

Professions and Public Health Subcommittee

Thursday, March 11, 2021
2:30 PM – 3:30 PM
Webster Hall (212 Knott)

Meeting Packet

Chris Sprowls
Speaker

Will Robinson
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Professions & Public Health Subcommittee

Start Date and Time:	Thursday, March 11, 2021 02:30 pm
End Date and Time:	Thursday, March 11, 2021 03:30 pm
Location:	Webster Hall (212 Knott)
Duration:	1.00 hrs

Consideration of the following bill(s):

HB 1221 Disability Abortions by Grall

This meeting will be live-streamed on https://thefloridachannel.org/. Persons who wish to attend must register at www.myfloridahouse.gov, and pick up a pass at the Legislative Welcome Center on the 4th Floor of the Capitol beginning one hour before the start of the meeting. Audience seating will be socially distanced and will be available on a first-come, first-served basis. Registration closes three hours before the meeting starts.

NOTICE FINALIZED on 03/09/2021 4:06PM by Osborne.Erin

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1221 Disability Abortions
SPONSOR(S): Grall and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1664

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Professions & Public Health Subcommittee		McElroy	McElroy
2) Health & Human Services Committee			

SUMMARY ANALYSIS

Prenatal screening and diagnostic tests are used to identify and diagnose genetic disorders in fetuses. These genetic disorders include chromosomal disorders, neural tube defects and some defects of the abdomen, heart, and facial features.

HB 1221 prohibits a physician from performing an abortion if the physician knows, or should know, that the woman is seeking the abortion solely on the basis on the basis of a test result or diagnosis of a disability or the potential of a disability. The bill provides an exception to this prohibition if the disability abortion is necessary to save the life of the mother. The bill defines disability as any disease, defect or disorder that is genetically inherited including:

- A physical disability.
- A mental or intellectual disability.
- A physical disfigurement.
- Scoliosis.
- Dwarfism.
- Down syndrome.
- Albinism.
- Amelia.
- A physical or mental disease

The bill may have an insignificant, negative fiscal impact on the Department of Health and the Agency for Health Care Administration, which current resources are adequate to absorb.

The bill has no fiscal impact on local governments.

The bill provides an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Federal Law on Abortion

In 1973, the foundation of modern abortion jurisprudence, *Roe v. Wade*[1], was decided by the U.S. Supreme Court. 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. 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.[2] In 1992, the fundamental holding of *Roe* was upheld by the U.S. Supreme Court in *Planned Parenthood v. Casey*.[3]

The Viability Standard

In *Roe v. Wade*, the U.S. Supreme Court established a rigid trimester framework dictating when, if ever, states can regulate abortion.[4] The Court held that states could not regulate abortions during the first trimester of pregnancy.[5] With respect to the second trimester, the Court held that states could only enact regulations aimed at protecting the mother's health, not the fetus's life. Therefore, no ban on abortions is permitted during the second trimester. The state's interest in the life of the fetus becomes sufficiently compelling only at the beginning of the third trimester, allowing it to prohibit abortions. Even then, the Court requires states to permit an abortion in circumstances necessary to preserve the health or life of the mother.[6]

The current viability standard is set forth in *Planned Parenthood v. Casey*.[7] Recognizing that medical advancements in neonatal care can advance viability to a point somewhat earlier than the third trimester, the U.S. Supreme Court rejected the trimester framework and, instead, limited the states' ability to regulate abortion pre-viability. Thus, while upholding the underlying holding in *Roe*, which authorizes states to "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother[,]"[8] the Court determined that the line for this authority should be drawn at "viability," because "there may be some medical developments that affect the precise point of viability . . . but this is an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter."[9] Furthermore, the Court recognized that "[i]n some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child."[10]

Undue Burden

In *Planned Parenthood v. Casey*, the U.S. Supreme Court (Supreme Court) established the undue burden standard for determining whether a law places an impermissible obstacle to a woman's right to an abortion. The Court held that health regulations which impose undue burdens on the right to abortion are invalid.[11] State regulation imposes an "undue burden" on a woman's decision to have an

