FINAL BILL ANALYSIS

BILL #: *CS/HJR 1179*

FINAL HOUSE FLOOR ACTION:
79 Y's *34 N's*

SPONSOR: *Rep. Baxley*

GOVERNOR'S ACTION: N/A

COMPANION BILLS: *SJR 1538*

SUMMARY ANALYSIS

CS/HJR 1179 passed the House on April 27, 2011. The bill was amended by the Senate on April 28, 2011, and subsequently passed the House on May 4, 2011. The Resolution was signed by Officers and filed with the Secretary of State on June 30, 2011. If approved by 60 percent of the voters in the 2012 general election, the resolution provides the proposed amendment will take effect on January 8, 2013.

The joint resolution proposes an amendment to the Florida Constitution to prohibit the spending of public funds for any abortion or for health-benefits coverage that includes the coverage of abortion.

The prohibition on the spending of public funds for any abortion or for health-benefits coverage that includes the coverage of abortion does not apply to:

- Expenditures required by federal law;
- A case in which a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering, physical condition caused by or arising from the pregnancy itself, which would, as certified by a physician, place the woman in danger of death unless an abortion is performed;
- An abortion due to a pregnancy resulting from rape; or
- An abortion due to a pregnancy resulting from incest.

Additionally, the joint resolution specifies that the Florida Constitution may not be interpreted to create broader rights to an abortion than those contained in the U.S. Constitution.

This joint resolution also includes a ballot summary, which outlines the provisions of the joint resolution.

This joint resolution creates Section 28, Article I, of the Florida Constitution.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Current Situation

Abortion Statistics

In 2008, there were 1.21 million abortions nationwide.[1] This same year, 22 percent of all pregnancies (excluding miscarriages) resulted in abortion.[2] According to the most recent statistics available, in 2008, there were 94,360 abortions in Florida[3], while there were 231,657 live births.[4] This amounts to approximately 2 abortions for every 5 births.

The Patient Protection and Affordable Care Act

The federal Patient Protection and Affordable Care Act (PPACA) was signed into law by President Obama on March 23, 2010. Under the PPACA, the state is required to create an insurance exchange by 2014. If the state does not take the necessary steps to create the exchange, as determined by the Secretary of the United States Health and Human Services (HHS) the exchange will be created by the Secretary and HHS.[5] The exchange will provide an insurance market place whereby individuals and small business can purchase health insurance. Under the PPACA, most citizens will be required to purchase health insurance, or will be required to pay a tax penalty of the greater of $695 per year up to a maximum of three times that amount ($2,085) per family or 2.5 percent of household income. Certain individuals who meet certain income thresholds will be given premium tax credits and cost sharing subsidies to help them purchase their health insurance.[6] Any household earning between 133 percent and 400 percent of the federal poverty level ($29,326 to $88,200 annual income for a family of 4) will be eligible for the premium tax credits and cost sharing subsidies[7].

Florida and 25 other states brought an action in the United States District Court for the Northern District of Florida challenging the constitutionality of the Act. On January 31, 2011, Judge Roger Vinson found the Act unconstitutional.[8] On March 3, 2011 Judge Vinson granted a stay of his order on the condition that the federal government seek an immediate appeal and seek an expedited review. The federal government filed the appeal and motion for expedited review to the United State Court of Appeal for the Eleventh Circuit on March 8, 2011.[9] Florida and the other plaintiffs have filed a motion requesting a more condensed briefing and oral argument schedule than requested by the federal government. The Eleventh Circuit responded on March 11, 2011 setting the briefing schedule beginning on April 4, 2011 and ending May 25, 2011.[10]

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[1] The Guttmacher Institute, Abortion Incidence and Access to Services in the United States, 2008.
[2] *Id.*
[3] The Guttmacher Institute, Abortion Incidence and Access to Services in the United States, 2008.
[4] Florida Department of Health, Department of Vital Statistics, 2008.
[5] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Section 1321(c).
[6] A premium tax credit is an amount taken out of the taxes you paid the previous year and given back to the payer. For tax credits given by the Patient Protection and Affordable Care Act, the credits will be sent directly to the issuer of the health insurance plan from the federal government. A cost sharing reduction is a reduction in out of pocket expenses paid by the health plan member such as co-pays.
[7] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Section 1401 & 1402.
[8] State of Florida, et al. v. United States Department of Health and Human Services, et al., --- F.Supp.2d ----, 2011 WL 285683 (N.D.Fla.).
[9] Case No. 11-11021-HH.
[10] State of Fla., et al. v. U.S. Dept. of Health & Human Serv., Nos. 11-11021-HH & 11-11067-HH, Order on Appellants' Mtn. to Expedite Appeal (11th Cir. March 11, 2011).

