

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 1411 Termination of Pregnancies

**SPONSOR(S):** Health & Human Services Committee; Health Care Appropriations Subcommittee; Burton and others

**TIED BILLS:**           **IDEN./SIM. BILLS:** SB 1722

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Quality Subcommittee	7 Y, 6 N	McElroy	O'Callaghan
2) Health Care Appropriations Subcommittee	9 Y, 4 N, As CS	Pridgeon	Pridgeon
3) Health & Human Services Committee	11 Y, 2 N, As CS	McElroy	Calamas

### SUMMARY ANALYSIS

Abortion clinics are regulated by the Agency for Health Care Administration (AHCA) under ch. 390, F.S. CS/CS/HB 1411 amends the regulatory requirements for abortion clinics. It establishes the manner for disposal of fetal remains and clarifies the penalty for failing to do so. It requires all abortion clinics to comply with the reporting requirements for the United States Standard Report of Induced Termination of Pregnancy adopted by the Centers for Disease Control and Prevention. It removes an existing license fee cap and requires AHCA to establish fees which may not be more than the costs incurred to license and regulate abortion clinics.

The bill requires all physicians who perform abortions in a clinic prior to the third trimester to have admitting privileges with a hospital within a reasonable proximity of the clinic unless the clinic has a written transfer agreement with a hospital within a reasonable proximity to the clinic which includes the transfer of the patient's medical records held by both the clinic and the treating physician. The bill also defines "gestation" and the trimesters of pregnancy, which are not currently defined in the licensure act.

The bill requires AHCA to perform annual licensure inspections of all abortion clinics, including a review of at least 50 percent of the patient records generated since the last inspection. The bill requires AHCA to submit an annual report to the President of the Senate and the Speaker of the House of Representatives which summarizes all regulatory actions it has taken against abortion clinics during the prior year.

The bill prohibits selling, purchasing, donating or transferring fetal remains obtained through an abortion, as well as advertising or offering to do any of the preceding acts.

The bill prohibits public funding for an organization that owns, operates, or is affiliated with a licensed abortion clinic, and provides exemptions to this prohibition.

The bill requires abortion referral or counseling agencies to register with AHCA, and AHCA must include actions against referral agencies in the annual report of ch. 390, F.S., licensure actions required by the bill.

The bill provides AHCA an appropriation of \$59,951 in recurring and \$185,213 in nonrecurring funding from the Health Care Trust Fund to implement the provisions of the bill. The bill also provides 0.5 FTE for additional inspections and records reviews as required in the bill. The bill has no impact on local government.

The bill provides an effective date of July 1, 2016 except as otherwise expressly provided in the act.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1411e.HHSC

DATE: 2/12/2016

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

##### Federal Law on Abortion

##### *Right to Abortion*

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

##### *Undue Burden*

In *Planned Parenthood v. Casey*, the U.S. 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.<sup>4</sup> State regulation imposes an "undue burden" on a woman's decision to have an 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.<sup>5</sup> However, the court opined, not every law which makes the right to an abortion more difficult to exercise is an infringement of that right.<sup>6</sup>

##### *Physician Admitting Privileges*

An admitting privilege is the right of a physician to admit patients to a particular hospital, and to provide specific services in that facility.<sup>7</sup> Ten states have enacted legislation requiring physicians who perform abortions to have admitting privileges with a local hospital.<sup>8</sup> The required distance between the location where the abortion is performed and the location of the hospital where the physician has admitting privileges varies in these statutes from within the same metropolitan area to within 30 miles.<sup>9</sup>

At least 10 states have enacted laws which require physicians who perform abortions to have hospital admitting privileges. Eight of these laws generated constitutional challenges.<sup>10</sup> In Wisconsin, a federal court ruled that the admitting privilege law was unconstitutional and permanently enjoined it.<sup>11</sup> In Alabama, Louisiana and Mississippi federal courts ruled the laws unconstitutional and enjoined them

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

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

<sup>3</sup> *Casey*, 505 U.S. 833 (1992).

<sup>4</sup> *Id.* at 878.

<sup>5</sup> *Id.* at 877.

<sup>6</sup> *Id.* at 873.

