The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Health Regulation Committee

BILL:	SJR 1538
INTRODUCER:	Senator Flores
SUBJECT:	Abortion/Public Funding/Construction of Rights
DATE:	March 11, 2011 REVISED: 3/14/2011

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan/Brown	Stovall	HR	**Pre-meeting**
2.			JU	
3.			BC	
4.			RC	
5.				
6.				

I. Summary:

This is a joint resolution proposing the creation of Section 28 of Article I of the Florida Constitution, to prohibit the spending of public funds for any abortion or for health-benefits coverage that includes the coverage of abortion, unless such expenditure is required by federal law or is required to save the life of the mother. 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 does not amend, create, or repeal any sections of the Florida Statutes.

II. Present Situation:

Background

Under Florida law the term "abortion" means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.[1] "Viability" means that stage of fetal development when the life of the unborn child may, with a reasonable degree of medical probability, be continued indefinitely outside the womb.[2] Induced abortion can be elective (performed for nonmedical indications) or therapeutic (performed for medical

[1] Section 390.011, F.S.
[2] Section 390.0111, F.S.

indications). Abortion can be performed by surgical or medical means (medicines that induce a miscarriage).[3] An abortion in Florida must be performed by a physician licensed to practice medicine or osteopathic medicine who is licensed under ch. 458, F.S., ch. 459, F.S., or a physician practicing medicine or osteopathic medicine in the employment of the United States.[4] No person who is a member of, or associated with, the staff of a hospital, or any employee of a hospital or physician in which, or by whom, the termination of a pregnancy has been authorized or performed, who states an objection to the procedure on moral or religious grounds is required to participate in the procedure. The refusal to participate may not form the basis for any disciplinary or other recriminatory action.[5]

In 2007, a total of 91,954 abortions were performed in Florida: for 83,890 of those, the gestational age of the fetus was 12 weeks and under; for 8,063, the gestational age of the fetus was 13 to 24 weeks; and for 1, the gestational age was over 25 weeks.[6]

Abortion Clinics

Abortion clinics are licensed and regulated by the Agency for Health Care Administration (Agency) under ch. 390, F.S., and part II of ch. 408, F.S. The Agency has adopted rules in Chapter 59A-9, Florida Administrative Code, related to abortion clinics. Section 390.012, F.S., requires these rules to address the physical facility, supplies and equipment standards, personnel, medical screening and evaluation of patients, abortion procedures, recovery room standards, and follow-up care. The rules relating to the medical screening and evaluation of each abortion clinic patient, at a minimum, require:

- A medical history including reported allergies to medications, antiseptic solutions, or latex; past surgeries; and an obstetric and gynecological history;
- A physical examination, including a bimanual examination estimating uterine size and palpation of the adnexa;
- The appropriate laboratory tests, including:
    - For an abortion in which an ultrasound examination is not performed before the abortion procedure, urine or blood tests for pregnancy performed before the abortion procedure,
    - A test for anemia,
    - Rh typing, unless reliable written documentation of blood type is available, and
    - Other tests as indicated from the physical examination;
- An ultrasound evaluation for patients who elect to have an abortion after the first trimester. If a person who is not a physician performs the ultrasound examination, that person must have documented evidence that he or she has completed a course in the operation of ultrasound equipment. If a patient requests, the physician, registered nurse, licensed practical nurse, advanced registered nurse practitioner, or physician assistant must review the ultrasound evaluation results and the estimate of the probable gestational age of the fetus with the patient before the abortion procedure is performed; and

[3] Suzanne R. Trupin, M.D., *Elective Abortion*, December 21, 2010, available at: http://www.emedicine.com/med/TOPIC3312.HTM (Last visited on March 11, 2011).
[4] Section 390.0111(2), F.S.
[5] Section 390.0111(8), F.S.
[6] Florida Vital Statistics Annual Report 2007, available at: http://www.flpublichealth.com/VSBOOK/VSBOOK.aspx# (Last visited on March 11, 2011).

- The physician to estimate the gestational age of the fetus based on the ultrasound examination and obstetric standards in keeping with established standards of care regarding the estimation of fetal age and write the estimate in the patient's medical history. The physician must keep original prints of each ultrasound examination in the patient's medical history file.

Relevant Case Law

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. In *Roe*, the 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. 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.[7]

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.[8] 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.[9]

The unduly burdensome standard, 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.

However, the undue burden standard was held not to apply in Florida. The 1999 Legislature passed a parental notification law, the Parental Notice of Abortion Act, requiring a physician to give at least 48 hours of actual notice to one parent or to the legal guardian of a pregnant minor before terminating the pregnancy of the minor. Although a judicial waiver procedure was included, the act was never enforced.[10] In 2003, the Florida Supreme Court[11] ruled this legislation unconstitutional on the grounds that it violated a minor's right to privacy, as expressly protected under Article I, s. 23 of the Florida Constitution.[12] Citing the principle holding of *In re T.W.*,[13] the Court reiterated that, as the privacy right is a fundamental right in Florida, any

[7] 410 U.S. 113, 114, 152 (1973).
[8] 505 U.S. 833, 834 (1992).
[9] *Id.* at 837.
[10] *See* s. 390.01115, F.S. (Repealed by s. 1, ch. 2005-52, Laws of Florida). Subsequent legislation was enacted in s. 390.01114, F.S.
[11] *North Florida Women's Health and Counseling Services, Inc., et al., v. State of Florida*, 866 So.2d 612, 619 (Fla. 2003)
[12] 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.
[13] 551 So.2d 1186, 1192 (Fla. 1989).