[1] *Roe v. Wade*, 410 U.S. 113 (1973).
[2] Id.
[3] *Casey*, 505 U.S. 833 (1992).
[4] *Roe*, 410 U.S. 113 (1973).
[5] *Id.* at 163-64.
[6] *Id.* at 164-165.
[7] *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833 (1992).
[8] *See Roe*, 410 U.S. at 164-65.
[9] *See Casey*, 505 U.S. at 870.
[10] *Id.*
[11] Id. at 878.

abortion if it has the purpose or effect of placing a substantial obstacle in the path of the woman who seeks the abortion of a nonviable fetus.[12] However, the court opined, not every law which makes the right to an abortion more difficult to exercise is an infringement of that right.[13]

The Medical Emergency Exception

In *Doe v. Bolton*, the U.S. Supreme Court was faced with determining, among other things, whether a Georgia statute criminalizing abortions (pre- and post-viability), except when determined to be necessary based upon a physician's "best clinical judgment," was unconstitutionally void for vagueness for inadequately warning a physician under what circumstances an abortion could be performed.[14] In its reasoning, the Court agreed with the district court decision that the exception was not unconstitutionally vague, by recognizing that:

> [T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age-relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.[15]

This broad interpretation of what constitutes a medical emergency was later tested in *Casey*[16], albeit in a different context. One question before the Supreme Court in *Casey* was whether the medical emergency exception to a 24-hour waiting period for an abortion was too narrow in that there were some potentially significant health risks that would not be considered "immediate."[17] The exception in question provided that a medical emergency is:

> [T]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.[18]

In evaluating the more objective standard under which a physician is to determine the existence of a medical emergency, the Court in *Casey* determined that the exception would not significantly threaten the life and health of a woman and imposed no undue burden on the woman's right to have an abortion.[19]

Florida Abortion Law

Right to Abortion

The Florida Constitution, as interpreted by Florida courts, affords greater privacy rights than those provided by the U.S. Constitution. While the federal Constitution traditionally shields enumerated and implied individual liberties from state or federal intrusion, the U.S. Supreme Court has noted that state constitutions may provide greater protections.[20] Unlike the U.S. Constitution, Article I, s. 23 of the Florida Constitution contains an express right to privacy:

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[12] Id. at 877
[13] Id. at 873.
[14] *Doe*, 410 U.S. at 179 (1973). Other exceptions, such as in cases of rape and when, "[t]he fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect." *Id.* at 183. *See also, U.S. v. Vuitich*, 402 U.S. 62, 71-72 (1971) (determining that a medical emergency exception to a criminal statute banning abortions would include consideration of the mental health of the pregnant woman).
[15] *Doe*, 410 U.S. at 192.
[16] *Casey*, 505. U.S. 833 (1992).
[17] *Id.* at 880.
[18] *Id.* at 879 (quoting 18 Pa. Cons. Stat. § 3203 (1990)).
[19] *Id.* at 880.
[20] *Pruneyard Shopping Center v. Robins*, 100 S.Ct. 2035, 2040 (1980), cited in *In re T.W.*, 551 So.2d 1186, 1191 (Fla. 1989).

> 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.

The Florida Supreme Court opined in *In re T.W.* that this section provides greater privacy rights than those implied by the U.S. Constitution.[21]

The Florida Supreme Court has recognized Florida's constitutional right to privacy "is clearly implicated in a woman's decision whether or not to continue her pregnancy."[22] In *In re T.W.,* the Florida Supreme Court ruled that:[23]

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

The court recognized that after viability, the state can regulate abortion in the interest of the unborn child if the mother's health is not in jeopardy.[24]

The state may regulate abortion pre-viability based upon its interest in maternal health beginning in the second trimester. In *Fla. Women's Medical Clinic, Inc. v. Smith* the court held that the state has an interest in maternal health only after the first trimester, not before, and may not impose substantive clinical standards in the first trimester.[25]

Abortion Regulation

In Florida, abortion 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.[26] An abortion must be performed by a physician[27] 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.[28]

In Florida, abortion 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.[29] An abortion must be performed by a physician[30] licensed under ch. 458, F.S., or ch. 459, F.S., or a physician practicing allopathic or osteopathic medicine in the employment of the United States.[31]

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[21] Id. at 1191-1192.
[22] Id. at 1192.
[23] Id. at 1193.
[24] Id. at 1194.
[25] Fla. Women's Medical Clinic, Inc. v. Smith, 478 F.Supp. 233 (S.D. Fla. 1979); Fla. Women's Medical Clinic, Inc. v. Smith, 536 F.Supp. 1048 (S.D. Fla. 1982).
[26] Section 390.011(1), F.S.
[27] Section 390.0111(2), F.S.
[28] Section 390.011(8), F.S.
[29] Section 390.011(1), F.S.
[30] Section 390.0111(2), F.S.
[31] Section 390.011(8), F.S.