State Legislation in Response to the PPACA[11]

The PPACA includes provisions that govern insurance coverage of abortion in state insurance exchanges, which are scheduled by the PPACA to be launched in 2014. The "Special Rules" (Section 1303) of the law and the related White House executive order contain these new provisions.[12] The law maintains current Hyde Amendment restrictions that govern abortion policy, which prohibit federal funds from being used for abortion services (except in cases of rape or incest, or when the life of the woman would be endangered), and extends those restrictions to the health insurance exchanges.

The PPACA allows states (through legislation) to prohibit abortion coverage in qualified health plans offered through an exchange. Without such prohibition, plans are permitted to offer insurance providing abortion coverage but must provide for a separate accounting mechanism. The plan must collect from each enrollee, two separate payments; one specifically for the abortion coverage and the other for all the other services provided. All individuals enrolled in the plan providing abortion coverage would be required to pay the separate abortion fee (without regard to the enrollee's age, sex, or family status).[13] Additionally, the PPACA specifies that the Act shall not preempt or have any effect on state laws regarding the prohibition of (or requirement of) coverage, funding, or procedural requirements on abortions.[14]

Since enactment of the PPACA in March 2010, at least five states (Arizona, Louisiana, Mississippi, Missouri, and Tennessee) have enacted legislation to restrict coverage for abortion in their insurance exchanges.

Arizona law expands on provisions that prohibit the use of public funds to finance abortions, by prohibiting the funding of abortion in insurance coverage; the law also provides a few exemptions. The law prohibits any qualified health insurance policy, contract, or plan offered through any state health care exchange from providing coverage for abortions unless the coverage is offered as a separate optional rider for which an additional insurance premium is charged. The law prohibits public and tax monies of the state or any political subdivision of the state from directly or indirectly paying the costs, premiums, or charges associated with a health insurance policy, contract, or plan that provides coverage, benefits, or services related to the performance of any abortion. Exemptions to this provision include saving the life of the woman having the abortion and averting impairment of a major bodily function. In addition, this law does not prohibit the state from complying with the federal law requirements.

Louisiana law prohibits elective abortions to be included in a policy available through the state health exchange. In accordance with the PPACA as well as longstanding policies of the state related to abortion, the law states that no health care plan required to be established in the state through an exchange shall offer coverage for abortion services.

In Mississippi, the "Federal Abortion-Mandate Opt-Out Act," prohibits the use of federal funds to pay for elective abortions covered by private insurance in the state through a health care

[11] National Conference of State Legislatures, *Health Reform and Abortion Coverage in the Insurance Exchanges*, November 2010, *available at* http://www.ncsl.org/default.aspx?tabid=21099 (last visited Mar. 17, 2011).
[12] 42 U.S.C § 18023; Exec. Order No. 13535, *reprinted in* 42 U.S.C. § 18023 (2010), *available at*, http://www.whitehouse.gov/the-press-office/executive-order-patient-protection-and-affordable-care-acts-consistency-with-longst (last viewed on April 14, 2011).
[13] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, section 1303(b) (2) (B) (i).
[14] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, section 1303(c) (1).

exchange. The law provides that no abortion coverage may be provided by a qualified health plan offered through an exchange created pursuant to the PPACA within the State of Mississippi. The act states that this limitation shall not apply to an abortion performed when the life of the mother is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself, or when the pregnancy is the result of an alleged act of rape or incest. The physician is required to maintain sufficient documentation in the medical record that supports the medical necessity or reason for the abortion.

In Missouri, among other abortion-related provisions, the law prohibits insurance plans or policies that provide coverage for elective abortions from inclusion in the state health insurance exchange. Elective abortions are defined as any abortion for any reason other than a spontaneous abortion or to prevent the death of the woman receiving the abortion. The law also prohibits coverage for elective abortions through the purchase of an optional rider within the exchange.

Tennessee law prohibits coverage for abortion services under any health care plan through an exchange required to be established in the state pursuant to the PPACA.

