

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1327 Abortion

**SPONSOR(S):** Plakon and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1702

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Access Subcommittee	9 Y, 5 N	Mathieson	Schoolfield
2) Civil Justice Subcommittee	7 Y, 5 N	Caridad	Bond
3) Health & Human Services Committee			

### SUMMARY ANALYSIS

The bill creates the “Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination and Equal Opportunity for Life Act.” The bill provides whereas clauses and a statement of legislative intent. In addition, the bill:

- Requires a physician performing a termination of pregnancy complete an affidavit attesting that the termination is not sought to select the sex or race of the fetus.
- Prohibits a person from knowingly performing such an act, intimidate or threaten someone to commit such an act, or finance or solicit moneys for such an act.
- Authorizes the Attorney General or state attorney to file in circuit court to enjoin certain acts.
- Creates a civil cause of action for recovery by the married father of the child, or maternal grandparents if the woman is younger than 18 years old.
- Provides that an individual who violates the bill commits a third degree felony punishable by \$5,000 or a term of imprisonment not exceeding five years.
- A woman on whom a sex or race selection abortion is performed is not subject to criminal prosecution or civil liability.
- Creates a fine of up to \$10,000 for certain healthcare practitioners for failing to report a termination based on the sex or race of the fetus.

The bill appears to have no fiscal impact on state or local governments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Current Situation

##### Sex and Race Selective Abortion

The issue of termination of pregnancy based on the sex or race of the fetus has generated international controversy, most notably over population control measures in China and social customs in India.<sup>1</sup> Critics of the Chinese population control measures suggest they are the cause of an emerging gender imbalance in favor of male children.<sup>2</sup> In India, researchers have observed what is described as a “son preference” over daughters because of socio-economic concerns.<sup>3</sup> In response to these issues, both China and India have enacted legislative measures that proscribe discovery of the sex of the fetus in certain circumstances.<sup>4</sup>

In Europe, legislation has been enacted by the United Kingdom to prevent termination of a fetus solely based on sex.<sup>5</sup>

In the United States, there is no federal prohibition on a termination of pregnancy that is sought for the sole purpose of sex or race of the fetus. However, there is currently such legislation before the U.S. House of Representatives, introduced by Rep. Trent Franks of the Second District of Arizona.<sup>6</sup>

Currently, there are four states in the Union that prohibit a termination of pregnancy based on the sex of the fetus: Arizona,<sup>7</sup> Oklahoma,<sup>8</sup> Illinois,<sup>9</sup> and Pennsylvania.<sup>10</sup> Of the four states that prohibit sex-selective terminations, only Arizona prohibits race-selective terminations.<sup>11</sup>

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<sup>1</sup> See, Amartya Sen, *More than 100 Million Women are Missing*, N.Y REV. BOOKS, (December 1990) (Sen bases the number of 100 million on the difference in gender ratios of live births in China); Amartya Sen, *Missing Women – Revisited*, 327 *BMJ* 1237 (2003) (in 2003, Sen revisited the issue, observing that there had been an improvement in girl-child mortality, however, the impact of sex-selective abortions still meant that there was a disparity in gender ratios); Arindam Nandi and Anil Deolalikar, *Does a Legal Ban on Sex-Selective Abortion Improve Child Sex Ratios? Evidence from a Policy Change in India*, (University of California, Riverside Economics Department Working Paper, April 2011) available at <http://economics.ucr.edu/2011.html> (Noting that in the absence of Indian legislation, the gender imbalance may have been more significant).

<sup>2</sup> David Smolin, *The Missing Girls of China: Population, Policy, Gender, Abortion, Abandonment. and Adoption in East –Asian Perspective*, 41 *CUMB. L. REV.* 1, (2010-2011).

<sup>3</sup> See, Sunita Puri, Vicanne Adams, Susan Ivey, and Robert Nachtgall, “There is such a thing as too many daughters, but not too many sons:” *A Qualitative Study of Son Preference and Fetal Sex Selection among Indian Immigrants in the United States*, 71 *SOC. SCI & MED.*, 1169 at 1170-1172 (April, 2011); Prabhat Jha, Rajesh Kumar, Priya Vasa, Neeraj Dhiringa, Deva Thiruchelvam, and Rahim Moineddin, *Low Male-to-Female Sex Ratio of Children Born in India: National Survey of 1.1 Million Households*, 367 *LANCET* 211, (January, 2006) (noting that prenatal sex determination followed by sex selective termination was the most likely explanation for the gender imbalance in Indian birth rates).