All abortions, whether in the first trimester or later, are subject to the following requirements:

- An abortion may only be performed in a validly licensed hospital, abortion clinic, or in a physician's office;[32]
- Proper medical care must be given and used for a fetus when an abortion is performed during viability;[33]
- Experimentation on a fetus is prohibited;[34]
- Except when there is a medical emergency, an abortion may only be performed after a patient has given voluntary and written informed consent,[35] which includes verification of the fetal age via ultrasound imaging;[36]
- Fetal remains are to be disposed of in a sanitary and appropriate manner;[37] and
- Partial-birth abortions are prohibited.

Abortions performed after the first trimester are also subject to clinical standards set by the Agency for Health Care Administration (AHCA) in rule, including: [38]

- Adequate private space for interviewing, counseling, and medical evaluations;
- Dressing rooms for staff and patients;
- Appropriate lavatory areas;
- Areas for preprocedure hand washing;
- Private procedure rooms;
- Adequate lighting and ventilation for procedures;
- Surgical or gynecological examination tables and other fixed equipment;
- Postprocedure recovery rooms that are equipped to meet the patients' needs;
- Emergency exits to accommodate a stretcher or gurney;
- Areas for cleaning and sterilizing instruments;
- Adequate areas for the secure storage of medical records and necessary equipment and supplies; and
- Conspicuous display of the clinic's current license issued by AHCA.

The Department of Health and AHCA have authority to take licensure action against practitioners and clinics, respectively, which violate licensure statutes or rules.[39] Additionally, any person who willfully performs, or actively participates in, an abortion in violation of these requirements commits a third degree felony and commits a second-degree felony if the woman dies.[40]

Prenatal Genetic Testing

Genetic disorders can be identified through carrier testing, prenatal screening tests and prenatal diagnostic tests. Carrier testing can be performed prior to or during any point during a pregnancy. Carrier testing detects whether an individual carries a gene mutation related to certain genetic disorders.[41]

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[32] Section 797.03 (1), F.S. A third trimester abortion may only be performed in a hospital
[33] Section 390.0111(4), F.S.
[34] Section 390.0111(6), F.S.
[35] Section 390.0111(3), F.S. A physician violating this provision is subject to disciplinary action.
[36] Section 390.0111(3)(a)1.b., F.S.
[37] Section 390.0111(8), F.S. A person who improperly disposes of fetal remains commits a second degree misdemeanor.
[38] Section 390.012(3)(a)1., F.S. Rules related to abortion are found in ch. 59A-9, F.A.C.
[39] Section 390.018, F.S.
[40] Section 390.0111(10), F.S.
[41] *Prenatal Screening Tests*, American College of Obstetricians and Gynecologists, available at https://www.acog.org/womens-health/faqs/prenatal-genetic-screening-tests (last visited on March 7, 2021).