State Legislation Prior to the PPACA[15]

Prior to the enactment of the PPACA, at least five states (Idaho, Kentucky, Missouri, North Dakota, and Oklahoma) had laws that restrict health insurance policies covering abortion.

Idaho's law requires various insurance policies to exclude coverage for elective abortions. Exclusion of this coverage may be waived if a separate premium is paid, and the availability of coverage is the option of the insurance carrier. Elective abortion is defined as an abortion for any reason other than to preserve the life of the female upon whom the abortion is performed.

In Kentucky, the law prohibits health insurance and health care contracts in the state from providing coverage for elective abortions, except by an optional rider for which there must be paid an additional premium. Elective abortion is defined as an abortion for any reason other than to preserve the life of the female upon whom the abortion is performed.

In Missouri, the law prohibits health insurance contracts, plans, or policies from providing coverage for elective abortions except by an optional rider for which there must be paid an additional premium. Elective abortion is defined as an abortion for any reason other than a spontaneous abortion or to prevent the death of the female upon whom the abortion is performed.

In North Dakota, the law states that health insurance contracts, plans, or policies may not provide coverage for abortions except by an optional rider for which there must be paid an additional premium. This does not apply to an abortion necessary to prevent the death of the woman.

In Oklahoma, the law prohibits health insurance contracts, plans, or policies from providing coverage for elective abortions except by an optional rider paid by an additional premium. Elective abortion is defined as an abortion for any reason other than a spontaneous miscarriage, to prevent the death of the woman, or when the pregnancy resulted from rape

[15] *Id.*

reported to the proper law enforcement authorities or when the pregnancy resulted from incest committed against a minor and the perpetrator has been reported to the proper law enforcement authorities.

The Hyde Amendment

The Hyde Amendment is a rider to the annual appropriations bill for the U.S. Departments of Labor and Education, which prevents Medicaid and any other programs under these departments from funding abortions, except in limited cases. The amendment is named after Rep. Henry J. Hyde (R-IL), who, as a freshman legislator, first offered the amendment.

The Hyde Amendment has been enacted into law in various forms since 1976, during both Democratic and Republican administrations. In 1980, the U.S. Supreme Court affirmed the constitutionality of the Hyde Amendment in *Harris v. McRae*.[16] In *Harris*, the Court determined that funding restrictions created by the Hyde Amendment did not violate the U.S. Constitution's Fifth Amendment and, therefore, did not contravene the liberty or equal protection guarantees of the Due Process Clause of the Fifth Amendment.[17] The Court opined that, although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those obstacles that are not created by the government (in this case indigence).[18] The Court further opined that, although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all.[19]

The current language of the Hyde Amendment, contained in the U.S. Departments of Labor, Health and Human Services, and Education, and related agencies Appropriations Act of 2010 is as follows:

> SEC. 507. (a) None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for any abortion.
> (b) None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for health benefits coverage that includes coverage of abortion.
> (c) the term "health benefits coverage" means the package of services covered by a managed care provider or organization pursuant to a contract or other arrangement.
> SEC. 508 (a) The limitations established in the preceding section shall not apply to an abortion—
> (1) if the pregnancy is the result of an act of rape or incest; or
> (2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by

[16] 448 U.S. 297 (1980). *See also Rust v. Sullivan*, 500 U.S. 173 (1991), and *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), upholding *Harris v. McRae*.
[17] *Harris*, 448 U.S. at 326-27.
[18] *Harris*, *Id*. at 316-17.
[19] *Id.*

> a physician, place the woman in danger of death unless an abortion is performed.[20]

In 1994, the Hyde Amendment stated:

> SEC 509. None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.[21]

In 1989, the Hyde Amendment stated:

> SEC. 204. None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.[22]

In Florida, based on the Hyde Amendment, Medicaid reimburses for abortions for one of the following reasons:

- The woman suffers from a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused or arising from the pregnancy itself, that would place the woman in danger of death unless an abortion is performed;
- When the pregnancy is the result of rape (sexual battery) as defined in s. 794.011, F.S.; or
- When the pregnancy is the result of incest as defined in s. 826.04, F.S.[23]

An Abortion Certification Form must be completed and signed by the physician who performed the abortion for the covered procedures. The form must be submitted with the facility claim, the physician's claim, and the anesthesiologist's claim. The physician must record the reason for the abortion in the physician's medical records for the recipient.[24]

In 2009-2010, Florida Medicaid paid for 4 abortions at a cost of $534.60.[25]