<sup>7</sup> FAQ: *The Next Abortion Battle: The Courts And Hospital Admitting-Privilege Laws*, Kaiser Health News, Julie Rovner, August 8, 2014, <http://khn.org/news/abortion-admitting-privileges-fight/> (last visited January 25, 2016). In order for a physician to be granted privileges, a hospital generally checks the individual's medical credentials, license and malpractice history. Many hospitals also require physicians to admit a minimum number of patients to the hospital each year before they will grant or renew privileges. Others require the doctor to live within a minimum distance of the hospital.

<sup>8</sup> Alabama (Ala. Code 1975 s. 26-23E-4); Louisiana (LSA-R.S. 40:1061.10); Mississippi (Miss. Code Ann s. 41-75-1); Missouri (V.A.M.S. 188.080); North Dakota (NDCC 14-02.1-04); Oklahoma (Okla. Sess. Laws 370 (2014)); Tennessee (T.C.A. s. 39-15-202); Texas (V.T.C.A. s. 171.0031); and Wisconsin (W.S.A. 253.095).

<sup>9</sup> Alabama (Ala. Code 1975 s. 26-23E-4; and Texas (V.T.C.A. s. 171.0031), respectively.

<sup>10</sup> Admitting privilege laws in Tennessee and North Dakota were not challenged, and are in effect.

<sup>11</sup> *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015).

temporarily, but final orders have not yet issued and the cases are ongoing.<sup>12</sup> Similarly, in Oklahoma the Oklahoma Supreme Court temporarily enjoined the law without ruling on its constitutionality, and the case is ongoing.<sup>13</sup> Federal courts in Missouri and South Carolina upheld the admitting privilege laws, finding they did not violate the constitution.<sup>14</sup> Finally, in Texas, a federal court of appeal ruled that the admitting privilege law did not violate the constitution, but the U.S. Supreme Court stayed its effect pending appeal. That appeal is ongoing in the U.S. Supreme Court.<sup>15</sup>

In Florida, s. 390.012(3)(c), F.S., requires the medical director of an abortion clinic to have *either* admitting privileges at a licensed hospital in Florida, *or* a transfer agreement with a licensed hospital within “reasonable proximity” of the clinic. AHCA defines “reasonable proximity” in Rule 59A-9.019, F.A.C., as a distance not to exceed thirty minutes transport time by emergency vehicle. This requirement applies only to clinics which perform abortions after the first trimester. Individual physicians who perform abortions are not required to have admitting privileges or transfer agreements. Clinics that only provide abortions during the first trimester are not required to have transfer agreements or physicians with admitting privileges.

### *Federal Funding of Abortions*

The Hyde Amendment is a rider to the annual appropriations bill for the U.S. Departments of Labor and Education, which prevents Medicaid and any other programs under these departments from funding abortions, except in limited cases. The Hyde Amendment does not prohibit the use of state or local public funds to pay for abortions.

The Hyde Amendment has been enacted into law in various forms since 1976.<sup>16</sup> In 1980, the U.S. Supreme Court affirmed the constitutionality of the Hyde Amendment in *Harris v. McRae*.<sup>17</sup> In *Harris*, the Court determined that funding restrictions created by the Hyde Amendment did not violate the U.S. Constitution’s Fifth Amendment and, therefore, did not contravene the liberty or equal protection guarantees of the Due Process Clause of the Fifth Amendment.<sup>18</sup> The Court opined that, although government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those obstacles that are not created by the government (in this case indigence).<sup>19</sup> The Court further opined that, although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all.<sup>20</sup>

Consistent with the Hyde Amendment, the Florida Medicaid program reimburses for abortions for the following reasons:

- The woman suffers from a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused or arising from the pregnancy itself, that would place the woman in danger of death unless an abortion is performed;
- The pregnancy is the result of rape (sexual battery) as defined in s. 794.011, F.S.; or

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<sup>12</sup> *Planned Parenthood Southeast, Inc. v. Strange*, 33 F.Supp.3d 1330 (M.D. Ala. 2014) (non-final order); *June Medical Services, LLC v. Caldwell*, 2014 WL 4296679 (M.D. La. 2014) (non-final order); *Jackson Women’s Health Organization v. Currier*, 760 F.3d 448 (5th Cir. 2014) (petition for certiorari currently pending before the United States Supreme Court).