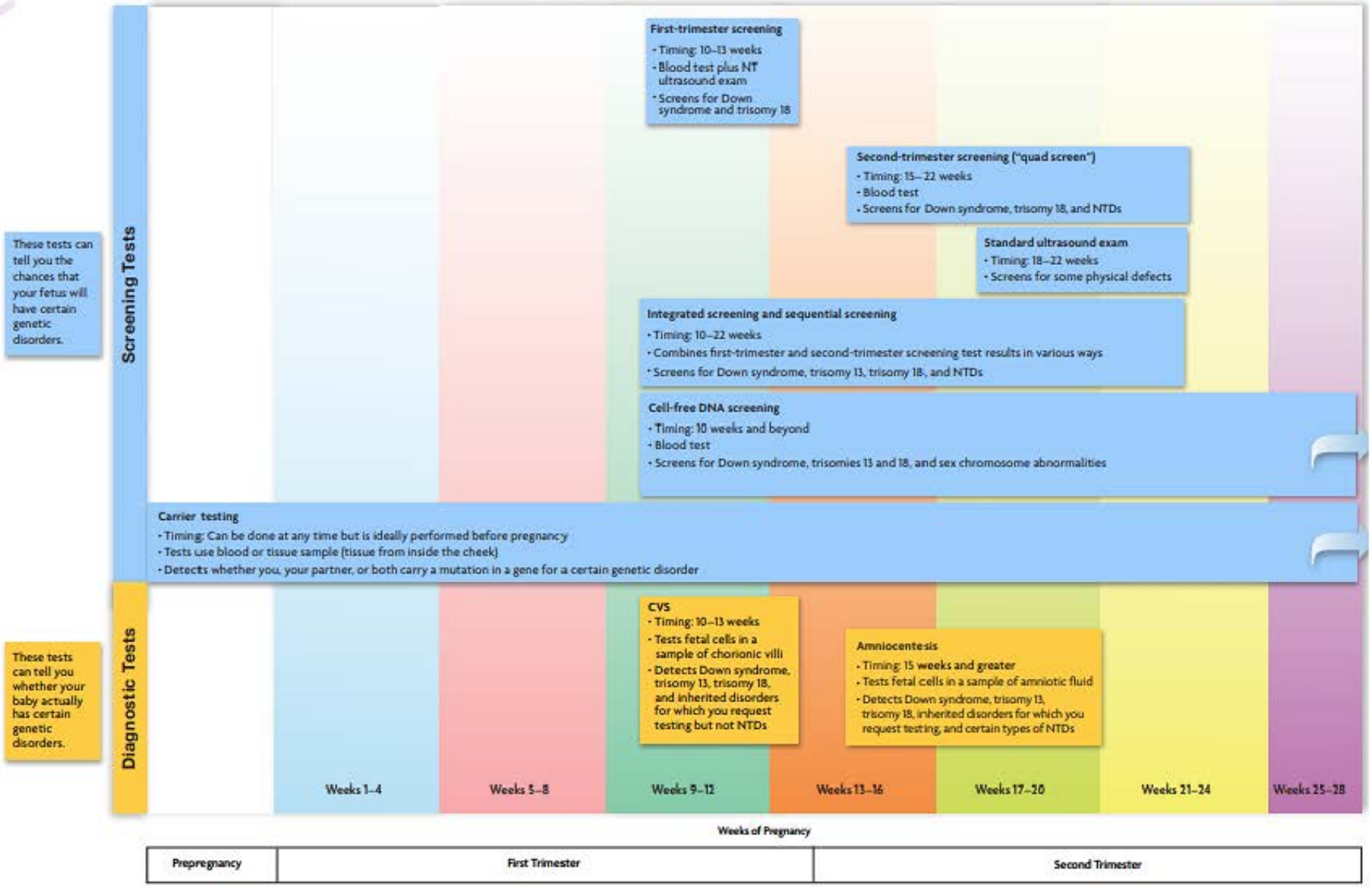
Prenatal genetic screening tests are performed during the first and second trimesters of pregnancy and are used to identify potential genetic disorders. During the 10th through 13th weeks of pregnancy blood tests and a nuchal translucency screening, which measures the thickness at the back of a fetuses neck, are conducted.[42] Blood tests screen for Down syndrome, trisomy 13, trisomy 18 and sex chromosome abnormalities.[43] An abnormal nuchal translucency screening indicates an increased risk for Downs Syndrome and is linked some defects of the abdomen, heart, and facial features.[44] Additional blood and ultrasound screening tests are typically conducted during the 15th through 22nd weeks of pregnancy. These tests can identify Downs Syndrome, trisomy 18, neural tube defects[45] and major physical defects in the brain and spine, facial features, abdomen, heart, and limbs.[46]

