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BILL ANALYSIS



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Senate Bill 395 (as enrolled)
Sponsor: Senator Michelle A. McManus
Senate Committee: Judiciary
House Committee: Family and Children Services

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RATIONALE

Although the United States Supreme Court repeatedly has upheld a woman's right to choose to terminate her pregnancy since the landmark *Roe v Wade* decision in 1973, some people believe that the practice of partial-birth abortion amounts to infanticide. Banning this procedure has been attempted at both the Federal and state levels. During its 1995-96 session, the United States Congress approved, and President Clinton then vetoed, legislation that would have banned partial-birth abortions. The current Congress again is considering legislation that would prohibit the procedure. When efforts to establish a national ban were unsuccessful, abortion opponents attempted to prohibit partial-birth abortion through legislation at the state level.

In Michigan, Public Act 273 of 1996 enacted a ban but was overturned in 1997 by the United States District Court for the Eastern District of Michigan (*Evans v Kelley*, 977 F. Supp. 1283). After the *Evans* decision, Public Act 107 of 1999 attempted to ban partial birth abortions by establishing the Infant Protection Act. That Act made it a felony for a person intentionally to perform a procedure or take an action upon a "live infant" (as defined in the Act) with the intent to cause the infant's death. In April 2001, the U.S. District Court for the Eastern District of Michigan ruled the Act unconstitutional (*Womancare of Southfield v Granholm*, 143 F. Supp. 2nd 849). (For further information on the *Evans* and *Womancare* cases and other abortion-related court cases, please see **BACKGROUND.**)

Opponents of partial-birth abortion believe that the procedure effectively could be banned in this State if the moment at which birth legally occurs were defined in statute.

CONTENT

The bill would create the "Legal Birth Definition Act" to do all of the following:

- Specify that a "perinate" would be a legally born person for all purposes under the law, and define "perinate".
- Provide criminal, civil, and administrative immunity under certain circumstances to a physician, or a person acting under the authority of a physician.
- Specify legislative findings.

The bill states that it would not abrogate any existing right, privilege, or protection under criminal or civil law that applied to an embryo or fetus.

Legal Birth

Under the bill, a perinate would be considered a legally born person for all purposes under the law. "Perinate" would mean "a live human being at any point after which any anatomical part of the human being was known to have passed beyond the plane of the vaginal introitus until the point of complete expulsion or extraction from the mother's body". "Live" would mean demonstrating one or more of the following biological functions: a detectable heartbeat, evidence of breathing, evidence of spontaneous movement, or umbilical cord pulsation. "Anatomical part" would mean any portion of the human anatomy that had not been severed from the body, but not including the umbilical cord or placenta.

Immunity

The bill specifies that a physician, or an individual performing an act, task, or function under a physician's delegatory authority, would be immune from criminal, civil, or

administrative liability for performing any procedure that resulted in injury to or the death of a perinate while completing the delivery of the perinate under either of the following circumstances:

- The perinate was being expelled from the mother's body as a result of a spontaneous abortion.
- In the physician's reasonable medical judgment, and in compliance with the applicable standard of practice and care, the procedure was necessary either 1) to save the mother's life and every reasonable effort was made to preserve the life of both the mother and the perinate, or 2) to avert an "imminent threat to the physical health" of the mother, and any harm to the perinate was incidental to treating the mother and not a known or intended result of the procedure performed.

("Imminent threat to the physical health" would mean a physical condition that, if left untreated, would result in substantial and irreversible impairment of a major bodily function.)

Legislative Findings

The bill specifies the following legislative findings:

- "That in Roe v Wade the United States supreme court declared that an unborn child is not a person as understood and protected by the constitution, but any born child is a legal person with full constitutional and legal rights."
- "That in Roe v Wade the United States supreme court made no effort to define birth or place any restrictions on the states in defining when a human being is considered born for legal purposes."
- "That, when any portion of a human being has been vaginally delivered outside his or her mother's body, that portion of the body can only be described as born and the state has a rational basis for defining that human being as born and as a legal person."
- "That the state has a compelling interest in protecting the life of a born person."

