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: **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) Health Quality Subcommittee			
3) Judiciary Committee			

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.[1] 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.[2] 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.[3] 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.[4]

Nineteen years later, in *Planned Parenthood v. Casey*,[5] the Court replaced the strict scrutiny standard and established the undue burden test to evaluate restrictions on the right to abortion.[6] "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."[7] 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[8] or a parental consent requirement,[9] 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.[10]

The Court has recognized that states have a legitimate interest in protecting potential life throughout the pregnancy term;[11] however, this interest only becomes a compelling interest after the fetus becomes viable.[12] 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.[13]

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."[14] 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

[1] *Roe v. Wade*, 410 U.S. 113 (1973).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
[6] *Planned Parenthood*, 505 U.S. at 879.
[7] *Planned Parenthood*, 505 U.S. at 836.
[8] *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).
[9] *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 443 U.S. 622 (1979).
[10] *Stenberg v. Carhart*, 530 U.S. 914, 936-37 (2000).
[11] *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).
[12] *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).
[13] *Stenberg v. Carhart*, 530 U.S. at 914.
[14] *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.[15] 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.[16]

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.[17] An abortion must be consensual[18] 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.[19]

Section 390.0111, F.S., prohibits an abortion from being performed in the third trimester[20] 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.[21]

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.,[22] commits a third degree felony.[23] If doing so results in the death of the woman, the person commits a second degree felony.[24]

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,[25] Oklahoma,[26] Illinois,[27] and Pennsylvania.[28] Of these four states, Arizona is the only one that also prohibits abortions based on the race of the fetus.[29] In Florida, there is currently no prohibition against abortions performed based on the sex or race of the fetus.[30]

Effect of the bill

The bill provides the following whereas clauses and a statement of legislative intent:

- Women are a vital part of American society and culture and possess the same fundamental human rights and civil rights as men;

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[15] *Id.*
[16] *State v. Presidential Women's Center*, 937 So.2d 114 (Fla. 2006).
[17] Section 390.011(1), F.S.
[18] 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.
[19] Section 390.0111(2), F.S.
[20] Section 390.011(8), F.S., defines "third trimester" as the weeks of pregnancy after the 24th.
[21] Section 390.0111(1), F.S.
[22] Except for subsections (3) (relating to consent) and (7) (relating to disposition of fetal remains).
[23] 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.
[24] 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.
[25] AZ. REV. STAT. ANN. 13-3603.2.
[26] OKLA. STAT. ANN. tit. 63, § 1-731.2 .
[27] IL STAT. Ch. 720 § 510/6 (8).
[28] 18 PA. CONS. STAT. ANN. § 3204(c).
[29] AZ. REV. STAT. ANN. 13-3603.2.
[30] *See* ch. 390, F.S.

- United States law prohibits the dissimilar treatment of males and females who are similarly situated and prohibits sex discrimination in various contexts, including the provision of employment, education, housing, health insurance coverage, and athletics;
- Sex is an immutable characteristic and is ascertainable at the earliest stages of human development through existing medical technology and procedures commonly in use, including maternal-fetal bloodstream DNA sampling, amniocentesis, chorionic villus sampling or "CVS," and medical sonography. In addition to medically assisted sex-determinations carried out by medical professionals, a growing sex-determination niche industry has developed and is marketing low-cost commercial products, widely advertised and available, that aid in the sex determination of an unborn child without the aid of medical professionals. Experts have demonstrated that the sex-selection industry is on the rise and predict that it will continue to be a growing trend in the United States. Sex determination is always a necessary step to the procurement of a sex-selection abortion;
- A "sex-selection abortion" is an abortion undertaken for purposes of eliminating an unborn child of an undesired sex. Sex-selection abortion is barbaric and described by scholars and civil rights advocates as an act of sex-based or gender-based violence predicated on sex discrimination. By definition, sex-selection abortions do not implicate the health of the mother of the unborn but instead are elective procedures motivated by sex or gender bias;
- The targeted victims of sex-selection abortions performed in the United States and worldwide are overwhelmingly female. The selective abortion of females is female infanticide, the intentional killing of unborn females, due to the preference for male offspring or "son preference." Son preference is reinforced by the low value associated, by some segments of the world community, with female offspring. Those segments tend to regard female offspring as financial burdens to a family over their lifetimes due to their perceived inability to earn or provide financially for the family unit as can a male. In addition, due to social and legal convention, female offspring are less likely to carry on the family name. Son preference is one of the most evident manifestations of sex or gender discrimination in any society, undermining female equality and fueling the elimination of a female's right to exist in instances of sex-selection abortion;
- Sex-selection abortions are not expressly prohibited by United States law and the laws of most states. Sex- selection abortions are performed in the United States. In a March 2008 report published in the Proceedings of the National Academy of Sciences, Columbia University economists Douglas Almond and Lena Edlund examined the sex ratio of United States-born children and found "evidence of sex selection, most likely at the prenatal stage." The data revealed obvious "son preference" in the form of unnatural sex-ratio imbalances within certain segments of the United States population, primarily those segments tracing their ethnic or cultural origins to countries where sex-selection abortion is prevalent. The evidence strongly suggests that some Americans are exercising sex-selection abortion practices within the United States consistent with discriminatory practices common to their country of origin or the country to which they trace their ancestry. While sex-selection abortions are more common outside the United States, the evidence reveals that female infanticide is also occurring in the United States;
- The American public supports a prohibition of sex-selection abortion. In a March 2006 Zogby International poll, 86 percent of Americans agreed that sex-selection abortion should be illegal, yet only a few states have proscribed sex-selection abortion;
- Despite the failure of the United States to proscribe sex-selection abortion, the United States Congress has expressed repeatedly, through Congressional resolution, strong condemnation of policies promoting sex-selection abortion in the "Communist Government of China." Likewise, at the 2007 United Nations' Annual Meeting of the Commission on the Status of Women, 51st Session, the United States delegation spearheaded a resolution calling on countries to eliminate sex-selective abortion, a policy directly contradictory to the permissiveness of current United States law, which places no restriction on the practice of sex-selection abortion. The United Nations Commission on the Status of Women has urged governments of all nations "to take necessary measures to prevent . . . prenatal 118 sex selection;"
- A 1990 report by Harvard University economist Amartya Sen estimated that more than 100 million women were "demographically missing" from the world as early as 1990 due to sexist practices, including sex-selection abortion. Many experts believe sex-selection abortion is the