Prenatal diagnostic tests determine whether the fetus actually has one of the disorders identified in a prenatal screening test. Prenatal diagnostic tests are performed on cells obtained from the fetus through chorionic villus sampling (CVS)[47] or amniocentesis.[48] CVS is performed during the 10th through 13th weeks of pregnancy and detects Down syndrome, trisomy 18 and inherited disorders.[49] Amniocentesis is usually performed beginning in the 15th week of pregnancy and detects Down syndrome, trisomy 13, trisomy 18, inherited disorders and certain types of neural tube defects.[50] The following chart illustrates the tests possible at various point in the pregnancy.[51]

[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] Neural tube defects are severe defects of the brain and spine. Anencephaly (brain defect where baby is missing parts of the brain and skull) and spina bifida are the two most common types of neural tube defects. *Facts about Neural Tube Defects*, Centers for Disease Control and Prevention, available at https://www.cdc.gov/ncbddd/birthdefects/facts-about-neural-tube-defects.html (last viewed on March 9, 2021).
[46] *See* footnote 43.
[47] Chorionic villus sampling is a prenatal test in which a sample of chorionic villi is removed from the placenta for testing. *Chorionic Villus Sampling*, Mayo Clinic, available at https://www.mayoclinic.org/tests-procedures/chorionic-villus-sampling/about/pac-20393533 (last viewed on March 7, 2021).
[48] *Id.* During amniocentesis a sample of amniotic fluid, which contains fetal cells and chemicals produced by the baby, is withdrawn for testing. *Amniocentesis*, Mayo Clinic, available at https://www.mayoclinic.org/tests-procedures/amniocentesis/about/pac-20392914 (last viewed on March 7, 2021).
[49] *See* footnote 43.
[50] *Id.*
[51] Prenatal Genetic Testing Chart, American College of Obstetricians and Gynecologists, 2019, available at Prenatal Genetic Testing Chart | ACOG (last viewed on March 7, 2021). Abbreviations: CVS, chorionic villus sampling; NT, nuchal translucency; NTD, neural tube defect.

PRENATAL GENETIC TESTING CHART

Related FAQS:
- Prenatal Genetic Screening Tests: www.acog.org/Patients/FAQs/
- Prenatal Genetic Diagnostic Tests: www.acog.org/Patients/FAQs



Disability Abortion Ban

Nine states[52] have enacted laws prohibiting a physician from performing an abortion if the physician has knowledge that the abortion is being sought solely on the basis of a test result or diagnosis of a disability or the potential of a disability. Under these laws, disability it typically defined as is any disease, defect or disorder that is genetically inherited, consistent with the definitions in other states, and includes:

- A physical disability.
- A mental or intellectual disability.
- A physical disfigurement.
- Scoliosis.
- Dwarfism.
- Down syndrome.
- Albinism.
- Amelia.
- A physical or mental disease.

Legal challenges to these laws have been brought in seven states.[53] Federal courts have granted injunctions in each of these cases which each state has appealed. These matters are currently pending in various federal courts, with the exception of one state whose law has been permanently enjoined.[54] The laws were not challenged in two states, Mississippi and North Dakota, so the prohibition remains in effect in those states.

Effect of Proposed Changes

HB 1221 prohibits a physician from performing an abortion if the physician knows, or should know, that the woman is seeking the abortion solely on the basis on the basis of a test result or diagnosis of a disability or the potential of a disability. The bill provides an exception to this prohibition if the disability abortion is necessary to save the life of the mother. The bill defines disability as any disease, defect or disorder that is genetically inherited including:

- A physical disability.
- A mental or intellectual disability.
- A physical disfigurement.
- Scoliosis.
- Dwarfism.
- Down syndrome.
- Albinism.
- Amelia.
- A physical or mental disease

The bill provides an effective date of July 1, 2021.

B. SECTION DIRECTORY:

Section 1: Amends s. 390.011, F.S., relating to definitions.
Section 2: Amends s. 390.0111, F.S., relating to termination of pregnancies.
Section 3: Provides an effective date of July 1, 2021.

