

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 845 Termination of Pregnancy Based on Sex or Race of Unborn Child

**SPONSOR(S):** Criminal Justice Subcommittee; Van Zant and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1072

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	8 Y, 5 N, As CS	Keegan	Cunningham
2) Judiciary Committee	10 Y, 7 N	Keegan	Havlicak

### SUMMARY ANALYSIS

Currently, there is no federal prohibition against an abortion sought based solely on the sex or race of the fetus. There are four states that prohibit termination of a pregnancy based on the sex of the fetus: Arizona, Oklahoma, Illinois, and Pennsylvania. Of these four states, Arizona is the only one that also prohibits abortions based on the race of the fetus. In Florida, there is currently no prohibition against abortions performed based on the sex or race of the fetus.

The bill creates the "Prenatal Nondiscrimination Act." The bill amends s. 390.0111, F.S., to prohibit a person from knowingly performing an abortion before signing an affidavit that he or she is not performing the abortion due to the child's sex or race, and has no knowledge that the abortion is being performed due to the child's sex or race.

The bill also creates a new subsection (6) within s. 390.0111, F.S., which prohibits:

- Performing, inducing, or actively participating in an abortion knowing that it is sought based on the sex or race of the child or based on the race of the child's parent;
- Using force or the threat of force to intentionally injure or intimidate any person for the purpose of coercing an abortion based on sex or race of the child; and
- Soliciting or accepting money to finance an abortion based on the sex or race of the child.

A person who willfully performs, or actively participates in, a termination of pregnancy procedure in violation of the requirements of s. 390.0111, F.S., commits a third degree felony. The bill authorizes the Attorney General or the state attorney to bring an action in circuit court to enjoin any of the acts prohibited by subsection (6).

The bill also authorizes the following individuals to bring a civil suit on behalf of the unborn child to obtain "appropriate relief" with respect to a violation of an act prohibited by subsection (6):

- The father of the unborn child if he is married to the mother at the time she receives an abortion based on the sex or race of the child; or
- The maternal grandparents of the unborn child if the mother is not yet 18 years of age at the time of the abortion.

The bill establishes a civil fine of not more than \$10,000 against any physician, physician's assistant, nurse, counselor, or other medical or mental health professional who knowingly does not report known occurrences of any of the acts prohibited by subsection (6) to law enforcement.

The Criminal Justice Impact Conference has not determined the prison bed impact of the bill. However, because the bill broadens the application of a felony offense, it may have a negative prison bed impact on the Department of Corrections.

This bill is effective October 1, 2013.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Federal Abortion Law**

In 1973, *Roe v. Wade* was decided by the U.S. Supreme Court (the “Court”), establishing legal access to abortions.<sup>1</sup> Using strict scrutiny, the Court determined that a woman’s right to an abortion is part of a fundamental right to privacy guaranteed under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.<sup>2</sup> Further, the Court reasoned that state regulation limiting the exercise of this right must be justified by a compelling state interest, and must be narrowly drawn.<sup>3</sup> The Court established a trimester framework for the regulation of abortions, holding that in the third trimester a state could prohibit termination to the extent that the woman’s life or health was not at risk.<sup>4</sup>

Nineteen years later, in *Planned Parenthood v. Casey*,<sup>5</sup> the Court replaced the strict scrutiny standard and established the undue burden test to evaluate restrictions on the right to abortion.<sup>6</sup> “An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.”<sup>7</sup> The Court has held a variety of abortion restrictions to constitute an undue burden. Restrictions which amount to a third party veto on the mother’s access to an abortion, such as spousal notice requirement<sup>8</sup> or a parental consent requirement,<sup>9</sup> constitute an undue burden. Laws that restrict the use of common methods of abortion without demonstrating that they are necessary for the preservation of the health of the mother also constitute an undue burden.<sup>10</sup>

The Court has recognized that states have a legitimate interest in protecting potential life throughout the pregnancy term;<sup>11</sup> however, this interest only becomes a compelling interest after the fetus becomes viable.<sup>12</sup> In *Stenberg v. Carhart*, the Court held that laws that further the state’s legitimate interest in the life of the fetus are nevertheless unconstitutional if the law imposes an undue burden.<sup>13</sup>

#### **Florida Abortion Law**

Article I, Section 23 of the Florida Constitution provides an express right to privacy. The Florida Supreme Court has recognized that Florida’s constitutional right to privacy “is clearly implicated in a woman’s decision whether or not to continue her pregnancy.”<sup>14</sup> In *In re T.W.*, the Florida Supreme Court determined that:

[p]rior to the end of the first trimester, the abortion decision must be left to the woman and may not be significantly restricted by the state. Following this point, the state may impose significant restrictions only in the least intrusive manner designed to safeguard the health of the mother. Insignificant burdens during either period must substantially further important state interests....Under our Florida Constitution, the state’s interest becomes compelling upon viability....Viability under Florida law occurs at that point in time when the fetus

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<sup>1</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>6</sup> *Planned Parenthood*, 505 U.S. at 879.