primary cause. As of 2008, estimates of women missing from the world range in the hundreds of millions;

- Countries with longstanding experience with sex-selection abortion, such as the Republic of India, the United Kingdom, and the People's Republic of China, have enacted complete bans on sex-selection abortion and have steadily continued to strengthen prohibitions and penalties. The United States, by contrast, has no law in place to restrict sex-selection abortion, establishing the United States as affording less protection from sex-based infanticide than the Republic of India or the People's Republic of China, whose recent practices of sex-selection abortion were vehemently and repeatedly condemned by United States congressional resolutions and by the United States Ambassador to the Commission on the Status of Women. Public statements from within the medical community reveal that citizens of other countries come to the United States for sex-selection procedures that would be criminal in their countries of origin. Because the United States permits abortion on the basis of sex, the United States may effectively function as a "safe haven" for those who seek to have American physicians do what would otherwise be criminal in their home countries: a sex-selection abortion, most likely late-term;
- The American medical community opposes sex-selection abortion. The American College of Obstetricians and Gynecologists, commonly known as "ACOG," stated in its February 2007 Ethics Committee Opinion, Number, that sex selection is inappropriate for family planning purposes because sex selection "ultimately supports sexist practices." Likewise, the American Society for Reproductive Medicine has opined that sex selection for family planning purposes is ethically problematic, is inappropriate, and should be discouraged;
- The American medical community opposes sex- selection abortion. The American College of Obstetricians and Gynecologists, commonly known as "ACOG," stated in its February 2007 Ethics Committee Opinion, Number, that sex selection is inappropriate for family planning purposes because sex selection "ultimately supports sexist practices." Likewise, the American Society for Reproductive Medicine has opined that sex selection for family planning purposes is ethically problematic, is inappropriate, and should be discouraged;
- Sex-selection abortions have the effect of diminishing the representation of women in the American population and, therefore, the American electorate;
- Sex-selection abortion reinforces sex discrimination and has no place in a civilized society;
- Minorities are a vital part of American society and culture and possess the same fundamental human rights and civil rights as the majority;
- United Sates law prohibits the dissimilar treatment of persons of different races who are similarly situated. United States law prohibits discrimination on the basis of race in various contexts, including the provision of employment, education, housing, health insurance coverage, and athletics;
- A "race-selection abortion" is an abortion performed for purposes of eliminating an unborn child because the child or a parent of the child is of an undesired race. Race-selection abortion is barbaric and described by civil rights advocates as an act of race-based violence, predicated on race discrimination. By definition, race-selection abortions do not implicate the health of mother of the unborn but instead are elective procedures motivated by race bias;
- Only one state has enacted a law to proscribe the performance of race-selection abortions;
- Race-selection abortions have the effect of diminishing the number of minorities in the American population and, therefore, the American electorate;
- Race-selection abortion reinforces racial discrimination and has no place in a civilized society;
- The history of the United States includes examples of both sex discrimination and race discrimination. The people of the United States ultimately responded in the strongest possible legal terms by enacting constitutional amendments correcting elements of such discrimination. Women, once subjected to sex discrimination that denied them the right to vote, now have suffrage guaranteed by the Nineteenth Amendment to the United States Constitution. African Americans, once subjected to race discrimination through slavery that denied them equal protection under the law, now have that right guaranteed by the Fourteenth Amendment to the United States Constitution. The elimination of discriminatory practices has been and is among the highest priorities and greatest achievements of American history;
- Implicitly approving the discriminatory practices of sex-selection abortion and race-selection abortion by choosing not to prohibit them will reinforce these inherently discriminatory practices and evidence a failure to protect a segment of certain unborn Americans because those unborn

are of a sex or racial makeup that is disfavored. Sex-selection and race-selection abortions trivialize the value of the unborn on the basis of sex or race, reinforcing sex and race discrimination and coarsening society to the humanity of all vulnerable and innocent human life, making it increasingly difficult to protect such life. Thus, this state has a compelling interest in acting—indeed it must act—to prohibit sex-selection abortion and race-selection abortion; and

- The Legislature declares that there is no place for discrimination and inequality in human society in the form of abortion due to a child's sex or race. Sex-selection and race-selection abortions are elective procedures that do not in any way implicate a woman's health. The purpose of this act is to protect unborn children from prenatal discrimination in the form of being subjected to an abortion based on the child's sex or race by prohibiting sex-selection or race-selection abortions. The intent of this act is not to establish or recognize a right to an abortion or to make lawful an abortion that is currently unlawful.

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. 390.0111(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.[31] After the Court's decision in *Planned Parenthood v. Casey*, this fundamental right is evaluated under the undue burden test.[32] 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."[33]

   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

[31] *Roe v. Wade*, 410 U.S. 113 (1973).
[32] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
[33] *Planned Parenthood*, 505 U.S. at 836.

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.

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.