BACKGROUND

The following is a brief discussion of challenges to Michigan's partial-birth abortion prohibitions and several pertinent abortion decisions of the United States Supreme Court.

Evans v Kelley

In this 1997 case in the Eastern District of Michigan, the State's 1996 statute banning partial-birth abortion was ruled unconstitutional and, as such, was enjoined.

Public Act 273 of 1996 amended the Public Health Code to prohibit a "partial-birth abortion", except to save the life of a pregnant woman. "Partial-birth abortion" was defined as a procedure in which a physician or a person acting under a physician's delegatory authority partially vaginally delivered a living fetus before killing the fetus and completing the delivery.

The plaintiffs claimed that Public Act 273 was unconstitutionally vague and overbroad and that its exception for saving a pregnant woman's life was too narrow. They contended that the statute did not provide clear notice of the specific procedure or procedures proscribed; was subject to multiple and confusing interpretations and could be read to encompass a number of abortion procedures; lacked any intent requirement; swept within its proscription substantially all second-trimester pre-viability abortion procedures; had the purpose and effect of imposing an undue burden on women seeking post-first-trimester abortions in Michigan in violation of the U.S. Supreme Court's decision in *Casey* (described below); and had a constitutionally insufficient exception provision because it applied only to save the life of a pregnant woman and not for procedures necessary to protect a woman's health.

The defendants argued that the Act would have prohibited only one particular method of abortion; did contain an intent requirement by implication and by reference; and did not impose an undue burden on the woman's right to an abortion since other alternative procedures would continue to be available.

The *Evans* Court found that the definition of "partial birth abortion" in Public Act 273 was "hopelessly ambiguous and not susceptible to a reasonable understanding of its meaning", in violation of Due Process requirements that people subject to regulation have a reasonable opportunity to know what conduct is prohibited. The Court declared the entire statute void. The Court also found that the statute's prohibition included several abortion procedures, including one used in more than 85% of the post-first-trimester abortions

performed in Michigan. The Court then concluded that Public Act 273 was "facially overbroad because in a substantial percentage of cases in which the statute is implicated, it will operate as a substantial obstacle to a woman's choice to undergo an abortion", thereby placing an undue burden on women seeking an abortion, in violation of *Casey*.

WomanCare of Southfield v Granholm

In this 2001 decision, the Eastern District of Michigan ruled the State's 1999 Infant Protection Act unconstitutional and permanently enjoined the State from enforcing it.

The Infant Protection Act made it a felony, punishable by imprisonment for life or any term of years and/or a maximum fine of \$50,000, for a person intentionally to perform a procedure or take any action upon a live infant with the intent to cause the infant's death. The Act defined "live infant" as a human fetus at any point after any part of the fetus was known to exist outside of the mother's body and had a detectable heartbeat, evidence of spontaneous movement, or evidence of breathing. "Part of the fetus" meant any portion of the body of a human fetus that had not been severed from the fetus, except the umbilical cord or placenta. "Outside of the mother's body" meant "beyond the outer abdominal wall or beyond the plane of the vaginal introitus".

In its ruling, the Court held that the statute failed "to contain an adequate exception to protect the mental and/or physical health of the pregnant woman" and that the effect of Michigan's law was "to place an undue burden on a pregnant woman's right to make a decision regarding abortion".

Roe v Wade (410 U.S. 113)

In 1973, the U.S. Supreme Court held that a Texas law that criminalized abortions except those necessary to save the mother's life, without regard to pregnancy stage and without recognition of the other interests involved, violated the Due Process Clause of the Fourteenth Amendment. The Court found that the constitutional right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy...but that this right is not unqualified and must be considered against important state interests in regulation"; and,

"a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision".