<sup>13</sup> *Burns v. Cline*, District Court of Oklahoma County, State of Oklahoma, case no. 2014-cv-1896; 339 P.3d 887 (OK 2014) (order remanding to trial court for further proceedings). The case is pending with trial currently set for February 2016.

<sup>14</sup> *Women’s Health Center of West County, Inc. v. Webster*, 871 F.2d 1377 (8th Cir. 1989); *Greenville Women’s Clinic v. Comm’r, S.C. Dept. of Health and Environmental Control*, 317 F.3d 357 (4th Cir.) 2002; cert. den. 538 U.S. 1008 (U.S. 2003).

<sup>15</sup> *Whole Woman’s Health v. Cole*, 790 F.3d 563 (5<sup>th</sup> Cir. 2015); cert. granted 136 S.Ct. 499 (U.S. 2015).

<sup>16</sup> See, e.g., Consolidated Appropriations Act of 2016, Pub. L. No. 114-113 (H.R. 2029, — 114th Congress (2015-2016)).

<https://www.congress.gov/bill/114th-congress/house-bill/2029/text> (last visited on January 15, 2016).

<sup>17</sup> 448 U.S. 297 (1980). See also *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), upholding *Harris v. McRae*.

<sup>18</sup> *Harris*, 448 U.S. at 326-27.

<sup>19</sup> *Harris*, *Id.* at 316-17.

<sup>20</sup> *Id.*

- The pregnancy is the result of incest as defined in s. 826.04, F.S.<sup>21</sup>

An Abortion Certification Form must be completed and signed by the physician who performed the abortion for the covered procedures. The form must be submitted with the facility claim, the physician's claim, and the anesthesiologist's claim. The physician must record the reason for the abortion in the physician's medical records for the recipient.<sup>22</sup>

### *Fetal Tissue Sale, Donation, and Research*

Federal law prohibits the sale of fetal tissue: a person may not knowingly transfer fetal tissue for valuable consideration.<sup>23</sup> Federal law also prohibits directed donation for use in transplantation. This applies to a donation which is made pursuant to a promise that the fetal tissue will be transplanted in a specific individual, as well as for a donation in which the recipient has paid for the donor's abortion.<sup>24</sup> Finally, solicitation or acceptance of tissues from fetuses gestated for the purpose of research is prohibited.<sup>25</sup> This includes fetal tissue that was donated related to a pregnancy that was deliberately initiated to provide tissue for research or fetal tissue that was gestated in the uterus of a nonhuman animal.<sup>26</sup> Violation of any of these prohibitions can result in fines and imprisonment of up to 10 years.<sup>27</sup>

Federal law authorizes the Secretary of the U.S. Department of Health and Human Services to conduct or support research on the transplantation of human fetal tissue for therapeutic purposes.<sup>28</sup> The human fetal tissue used in the research may come from a spontaneous abortion, an induced abortion or a stillbirth.<sup>29</sup> However, before the fetal tissue may be used for research, informed consent must be obtained.

The woman electing to donate fetal tissue must sign a written statement declaring the donation is for research, made without restriction as to who may receive the tissue, and that she has not been informed of the identity of any potential recipients. The attending physician must sign a written statement declaring that the tissue has been donated with the woman's consent and that the physician fully disclosed any interest in the research and of any known medical or privacy risks to the woman. If the fetal tissue was obtained through an induced abortion, the physician must also attest that the physician obtained consent to the abortion prior to obtaining consent for the donation; that no alteration of the timing, method, or procedures used to terminate the pregnancy was made solely for the purposes of obtaining the tissue; and the abortion was performed in accordance with applicable state law. The researcher must sign a written statement declaring awareness that the tissue is human and that it has been donated as a result of an abortion or stillbirth; and that the researcher had no part in any decisions as to the timing, method, or procedures used to terminate the pregnancy.<sup>30</sup>

## 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

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<sup>21</sup> See, e.g., Agency for Health Care Administration, Florida Medicaid Practitioner Services Coverage and Limitations Handbook, April 2014; and Agency for Health Care Administration, Florida Medicaid Managed Medical Assistance Program Model Contract, Attachment II, Exhibit II-A, Section V.(23), Nov. 11, 2015.

