basic right of a woman to choose an abortion before fetal viability. However, the standard against which the Court evaluated state regulatory provisions restricting that right shifted from one of "strict scrutiny" to the less rigorous "undue burden." Consequently, state efforts to promote a policy preference for encouraging childbirth over abortion is now permissible even if those measures do not further a health interest. Post-viability, the state may regulate, even proscribe, abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the pregnant woman."

In the recent *Women's Medical Professional Corp. v. Voinovich* (1995), the federal court decision which considered the constitutionality of Ohio's statute banning intact D&E, the court concluded that because for some women the method posed less medical risk than available alternatives, banning the procedure would be an undue burden and therefore unconstitutional. Further, even it other alternatives were as safe, the fact that some procedures require the woman to be hospitalized, while the intact D & E method is available on an out-patient basis, may also impact the practical availability of pre-viability abortions. The decision is on appeal.

Supporters of the ban focus on the fact that the procedure involves the partial delivery of a living fetus - hence the term "partial-birth" abortion. Although, past court doctrine has held that a fetus becomes a legal "person" upon emerging from the uterus, courts have never addressed the constitutional status of those who are in the process of being born. It could be said that the partial-birth abortion procedure kills a human being who is partly

born. Supreme Court abortion precedent applicable to unborn fetuses therefore may not apply to a partially born human being.

Even if the Court concluded that a partially-born child is not a person, the availability of alternative procedures may avoid the undue burden barrier to a woman's pre-viability right to an abortion. Post-viability, the state's recognized interest in protecting the potentiality of human life should permit the prohibition of a procedure that is particularly painful and offensive to humanity, especially since an exception is permitted when the mother's life is endangered.

Finally, proponents of the prohibition focus on many other state interests which may be considered if this ban is not held to place an undue burden on the mother's right to choose to have an abortion: the government's interest in protecting human life; protecting the dignity of human life; the prevention of moral and legal confusion over the role of the physician to protect both the mother and child; and the prevention of cruel and inhumane treatment.

Florida Law: Under the rule commonly referred to as the "adequate and independent state ground doctrine," a federal court will not disturb a state court judgment which is based on an adequate and independent state ground, even if federal issues are present, provided the result is not violative of the federal constitution. When this occurs, federal courts are without jurisdiction to review these decisions, provided the state ground is both adequate and independent.

Unlike the U.S. Constitution, Florida's Constitution contains an express provision guaranteeing a right of privacy, Art. I, § 23. Adopted in 1980, the Florida Supreme Court, in *Winfield v. Division of Pari-Mutual Wagering (Fla. 1985)*, concluded that section 23 provided a strong right of privacy not found in the United States Constitution which is much broader in scope than that of the Federal Constitution. In *Winfield* the Court also provided a standard of review, holding that: "The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means."

In *In re T.W.*, 551 So.2d 1186 (1989), the Florida Supreme Court struck down a state statute requiring parental consent for a minor's abortion as violative of Florida's constitutional right of privacy ("Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy"). Given the broader protection provided by the Florida Constitution's express "right of privacy," and the higher burden that the state must assume to overcome that right, a state law banning partial-birth abortions would face a more challenging constitutional fight.

B. EFFECT OF PROPOSED CHANGES:

Physicians will be prohibited from performing partial-birth abortions in this state.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes, the bill encroaches on medical decision-making and interferes in the physician-patient relationship by restricting a physician's ability to select a presently legal abortion procedure. Consequently, the bill will limit the medical options of physicians and of woman seeking an abortion.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

Yes, by granting both the husband or parents of a minor upon who a partial birth abortion is performed, a civil cause of action for damages, both husbands and parents will have increased legal authority to intervene in a woman’s abortion decision.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Renumbers and amends s. 390.001, F.S., relating to the termination of pregnancies, to:

(a) Delete the definition subsection;
(b) Prohibit the performance of partial-birth abortions by physicians, except to save the mother whose life is physically endangered;
(c) Exempt women upon whom a partial-birth abortion is performed from prosecution under this section;
(d) Provide a civil cause of action for husbands or parents of a minor upon whom a partial-birth abortion is performed, and specify appropriate relief; and
(e) Update references to the Dept. of Health, and make certain technical and conforming corrections to the statute.

Section 2. Renumbers s. 390.002, F.S., relating to the statistical reporting of abortions.

Section 3. Amends s. 390.011, F.S., providing defintions relating to the regulation of abortion clinics to:

(a) Apply the definitions to the entire chapter; and
(b) Add a definition for “partial-birth abortion.”

Section 4. Provide that the act takes effect upon becoming a law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

   None.

3. Long Run Effects Other Than Normal Growth:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

   To the extent that access to a particular medical procedure which may pose the least medical risk in certain circumstances will be prohibited, medical costs for late term abortions and complications resulting from such abortions may increase.

2. Direct Private Sector Benefits:

   None.

3. Effects on Competition, Private Enterprise and Employment Markets:

   Negligible.

D. FISCAL COMMENTS:

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to expend funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of counties or municipalities to raise revenues.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

It is unclear who the defendant would be in a civil action brought by the woman's husband or parents. While one would assume that the physician would be a defendant, it is also feasible that the woman undergoing the abortion could be a defendant.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee Substitute makes several technical and clarifying changes to chapter 390 in order to update and integrate the chapter's provisions.

VII. SIGNATURES:

COMMITTEE ON HEALTH CARE SERVICES:

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