The Court concluded that, for the stage before the approximate end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. For the stage after the approximate end of the first trimester, the state, in promoting its interest in the health of the mother, may regulate the abortion procedure in ways that are reasonably related to maternal health. For the stage subsequent to viability, the state, in promoting its interest in the potentiality of human life, may regulate and even proscribe abortion except when it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Doe v Bolton (410 U.S. 179)

In this decision, issued on the same day as *Roe*, the U.S. Supreme Court struck down Georgia's abortion law and laid out the guidelines for a health exception to a state's abortion restriction. The Court referred to a 1971 case dealing with a District of Columbia statute in which the preservation of the mother's life or health under the direction of a competent licensed physician was "construed to bear upon psychological as well as physical well-being" (*United States v Vuitch*, 402 U.S. 62). The *Doe* Court agreed with the earlier opinion that "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". The Court opined that all of those factors may relate to a woman's health and considering them "allows the attending physician the room he needs to make his best medical judgment", which "operates for the benefit, not the disadvantage, of the pregnant woman".

Planned Parenthood of Central Missouri v Danforth (428 U.S. 52)

This 1976 case apparently is the only U.S. Supreme Court decision involving the constitutionality of a ban on a specific abortion procedure, until 2000. In addition to

addressing issues of informed consent, spousal consent, and parental consent, as well as other statutory provisions, the Court held that a Missouri statute banning the saline amniocentesis abortion procedure was unconstitutional. According to the trial court record, this method was one of the most commonly used in the nation after the first trimester, and, with respect to maternal mortality, safer than continuation of the pregnancy until normal childbirth. The Supreme Court reasoned that, "as a practical matter, it forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed". The Court concluded that the ban on the procedure constituted an "unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting the vast majority of abortions after the first 12 weeks. As such, it does not withstand constitutional challenge."

Webster v Reproductive Health Services (492 U.S. 490)

In 1989, the U.S. Supreme Court abandoned its trimester framework of *Roe v Wade*, stating that, "we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability". The Court upheld a Missouri statute that requires a physician, before performing an abortion on a woman whom the doctor has reason to believe is 20 or more weeks pregnant, to ascertain whether the fetus is viable by performing certain medical examinations and tests; prohibits public employees from performing an abortion not necessary to save the mother's life; and prohibits the use of public facilities for performing an abortion not necessary to save the mother's life.

Planned Parenthood of Southeastern Pennsylvania v Casey (505 U.S. 833)

In this 1992 plurality opinion, which dealt with the issue of informed consent to abortion, the U.S. Supreme Court reaffirmed the essential holdings in *Roe* that: A woman has the right to terminate her pregnancy before fetal viability occurs without any undue interference from the state; a state has the power to restrict abortions after viability, if the law contains exceptions for a pregnancy that

endangers the woman's life or health; and the state has a legitimate interest from the outset of a pregnancy in protecting the health of the woman and the potential life of the fetus that may become a child. The Court, however, also affirmed the decision in *Webster* to reject the rigid trimester framework outlined in *Roe*, reasoning that that approach was incompatible with the state's interest in potential life throughout the pregnancy.

The plurality *Casey* opinion adopted an "undue burden" standard for evaluating a state's abortion restrictions and held that an undue burden exists when a provision of law has the purpose or effect of placing a "substantial obstacle" in the path of a woman seeking an abortion before fetal viability. Using this standard, the Court ruled that Pennsylvania's informed consent provisions--including a 24-hour waiting period and fetal descriptions--did not pose an undue burden on a woman's right to terminate a pregnancy, although the Court did reject a spousal notification requirement. In upholding major portions of Pennsylvania's statute, the Court overruled earlier informed consent decisions that, according to *Casey*, were inconsistent with the acknowledgment in *Roe* of an important interest in potential life.

Stenberg v Carhart (530 U.S. 914)

In this 2000 case, the U.S. Supreme Court addressed the constitutionality of Nebraska's ban on partial-birth abortion. The Court declined to revisit the established legal principle "that the Constitution offers basic protection to the woman's right to choose". Rather, it applied to the Nebraska law three other established principles to determine the constitutionality of the partial-birth abortion ban.