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[20] P.L. 111-117 (2009).
[21] P.L. 103-133 (1994).
[22] P.L. 101-166 (1989).
[23] Agency for Health Care Administration, *Florida Medicaid: Ambulatory Surgery Center Services Coverage and Limitations Handbook*, January 2005, *available at* http://www.baccinc.org/medi/CD_April_2005/Provider_Handbooks/Medicaid_Coverage_and_Limitations_Handbooks/Ambulatory_Surgical_Center_Updated_January_2005.pdf (last visited Mar. 17, 2011).
[24] *Id.*
[25] Email from AHCA legislative staff, April 14, 2011 (on file with the Committee).

Relevant Case Law

Restrictions on Abortions

In 1973, the landmark case of *Roe v. Wade* established that restrictions on a woman's access to secure an abortion are subject to a strict scrutiny standard of review.[26] In *Roe*, the U.S. Supreme Court determined that a woman's right to have an abortion is part of the fundamental right to privacy guaranteed under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, justifying the highest level of review.[27] Specifically, the Court concluded that: (1) during the first trimester, the state may not regulate the right to an abortion; (2) after the first trimester, the state may impose regulations to protect the health of the mother; and (3) after viability, the state may regulate and proscribe abortions, except when it is necessary to preserve the life or health of the mother.[28] Therefore, a state regulation limiting these rights may be justified only by a compelling state interest, and the legislative enactments must be narrowly drawn to express only legitimate state interests at stake.[29]

In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the U.S. Supreme Court relaxed the standard of review in abortion cases involving adult women from strict scrutiny to unduly burdensome, while still recognizing that the right to an abortion emanates from the constitutional penumbra of privacy rights.[30] In *Planned Parenthood*, the Court determined that, prior to fetal viability, a woman has the right to an abortion without being unduly burdened by government interference.[31] The Court concluded that the state may regulate the abortion as long as the regulation does not impose an undue burden on a woman's decision to choose an abortion.[32] If the purpose of a provision of law is to place substantial obstacles in the path of a woman seeking an abortion before viability, it is invalid; however, after viability the state may restrict abortions if the law contains exceptions for pregnancies endangering a woman's life or health.[33]

The unduly burdensome standard as applied in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, generally considered to be a hybrid between strict scrutiny and intermediate level scrutiny, shifted the Court's focus to whether a restriction creates a substantial obstacle to access. This is the prevailing standard today applied in cases in which abortion access is statutorily restricted.

Florida's Privacy Clause

In *In re T.W.*, 551 So. 2d 1186 (Fla. 1989), the Florida Supreme Court concluded that, because Article I, Section 23 of the Florida Constitution contains an express right of privacy[34], the Florida Constitution confers broader rights with respect to an abortion than the United States Constitution. The Court held that, under the State Constitution, abortion regulations are subject to "strict scrutiny." In other words, an abortion regulation is unconstitutional unless the state can

[26] 410 U.S. 113 (1973).
[27] 410 U.S. 113, 154 (1973).
[28] 410 U.S. 113, 162-65 (1973).
[29] 410 U.S. 113, 152-56 (1973).
[30] 505 U.S. 833, 876-79 (1992).
[31] *Id.*
[32] *Id*.
[33] *Id.*
[34] The constitutional right of privacy provision reads: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." FLA. CONST. art. I, s. 23.

prove that it serves a "compelling state interest through the least intrusive means." Under this demanding standard, the Court invalidated a parental-consent statute,[35] even though the United States Supreme Court had previously upheld other states' parental-consent statutes under *Roe*.

In *North Florida Women's Health and Counseling Services*, *Inc. v. State*. 866 So. 2d 612 (Fla. 2003), the Court reaffirmed its conclusion that all abortion regulations are "presumptively unconstitutional" under Article I, Section 23 of the Florida Constitution, and that, unlike the United States Constitution, the Florida Constitution subjects all abortion regulations to strict scrutiny. The Court concluded that Florida's parental-notice statute did not serve a compelling interest, and was therefore unconstitutional, despite the fact that the United States Supreme Court had upheld a parental-notice statute under the United States Constitution.

In 2004, Florida voters adopted a constitutional amendment to authorize the enactment of a parental-notice statute. The strict-scrutiny standard embraced by the Florida Supreme Court in *In re T.W.* remains in force, however, and the State Constitution continues to provide broader and more aggressive protections for abortion than the United States Constitution.