<sup>7</sup> *Planned Parenthood*, 505 U.S. at 836.

<sup>8</sup> *Planned Parenthood*, 505 U.S. at 887-88 (holding that a spousal notification statute was unconstitutional because requiring proof of notification would often be tantamount to giving the husband veto power over the mother’s decision).

<sup>9</sup> *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 443 U.S. 622 (1979).

<sup>10</sup> *Stenberg v. Carhart*, 530 U.S. 914, 936-37 (2000).

<sup>11</sup> *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

<sup>12</sup> *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

<sup>13</sup> *Stenberg v. Carhart*, 530 U.S. at 914.

<sup>14</sup> *In re T.W.*, 551 So.2d 1186, 1192 (Fla. 1989).

becomes capable of meaningful life outside the womb through standard medical procedures.

The court recognized that after viability, the state can regulate termination in the interest of the unborn child so long as the mother's health is not in jeopardy.<sup>15</sup> Florida courts have upheld a number of different types of regulations on abortion, providing they are not an undue burden on the mother's access to abortion. For example, in *Florida v. Presidential Women's Center*, the Florida Supreme Court upheld a Florida law that required the patient to be informed of the age of the fetus, and required that an ultrasound be performed prior to performing any abortion procedures.<sup>16</sup>

In Florida, abortion is addressed in ch. 390, F.S., and is defined as the termination of a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.<sup>17</sup> An abortion must be consensual<sup>18</sup> and must be performed by a physician licensed under ch. 458, F.S., or ch. 459, F.S., or a physician practicing medicine or osteopathic medicine in the employment of the United States.<sup>19</sup>

Section 390.0111, F.S., prohibits an abortion from being performed in the third trimester<sup>20</sup> unless:

- Two physicians certify in writing to the fact that, to a reasonable degree of medical probability, the termination of pregnancy is necessary to save the life or preserve the health of the pregnant woman; or
- The physician certifies in writing to the medical necessity for legitimate emergency medical procedures for termination of pregnancy in the third trimester, and another physician is not available for consultation.<sup>21</sup>

Section 390.0111(10), F.S., specifies that any person who willfully performs, or actively participates in, a termination of pregnancy procedure in violation of the requirements of s. 390.0111, F.S.,<sup>22</sup> commits a third degree felony.<sup>23</sup> If doing so results in the death of the woman, the person commits a second degree felony.<sup>24</sup>

### **Sex- and Race-Motivated Abortions**

Currently, there is no federal prohibition against an abortion sought based solely on the sex or race of the fetus. There are four states that prohibit termination of a pregnancy based on the sex of the fetus: Arizona,<sup>25</sup> Oklahoma,<sup>26</sup> Illinois,<sup>27</sup> and Pennsylvania.<sup>28</sup> Of these four states, Arizona is the only one that also prohibits abortions based on the race of the fetus.<sup>29</sup> In Florida, there is currently no prohibition against abortions performed based on the sex or race of the fetus.<sup>30</sup>

### **Effect of the bill**

The bill provides numerous whereas clauses related to the subject of the bill, as well as a statement of legislative intent.

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<sup>15</sup> *Id.*

<sup>16</sup> *State v. Presidential Women's Center*, 937 So.2d 114 (Fla. 2006).

<sup>17</sup> Section 390.011(1), F.S.

<sup>18</sup> A termination of pregnancy may not be performed or induced except with the voluntary and informed written consent of the pregnant woman or, in the case of a mental incompetent, the voluntary and informed written consent of her court-appointed guardian. Section 390.0111(3), F.S.

<sup>19</sup> Section 390.0111(2), F.S.

<sup>20</sup> Section 390.011(8), F.S., defines "third trimester" as the weeks of pregnancy after the 24<sup>th</sup>.

<sup>21</sup> Section 390.0111(1), F.S.