The three principles are: 1) Before viability, a woman has the right to choose termination of her pregnancy; 2) a law restricting abortion is unconstitutional if it imposes an undue burden on the woman's decision before fetal viability and that undue burden is "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"; and 3) "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, 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". After considering these principles, the Court held that the Nebraska statute was unconstitutional.

Since the Nebraska law sought to prohibit a particular procedure, the Court offered a detailed description of various abortion procedures, including dilation and evacuation (D&E), which the Court identified as the most commonly used procedure in second trimester abortions, and dilation and extraction (D&X), which also is known as intact D&E and evidently is used quite rarely (the procedures used in partial-birth abortions).

After reviewing those procedures, the Court determined that Nebraska's law criminalizing partial-birth abortion violated the Constitution for at least two reasons. Quoting *Casey*, the Court concluded that "the law lacks any exception 'for the preservation of the...health of the mother'" and that "it 'imposes an undue burden on a woman's ability' to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself". The Court also determined that the Nebraska statute did not further an interest in the potentiality human life of the fetus because it would not save the fetus from destruction, but would regulate only a method of performing abortion.

The Court particularly identified as problems the Nebraska law's application both before and after viability and its use of the term partial-birth abortion without reference to which medical procedure was prohibited. The Court posited that, since case law requires a health exception "in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation", and the statute contained no such exception. In addition, while Nebraska officials contended that the ban applied only to the D&X procedure, the Court stated that the statute's "language makes clear that it also covers a much broader category of procedures. The language does not track the medical differences between D&E and D&X--though it would have been a simple matter" to do so.

The Court summarized its findings as follows: "...using this law some present prosecutors and future Attorneys General may choose to pursue physicians who use D&E procedures, the most commonly used method for performing previability second trimester abortions. All those who perform abortion procedures using that method must fear

prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision. We must consequently find the statute unconstitutional."

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Although *Roe v Wade* established a woman's right to choose an abortion, that landmark case also held that the right is not without qualification and that there is a significant state interest in the potentiality of human life. More than 30 states have attempted to establish some sort of outer boundary for legal abortion, usually by focusing on and trying to prohibit procedures commonly referred to as partial-birth abortion. Although attempts to restrict or prohibit this procedure have been challenged successfully in courts of law, neither *Roe* nor subsequent decisions clearly identify the point at which birth occurs, and the U.S. Supreme Court has not in any of those cases restricted states from defining birth for legal purposes.

Rather than attempt once again to proscribe certain abortion procedures or abortions under certain circumstances, the bill takes a different approach. It does not mention abortion or any particular procedure, but would, in effect, establish a legal definition of when birth occurs. By creating a bright line between the end of pregnancy and the beginning of birth, the bill would afford a child all the legal protections of personhood once birth began (i.e., a portion of the fetus was outside the mother's body) and the infant showed signs of life.

Further, providing for an infant's human rights in this manner would be accomplished within the legal framework established by the U.S. Supreme Court. Since a state's interest in potential human life has been affirmed in cases from *Roe* to *Casey*, it would be appropriate to establish a legal definition of birth. Nothing in the body of case law dealing with abortion rights defines the point at which birth occurs or restricts a state's ability to do so. The bill would not violate any of the privacy protections afforded pregnant women that are elucidated in abortion rights

decisions, but would identify when a child is vested with his or her own legal rights.

Response: Although it does not specifically identify abortion or any particular abortion procedure, the proposed definitions of “perinate”, “life”, and “anatomical part” combine to prohibit at least D&X and D&E abortion procedures. Like previous efforts to restrict access to abortion procedures in Michigan and elsewhere, the bill would violate well-established constitutional principles.