restrictions on privacy warrant a strict scrutiny review, rather than that of an undue burden. Here, the Court held that the state failed to show a compelling state interest.[14]

In 1997, the Florida Legislature enacted the Woman's Right to Know Act. This act essentially prohibits termination of pregnancy procedures from being performed or induced unless voluntary and informed consent is obtained. The Woman's Right to Know Act was challenged shortly after enactment. The Florida Supreme Court ruled on the constitutionality of one part of the informed consent, that portion in s. 390.0111(3)(a)1, F.S., related to the oral information required to be provided to the patient by the referring physician or physician who is to perform the procedure.[15] The court ruled that the informational requirements of s. 390.0111(3)(a)1., F.S., are comparable to those of the common law and other Florida informed consent statutes implementing the common law.[16] The Court adopted the state's interpretation of the "reasonable patient" language to require a physician to consider only and exclusively the individual circumstances of each patient presenting herself for treatment in determining what information is material to that patient's decision, and therefore the statute is not unconstitutionally vague. The Court also adopted the state's contention that the risks that a physician must discuss with the patient is limited to medical risks pertaining to terminating or not terminating a pregnancy, not information with regard to social, economic, or any other risks. The Court noted that physicians are not sociologists, economists, theologians, or philosophers, and it is implausible to conclude that the Legislature intended that physicians be required to venture far beyond their professional specialty and expertise to advise patients of nonmedical matters.

One element of the Court's discussion related to informed consent included a footnote noting, "…to the extent that the [Women's Right to Know] Act permits only the performing physician or a referring physician to provide the informed consent information, we note that other informed consent statutes, including the general medical consent statute, require a physician to provide the informed consent information."

The Hyde Amendment

The Hyde Amendment is a rider to the annual appropriations bill for the U.S. Departments of Labor, Health and Human Services (HHS), 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*.[17] In *Harris*, the Court determined that funding restrictions created by the Hyde Amendment did not violate the U.S. Constitution's

[14] *North Florida Women's Health and Counseling Services, supra* note 8, at 642.
[15] *State of Florida v. Presidential Women's Center, et al.*,937 So.2d 114 (Fla. 2006).
[16] The Court referred to: s. 766.103, F.S. (2005), which addresses medical informed consent generally; s. 458.324, F.S. (2005), addressing breast cancer; s. 458.325, F.S., (2005), addressing electroconvulsive and psychosurgical procedures; and s. 945.48, F.S., (2005), addressing inmates receiving psychiatric treatment.
[17] 448 U.S. 297 (1980). *See also Rust v. Sullivani*, 500 U.S. 173 (1991) and *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), upholding *Harris v. McRae*.

Fifth Amendment, and therefore, did not controvene the liberty or equal protection guarantees of the Due Process Clause of the Fifth Amendment. 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). 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.[18]

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.[19]

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.[20]

State Legislation in Response to the Patient Protection and Affordable Care Act[21]

The federal Patient Protection and Affordable Care Act (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. 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 also maintains federal "conscience" protections for health care providers who object to performing abortion or sterilization procedures that conflict with their beliefs. In addition, the law provides new protections that prohibit discrimination against health care facilities and providers who are unwilling to provide, pay for, provide coverage of, or refer women for abortions. The law allows states (through legislation) to prohibit abortion coverage in qualified health plans offered through an exchange. If insurance coverage for abortion is included in a plan

[18] *Harris*, 448 U.S. at 316-317.
[19] 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 on March 11, 2011).
[20] *Id.*
[21] 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 on March 11, 2011).

in the exchange, a separate premium is required for this coverage, to be paid for by the policyholder. In addition, the "Patient Protection and Affordable Care Act's Consistency with Longstanding Restrictions on the Use of Federal Funds for Abortion" executive order establishes an enforcement mechanism to ensure that federal funds are not used for abortion services, consistent with existing federal statute.[22]

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.

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

[22] *Id.*

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

State Legislation Prior to the Patient Protection and Affordable Care Act[23]

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 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.

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.[24] 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.[25]

[23] *Id.*
[24] FLA. CONST. art. XI, s. 5(a).
[25] FLA. CONST. art. XI, s. 5(e).

III. Effect of Proposed Changes:

This is a joint resolution proposing the creation of Section 28 of Article I of the Florida Constitution, to prohibit the spending of public funds for any abortion or for health-benefits coverage that includes the coverage of abortion, unless such expenditure is *required* by federal law or to save the life of the mother. 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 overrule court decisions[26] 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.

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.[27]

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of the joint resolution have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of the joint resolution have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of the joint resolution have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

As exemplified by the cases discussed above, under the subheadings "Relevant Case Law" and "The Hyde Amendment," this joint resolution, should it become a state constitutional amendment, may be challenged under the state and federal constitution's Equal Protection and Due Process Clauses and the state constitution's Right of Privacy Clause.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

[26] *See, e.g., supra* fn. 11.
[27] *Id.*

B. Private Sector Impact:

Persons would not have access to public funding for any abortion or health-benefits coverage that includes coverage of abortion, unless required by federal law or to save the life of the mother. If federal law were to change, such that it no longer required the use of federal funds for an abortion if the pregnancy is the result of an act of rape or incest, then the use of public funds in such cases would not be authorized, unless that abortion would also save the life of the mother.

C. Government Sector Impact:

The state will not incur costs other than the state is presently required to incur under federal law or to provide abortion services for those who qualify for Medicaid and the abortion is required to save the life of the mother.[28]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[28] *See*, *supra* fn. 19. The state policy mirrors the federal Hyde Amendment, which allows for Medicaid reimbursement under certain circumstances.