<sup>22</sup> Except for subsections (3) (relating to consent) and (7) (relating to disposition of fetal remains).

<sup>23</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

<sup>24</sup> A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

<sup>25</sup> AZ. REV. STAT. ANN. 13-3603.2.

<sup>26</sup> OKLA. STAT. ANN. tit. 63, § 1-731.2 .

<sup>27</sup> IL STAT. Ch. 720 § 510/6 (8).

<sup>28</sup> 18 PA. CONS. STAT. ANN. § 3204(c).

<sup>29</sup> AZ. REV. STAT. ANN. 13-3603.2.

<sup>30</sup> *See* ch. 390, F.S.

The bill amends s. 390.0111, F.S., to prohibit a person from knowingly performing an abortion before signing an affidavit that he or she is not performing the abortion due to the child's sex or race, and has no knowledge that the abortion is being performed due to the child's sex or race.

The bill also creates a new subsection (6) within s. 390.0111, F.S., which prohibits:

- Performing, inducing, or actively participating in an abortion knowing that it is sought based on the sex or race of the child or based on the race of the child's parent;
- Using force or the threat of force to intentionally injure or intimidate any person for the purpose of coercing an abortion based on sex or race of the child; and
- Soliciting or accepting money to finance an abortion based on the sex or race of the child.

As noted above, s. 390.0111(10), F.S., currently makes it a third degree felony for any person to willfully perform, or actively participate in, a termination of pregnancy procedure in violation of the requirements of s. 390.0111, F.S. The newly created prohibitions will be subject to this penalty provision to the extent they involve a person willfully performing, or actively participating in, an abortion.

The bill authorizes the Attorney General or the state attorney to bring an action in circuit court to enjoin any of the acts prohibited by subsection (6).

The bill also authorizes the following individuals to bring a civil suit on behalf of the unborn child to obtain "appropriate relief" with respect to a violation of an act prohibited by subsection (6):

- The father of the unborn child if he is married to the mother at the time she receives an abortion based on the sex or race of the child; or
- The maternal grandparents of the unborn child if the mother is not yet 18 years of age at the time of the abortion.

"Appropriate relief" includes monetary damages for all injuries, whether psychological, physical, or financial, including loss of companionship and support, resulting from the violation. The court may also award reasonable attorneys fees.

The bill establishes an exception for criminal prosecution or civil liability for the mother of an unborn child who receives an abortion based on the child's sex or race who is not 18 years of age at the time of the abortion.

The bill establishes a civil fine of not more than \$10,000 against any physician, physician's assistant, nurse, counselor, or other medical or mental health professional who knowingly does not report known occurrences of any of the acts prohibited by subsection (6) to law enforcement.

## B. SECTION DIRECTORY:

Section 1. Designates this bill as the "Prenatal Nondiscrimination Act."

Section 2. Provides declarations of the Legislature.

Section 3. Amends 390.0111, F.S., relating to termination of pregnancies.

Section 4. Provides an effective date of October 1, 2013.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have a fiscal impact on state revenues.

2. Expenditures:

The Criminal Justice Impact Conference has not determined the prison bed impact of the bill. However, because the bill broadens the application of a felony offense, it may have a negative prison bed impact on the Department of Corrections.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have a fiscal impact on local government revenues.

2. Expenditures:

The bill does not appear to have a fiscal impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill establishes a civil fine of not more than \$10,000 against any physician, physician's assistant, nurse, counselor, or other medical or mental health professional who knowingly does not report known occurrences of any of the acts prohibited by s. 390.011(6), F.S., to law enforcement.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

*Roe v. Wade* established the fundamental right to abortion.<sup>31</sup> After the Court's decision in *Planned Parenthood v. Casey*, this fundamental right is evaluated under the undue burden test.<sup>32</sup> A law governing abortion is struck down as an undue burden "if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability."<sup>33</sup>

The Court's decisions regarding abortion are based on a constitutional due process analysis. This bill implicates equal protection rights and the constitutional right to abortion. The issue of restricting abortions that are conducted based on the sex or race of the fetus has not been before the Florida Supreme Court or the United States Supreme Court. If challenged, it is unknown whether this bill will withstand constitutional scrutiny.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

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<sup>31</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>32</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>33</sup> *Planned Parenthood*, 505 U.S. at 836.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 27, 2013, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment corrected statistical data in the bill's whereas clauses.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.