Supporting Argument

By defining when birth occurs, the bill effectively would prohibit the practice of partial-birth abortion. That procedure amounts to infanticide and deserves comparable punishment. At the point when an infant is partially outside the mother’s body, he or she should be protected from being killed. Partial-birth abortion is a gruesome procedure whereby a nearly full-term fetus is partially delivered and then killed by means of having its skull crushed or incised before the delivery is completed. Reportedly, many physicians contend that there is no medical need for the procedure because there are other, safer methods for terminating a pregnancy. This extreme practice should not be tolerated in a civilized society and violators should be punished appropriately. While the bill does not refer to partial-birth abortion by name, it specifies that a perinate would be considered a legally born person for all purposes under the law. Assaulting or killing a perinate, then, would subject an offender to serious criminal penalties.

Response: It is misleading to describe partial-birth abortion as a procedure in which a nearly full-term fetus is destroyed. Reportedly, the vast majority of partial-birth abortions are performed during the second trimester, long before the fetus is viable (that is, capable of surviving outside the womb, with or without medical assistance); and only about 0.04% of abortions of any type are performed after 26 weeks. (Viability is generally considered to occur at 24 weeks, while a full-term pregnancy is 40 weeks.) In regard to safety, the partial-birth method actually is said to be one of the safest options available for midpregnancy termination, and it is significantly less risky than alternatives that could be used to get around the ban. Indeed, the *Carhart* Court determined that banning D&X without a health exception could “create significant health risks for women, because the record shows that significant medical authority supports the proposition that in

some circumstances, D&X would be the safest procedure”. In addition, the bill could result in prohibiting D&E abortions as well as D&X procedures. That would be a sweeping proscription of a commonly used procedure for second trimester abortions and would unconstitutionally violate a woman’s right to choose abortion before viability. Furthermore, every method of abortion, at any stage of pregnancy, sounds like a horribly gruesome procedure if it is described in detail. That does not change constitutionally protected rights.

Opposing Argument

The bill would create the term “perinate” to refer to a “live human being at any point after which any anatomical part of that human being was known to have passed beyond the plane of the mother’s vaginal introitus...” (that is, outside the opening to the vagina). The proposed definition of “live” fails to distinguish between a fetus in the first few weeks of gestation and a full-term live birth. Thus, the bill would criminalize many earlier-term, constitutionally protected abortions, even those performed in the first trimester. Also, the definitions could be interpreted to proscribe widely used abortion procedures that are considered to be medically safe. As a result, in violation of *Casey*, the bill would operate as a “substantial obstacle” to a woman’s path to choose to terminate her pregnancy, thereby placing an “undue burden” on a woman seeking a legal, constitutionally protected abortion before the fetus attained viability, just as Public Act 273 of 1996 was ruled to have done in *Evans* and Public Act 107 of 1999 was ruled to have done in *WomanCare*. While the nomenclature is different, the bill’s constitutional defects are similar to those of Public Acts 273 and 107. Furthermore, referring to a fetus as a “live human being” appears to be an attempt to begin undermining a woman’s right to any type of abortion.

Response: The bill takes a different approach from either Public Act 273 or Public Act 107. Instead of addressing any particular medical procedure (as Public Act 273 did) or providing criminal penalties for the intentional killing of a live infant (as Public Act 107 did), the bill simply would define a perinate and provide that a perinate would be legally born. Abortion procedures that do not involve killing a perinate would remain available and accessible to a woman seeking an abortion. In a footnote to the *Evans* opinion, the Federal Court expressed its own belief that, “...the Michigan Legislature may constitutionally

regulate abortion practices in Michigan, and specifically, that the Legislature can, consistent with *Casey* and other Supreme Court precedent, tailor an abortion regulation that would avoid the pitfalls of vagueness and overbreadth and pass constitutional muster." The bill represents such an attempt.