<sup>4</sup> In 1994, India enacted The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, No. 57, Acts of Parliament, 1994. At the time of publication, it has not been possible to locate a primary source of Chinese law, however, the Stipulation on Forbidding Non-medical Aimed Fetus Sex Determination and Sex Selective Abortion from 2004, is cited in Smolin, *supra* note 11 at footnote 21.

<sup>5</sup> Human Fertilisation and Embryology Act, 1990, 37 *Eliz. II, c. 37*, 1ZB(1)-(4)(b), sched. 2: United Kingdom.

<sup>6</sup> H.R. 3541, 112<sup>th</sup> Cong. (2012). At the time of publication, Reps. Dennis Ross, Bill Posey and Jeff Miller from Florida are amongst the co-sponsors in the House. Similar measures were introduced in the 111<sup>th</sup> Congress (H.R. 1822, 111<sup>th</sup> Cong. (2009) but did not make it out of committee) and, the 110<sup>th</sup> Congress (H.R. 7016, 110<sup>th</sup> Cong. (2008) but did not make it out of committee).

<sup>7</sup> ARIZ. REV. STAT. ANN. s. 13-3603.2 (2011). At the time of publication, there has been no litigation challenging the validity of this section of Arizona law.

<sup>8</sup> OKLA. STAT. tit. 63, s. 1-731.2 (2011). At the time of publication, there has been no litigation challenging the validity of this section of Oklahoma law.

<sup>9</sup> 720 ILL. COMP. STAT. 510/6-8 (2011). At the time of publication, there has been no litigation challenging the validity of this prohibition in Illinois law.

<sup>10</sup> 18 PA. CONS. STAT. s. 3204(c), (2011). At the time of publication, there has been no litigation challenging the validity of this prohibition in Pennsylvania law.

There is some research to suggest sex-selective terminations might occur in the United States, specifically among families that have recently migrated to the U.S.<sup>12</sup>

In Florida, there is currently no explicit prohibition on a termination of pregnancy that is sought for the sole purpose of selecting the sex or race of the fetus.<sup>13</sup>

### Effect of Proposed Changes

The bill creates the “Susan B. Anthony<sup>14</sup> and Frederick Douglass<sup>15</sup> Prenatal Nondiscrimination and Equal Opportunity for Life Act.” The bill contains 22 whereas clauses. The bill also contains a statement of legislative intent, providing that the purpose of the act is to protect unborn children from pre-natal discrimination.

The bill provides that a person may not knowingly:

- Perform or induce a termination of pregnancy that is based on the sex or race of the fetus;
- Use force or the threat of force to injure or intentionally intimidate any person for the purpose of obtaining a termination based on the sex or the race of the fetus; or
- Solicit or accept moneys to finance a termination based on the sex or the race of the fetus.

A person who knowingly does any such acts commits a third degree felony punishable by a fine not exceeding \$5,000 or a term of imprisonment not exceeding five years.<sup>16</sup>

The bill provides that a physician may not terminate a pregnancy without first completing an affidavit stating the termination is not being performed because of the fetal sex or race, and that the physician has no knowledge of such a motivation.

The bill provides that a physician, physician’s assistant, nurse, counselor or other medical or mental health professional who knowingly fails to report violations of this subsection to law enforcement is subject to a fine of not more than \$10,000.

The bill creates a cause of action in circuit court for the Attorney General or state attorney to enjoin the performance of a sex-selection or race-selection termination.

In addition, the bill creates a civil cause of action on behalf of the unborn child by the father who is married to the woman upon whom a sex or race selective termination was performed; or by the maternal grandparents, if the woman upon whom a sex or race selective termination was performed, had not attained the age of 18. The court is authorized to award reasonable attorneys fees in such an action. The bill defines appropriate relief to include monetary damages for all injuries, including psychological, physical and financial. The bill defines financial damages to include loss of companionship and support.