Constitutional Amendments

Section 1, Article XI, of the Florida Constitution authorizes the Legislature to propose constitutional amendments by joint resolution approved by a three-fifths vote of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office, or at a special election held for that purpose.[36] Section 5(e), Article XI, of the Florida Constitution requires 60-percent voter approval for a constitutional amendment to take effect. An approved amendment will be effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.[37]

Effect of Changes

The joint resolution proposes the creation of Section 28 of Article I of the Florida Constitution. Subsection (a) would prohibit the spending of public funds for any abortion or for health benefits coverage that includes the coverage of abortion. The prohibition does not apply to:

- Expenditures required by federal law;
- A case in which a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering, physical condition caused by or arising from the pregnancy itself, which would, as certified by a physician, place the woman in danger of death unless an abortion is performed;
- An abortion due to a pregnancy resulting from rape; or
- An abortion due to a pregnancy resulting from incest.

Subsection (b) of the joint resolution specifies that the Florida Constitution may not be interpreted to create broader rights to an abortion than those contained in the U.S. Constitution, meaning that the joint resolution, should it become law, would supersede court decisions[38]

[35] *North Florida Women's Health and Counseling Services, Inc., et al., v. State of Florida*, 866 So. 2d 612, 619-20 (Fla. 2003).
[36] FLA. CONST. art. XI, s. 5(a).
[37] FLA. CONST. art. XI, s. 5(e).
[38] *See*, *e.g., supra* note 16.

which have concluded that the right of privacy under Article I, Section 23, of the Florida Constitution is broader in scope than that of the U.S. Constitution.

This addresses the holdings of *In re T.W.* and *North Florida Women's*. If the Joint Resolution were adopted, regulations of abortion would no longer be presumptively unconstitutional or subject to strict scrutiny (unless interpretations of the United States Constitution were to obtain), but would be subject to an analysis that is not more rigorous than under the United States Constitution. Subsection (b) is not a pure conformity clause, in the sense that it does not preclude Florida courts from interpreting the Florida Constitution to confer *narrower* rights to an abortion than the United States Constitution. It merely provides that abortion rights under the Florida Constitution are *not broader* than under the United States Constitution.

As in the case of conformity clauses, the joint resolution would not merely enshrine in the Florida Constitution the analysis that obtains under the United States Constitution at the time the amendment is adopted, but would look to the analysis under the United States Constitution as it evolves in subsequent decisions as well.[39] [40]

An effective date for the amendment is not specified. Therefore, the amendment, if approved by the voters, will take effect on the first Tuesday after the first Monday in January following the election at which it is approved.[41]

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The Division of Elections within the Department of State is required to publish the proposed constitutional amendment twice in a newspaper of general circulation in each county. The average cost per word to advertise an amendment is $106.14 according to the division. If

[39] *See State v. Moreno-Gonzalez*, 18 So. 3d 1180, 1182 (Fla. 3d DCA 2009) (holding that an amendment conforming the search-and-seizure provision of the Florida Constitution to interpretations of the Fourth Amendment "brings this state's search and seizure laws into conformity with all decisions of the United States Supreme Court rendered before and subsequent to the adoption of that amendment"); *Bernie v. State*, 524 So. 2d 988, 992 (Fla. 1988) (same).

[40] Unlike the conformity clauses in Article I, Sections 12, 17, and 22 of the Florida Constitution, the joint resolution does not reference the United States Supreme Court. The Florida Supreme Court has construed such references to limit the application of the conformity clause to cases directly and specifically controlled by a decision of the United States Supreme Court. *See*, *e.g.*, *Soca v. State*, 673 So. 2d 24, 26 (Fla. 1996) ("However, in the absence of a controlling U.S. Supreme Court decision, Florida courts are still 'free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution.'" (quoting *State v. Lavazzoli*, 434 So. 2d 321, 323 (Fla. 1983)). Under the Joint Resolution, Florida courts would look broadly to federal interpretations of the United States Constitution in all abortion cases, and not merely in cases controlled by a decision of the United States Supreme Court factually on point.

[41] FLA. CONST. art. XI, s. 5(e).

the joint resolution passes and the proposed constitutional amendment is placed on the ballot, the department will incur costs to advertise the proposed amendment.[42]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

[42] See, e.g., Fiscal Note on SJR 2 prepared by the Florida Department of State (January 4, 2011).