Opposing Argument

As court decisions have repeatedly articulated, any law seeking to prohibit or restrict the availability of abortions must include an exception that considers the mother's life and health. Indeed, the absence of an adequate health exception was a fatal flaw in both Public Act 273 of 1996 and Public Act 107 of 1999. The bill's provision that a physician would not be liable for an action taken to "avert an imminent threat to the physical health of the mother..." is entirely insufficient because it excludes mental health and other considerations established in *Doe* and reiterated in subsequent abortion decisions, and includes only a condition that "would result in substantial and irreversible impairment of a major bodily function". In ruling Michigan's 1999 Infant Protection Act unconstitutional, the U.S. District Court in *Womancare* stated that the statute failed "to contain an adequate exception to protect the mental and/or physical health of the pregnant woman" (emphasis added). That Court also stated that, on this matter, the *Carhart* decision is controlling. In that decision, the U.S. Supreme Court found that Nebraska's law banning partial-birth abortion was unconstitutional on at least two grounds, one of which was that the law lacked any exception for the preservation of the mother's health. Any law that effectively would ban or restrict abortion, then, must have such an exception. Furthermore, the proposed immunity would be virtually meaningless because it would apply only if harm to a perinate were not "a known or intended result of the procedure performed". Since it is known that any abortion procedure will harm the fetus, a physician would have no immunity if he or she aborted a partially delivered fetus in order to protect the health of the mother.

Response: Since the bill does not address the practice of abortion or any particular abortion procedure, it would not have to make a broad exception for the health of the mother, as case law has required of abortion restrictions. Moreover, the health exception articulated in case law is so broad as to encompass interference with a person's family or socioeconomic situation. The exception

should be limited to consideration of a woman's long-term physical health.

Opposing Argument

In addition to banning many early-term abortions, the bill's designation of a perinate as a live human being could affect other medical procedures. For example, the bill could be applied to situations in which a physician treated a spontaneous miscarriage. That is, a woman experiencing a miscarriage could arrive at the emergency room at a point when the miscarried fetus still exhibited signs of life, such as umbilical cord pulsation, bringing it under the bill's definition of "live". Since the fetus had spontaneously aborted, however, the medically appropriate treatment would be to remove the fetus. As a result, a doctor who treated a woman under these circumstances could be considered under the bill to have harmed a perinate. Also, in a situation in which a woman is pregnant with twins and the life of one of the twins can be assured only by the removal of the other fetus, the physician may be required to abort one of the fetuses for the sake of the mother and the other twin. Doing so could result in the physician harming a perinate under the bill.

Response: The bill specifically would exempt a physician or an individual acting under a physician's authority from any liability for performing a procedure that resulted in injury to or the death of a perinate that was being expelled from the mother's body as a result of a spontaneous abortion.

Opposing Argument

Legislation is not needed to prevent the practice of partial-birth abortion in the late stages of pregnancy, either by directly prohibiting the procedure or by defining birth. As the U.S. District Court pointed out in *Evans*, the Michigan Supreme Court sought to save what it could of Michigan's statute outlawing abortion, in the 1973 post-*Roe* case of *People v Bricker* (389 Mich 524). Section 14 of the Michigan Penal Code makes it a felony to administer any substance or use any instrument or other means with the intent to cause a miscarriage, unless it is necessary to save the life of the pregnant woman (MCL 750.14). In light of *Roe*, the Michigan Court construed that section of the Penal Code "to mean that the prohibition...shall not apply to 'miscarriages' authorized by a pregnant woman's attending physician in the exercise of his medical judgment; the effectuation of the decision to abort is also left to the physician's

judgment; however a physician may not cause a miscarriage after viability except where necessary, in his medical judgment, to preserve the life or health of the mother". Arguably, then late-term abortions, whether performed by the partial-birth procedure or otherwise, already are prohibited in Michigan.

Opposing Argument

The bill may be unnecessary, since Congress is on the verge of passing a Federal ban on partial-birth abortions and the President evidently is poised to sign the legislation. Under the proposed "Partial-Birth Abortion Ban Act of 2003", the practice would be banned and anyone performing a partial-birth abortion would be subject to criminal penalties.

Response: Unlike the Federal legislation, the bill does not specifically address abortion, but would define the point at which birth occurs for legal purposes. Regardless of whether the Federal legislation is enacted or whether it withstands court challenges, the bill should be approved.

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bill would have an indeterminate fiscal impact on State and local government.

Fiscal Analyst: Bethany Wicksall

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.