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<sup>11</sup> ARIZ. REV. STAT. ANN. s. 13-3603.2 (2012).

<sup>12</sup> See Puri, et al, *supra*, note 3, (Researchers interviewed 65 recent immigrants in CA, NJ and NY, and suggest that 89% of respondents terminated based on the sex of the fetus. It should also be noted that 58% of respondents had an education level of high school or less); Douglas Almond and Lena Edlund, *Son-Biased Sex Ratios in the 2000 United States Census*, 105 PNAS 5681, (April, 2008) (Researchers compared white, Chinese, Korean and Asian Indian birth rates at the first, second and third child, finding that for second and third children in Chinese, Korean and Asian Indian families, there appears to be a son preference – they interpreted this be as a result of prenatal sex-selection); see also, Puri et al, *supra* note 3, at 1170 (claiming that there may be a correlation between access to technology in the United States that they did not have access to in India, because of prohibitions, and the sex-selective termination).

<sup>13</sup> See ch. 390, F.S.

<sup>14</sup> Susan B. Anthony was a civil rights leader of the women's rights movement to introduce women's suffrage into the United States.

See Susan B. Anthony House, <http://susanbanthonyhouse.org/index.php> (last accessed Jan. 28, 2012).

<sup>15</sup> Frederick Douglass was a leader of the abolitionist movement. See Public Broadcasting Station (PBS),

<http://www.pbs.org/wgbh/aia/part4/4p1539.html> (last accessed Jan. 28, 2012).

<sup>16</sup> Sections 775.082, 775.083, 775.084, F.S.

A woman on whom a sex-selection or race-selection termination of pregnancy is performed is not subject to criminal prosecution or civil liability for any violation under the provisions of the bill.

**B. SECTION DIRECTORY:**

Section 1 creates an unnumbered section of law, designating the “Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination and Equal Opportunity for Life Act.”

Section creates an unnumbered section of law relating to legislative findings.

Section 3 amends s. 390.0111, F.S., relating to the termination of pregnancies.

Section 4 provides an effective date of October 1, 2012.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

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

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

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

2. Expenditures:

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

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill does not appear to have any direct economic impact on the private sector.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

This 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:

In *Roe v. Wade*,<sup>17</sup> the United States Supreme Court established a rigid trimester framework dictating when, if ever, states can regulate abortion. In *Planned Parenthood v. Casey*,<sup>18</sup> the United States Supreme Court rejected the trimester framework and, instead, limited the states' ability to regulate abortion based on the viability of the fetus. The state is limited in its ability to regulate abortion pre-viability. However, a state may regulate or even prohibit abortion post-viability provided that the regulation contains a medical emergency exception based on the mother's health.

United States Supreme Court decisions regarding abortion are based on a constitutional due process analysis. This bill implicates equal protection rights, also a constitutional right. No United States Supreme Court decision has decided whether a constitutional right of equal protection is stronger than, or subordinate to, constitutional due process rights as it relates to abortion prior to viability.

This bill may also implicate Art. I, s. 23 of the Florida Constitution, which provides for an express right to privacy that limits the state's ability to regulate abortions in the first and second trimesters.<sup>19</sup>

### B. RULE-MAKING AUTHORITY:

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

### C. DRAFTING ISSUES OR OTHER COMMENTS:

Line 254 uses the term "knowingly," so the use of "knowing" on line 255 is superfluous.

Lines 279-280 refers to several healthcare professionals. It could be simplified by using the term "healthcare practitioner" as defined by s. 456.001(4), F.S.

## IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

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<sup>17</sup> 410 U.S. 113 (1973).

<sup>18</sup> 505 U.S. 833 (1992).

<sup>19</sup> *In re T.W.*, 551 So.2d 1186 (1989). Note that this decision used the *Roe* trilogy, and was decided before *Casey*. On one hand, the opinion claims that it is independent of *Roe*; on the other hand, 22 years have elapsed and it is unknown whether today's members of the court would adhere to the reasoning in *T.W.* in light of more recent United States Supreme Court precedent that is different.