[52] Arkansas, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Ohio and Tennessee.
[53] Legal challenges have been brought in Arkansas, Indiana, Kentucky, Louisiana, Missouri, Ohio and Tennessee.
[54] Indiana's law has been permanently enjoined.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have an insignificant, negative fiscal impact on the Department of Health and the Agency for Health Care Administration for the enforcement of the bill's provisions, which current resources are adequate to absorb.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

The bill's provisions may implicate the privacy rights established in Article I, s. 23, FL Const.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to disability abortions; amending s. 390.011; providing definitions; amending s. 390.0111; prohibiting a physician from performing or inducing, or attempting to perform or induce, a disability abortion; providing immunity from prosecution for a woman upon whom such abortion is performed; providing an exception; conforming provisions to changes made by the act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (6) through (13) of section 390.011, Florida Statutes, are renumbered as subsections (8) through (15), respectively, and new subsections (6) and (7) are added to that section, to read:

390.011 Definitions.—As used in this chapter, the term:

(6) "Disability" means any disease, defect, or disorder that is genetically inherited including, but not limited to:

(a) A physical disability;

(b) A mental or intellectual disability;

(c) A physical disfigurement;

(d) Down syndrome;

(e) Scoliosis;

(f) Dwarfism;

CODING: Words stricken are deletions; words underlined are additions.

(g) Albinism;

(h) Amelia; or

(i) A physical or mental disease.

The term does not include a lethal fetal anomaly.

(7) "Disability abortion" means an abortion in which the physician performing the termination of pregnancy knows, or should know, that the pregnant woman is seeking the termination of pregnancy solely on the basis of a prenatal diagnosis, test, or screening indicating a disability or the potential for a disability in the fetus.

Section 2. Subsections (6) through (15) of section 390.0111, Florida Statutes, are renumbered as subsections (7) through (16), respectively, present subsection (10) is amended, and a new subsection (6) is added to that section, to read:

390.0111 Termination of pregnancies.—

(6) DISABILITY ABORTION PROHIBITED; EXCEPTION.—

(a) A physician may not perform or induce, or attempt to perform or induce, a disability abortion.

(b) A woman upon whom a disability abortion is performed may not be prosecuted under this section for a conspiracy to violate the provisions of this section.

(c) This subsection does not apply to a disability abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury,

provided that no other medical procedure would suffice for that purpose.

(11)~~(10)~~ PENALTIES FOR VIOLATION.—Except as provided in subsections (3), (8), and (13) ~~(7), and (12)~~:

(a) Any person who willfully performs, or actively participates in, a termination of pregnancy in violation of the requirements of this section or s. 390.01112 commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) Any person who performs, or actively participates in, a termination of pregnancy in violation of this section or s. 390.01112 which results in the death of the woman commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 3. This act shall take effect July 1, 2021.

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing bill: Professions & Public Health Subcommittee

Representative Grall offered the following:

Amendment (with title amendment)

Between lines 64 and 65, insert:

Section 1. Section 381.990, Florida Statutes, is created to read:

381.990 Educational Information on Prenatal Genetic Disorders.—

The Department of Health shall publish on its website and update annually:

(1) Evidence-based information about prenatal genetic disorders including, but not limited to, Down syndrome, scoliosis, dwarfism, albinism and amelia. The department shall

include information reviewed by medical experts and national organizations and include the following:

(a) Physical, developmental, educational and psychosocial outcomes.

(b) Life expectancy.

(c) Clinical course.

(d) Intellectual and functional development.

(e) Treatment options.

(f) Any other information the department deems necessary.

(2) Information regarding resources and support services for families, including information hotlines, relevant resource centers or clearinghouses, national and local support organizations and education and support programs.

Section 2. Section 456.52, Florida Statutes, is created to read:

456.52 Dissemination of Educational Information on Prenatal Genetic Disorders.—

A health care practitioner that administers or orders a screening or diagnostic test for a prenatal genetic disorder shall, upon receiving a test result indicating a prenatal genetic disorder or the potential for a prenatal genetic disorder, provide the patient educational information made available by the department under s. 381.990. The health care practitioner may provide the educational information in written or electronic form.

41
42 ----------
43 **T I T L E A M E N D M E N T**
44 Remove line 9 and insert:
45 the act; creating s. 381.990; requiring the Department of Health
46 to publish educational information on prenatal genetic disorders
47 on its website; creating s. 456.52; requiring health care
48 practitioners to disseminate educational information on prenatal
49 genetic disorders under certain circumstances; providing an
50 effective date.
51