<sup>22</sup> Id.

<sup>23</sup> Valuable consideration does not include reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue. 42 U.S. Code § 289g-2(a).

<sup>24</sup> 42 U.S. Code § 289g-2(b).

<sup>25</sup> 42 U.S. Code § 289g-2(c).

<sup>26</sup> Id.

<sup>27</sup> 42 U.S. Code § 289g-2(d).

<sup>28</sup> 42 U.S. Code § 289g-1.

<sup>29</sup> Id.

<sup>30</sup> Id.

Court has noted that state constitutions may provide greater protections.<sup>31</sup> Unlike the U.S. Constitution, Article I, s. 23 of the Florida Constitution contains an express right to privacy:

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.<sup>32</sup>

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."<sup>33</sup> In *In re T.W.*, the Florida Supreme Court ruled that<sup>34</sup>:

[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.<sup>35</sup>

#### *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.<sup>36</sup> An abortion must be performed by a physician<sup>37</sup> 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.<sup>38</sup>

The Agency for Health Care Administration (AHCA) licenses and regulates abortion clinics in the state, pursuant to ch. 390, F.S., and part II of ch. 408, F.S.<sup>39</sup> Section 408.805, F.S., requires AHCA to establish license fees for all regulated facilities at a rate necessary to cover its administrative costs, unless otherwise limited by facility-specific statutes. That section also requires AHCA to increase the fees annually based on the Consumer Price Index. However, s. 390.014, F.S., limits licensure fees for abortion clinics to not less than \$70 or more than \$500. AHCA currently charges a biennial licensure fee of \$545.00 pursuant to Rule 59A-9.020, F.A.C.

All abortion clinics and physicians performing abortions 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;<sup>40</sup>
- An abortion clinic must be operated by a person with a valid and current license;<sup>41</sup>

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<sup>31</sup> *Pruneyard Shopping Center v. Robins*, 100 S.Ct. 2035, 2040 (1980), cited in *In re T.W.*, 551 So.2d 1186, 1191 (Fla. 1989).

<sup>32</sup> *Id.* at 1191-1192.

<sup>33</sup> *Id.* at 1192.

<sup>34</sup> *Id.* at 1193.

<sup>35</sup> *Id.* at 1194.

<sup>36</sup> Section 390.011(1), F.S.

<sup>37</sup> Section 390.011(2), F.S.

<sup>38</sup> Section 390.011(8), F.S.

<sup>39</sup> Section 408.802(3) provides for the applicability of the Health Care Licensing Procedures Act to abortion clinics.

<sup>40</sup> Section 797.03 (1), F.S.

- A third trimester abortion may only be performed in a hospital;<sup>42</sup>
- Proper medical care must be given and used for a fetus when an abortion is performed during viability;<sup>43</sup>
- Experimentation on a fetus is prohibited;<sup>44</sup>
- Except when there is a medical emergency, an abortion may only be performed after a patient has given voluntary and written informed consent;<sup>45</sup>
- Consent includes verification of the fetal age via ultrasound imaging;<sup>46</sup>
- Fetal remains are to be disposed of in a sanitary and appropriate manner;<sup>47</sup> and
- Parental notice must be given 48 hours before performing an abortion on a minor,<sup>48</sup> unless waived by a parent or otherwise ordered by a judge.

The level of regulation prescribed by AHCA depends on the trimester in which the abortion is being performed, and the viability of the fetus. However, current law does not define “trimester”. Section 390.011(11), F.S., defines “third trimester” as the weeks of pregnancy after the 24th week of pregnancy. AHCA Rule 59A-9.019, F.A.C., defines the trimesters as follows:

First Trimester. The first 12 weeks of pregnancy (the first 14 completed weeks from the last normal menstrual period).

Second Trimester. That portion of a pregnancy following the 12th week and extending through the 24th week of gestation.

Third Trimester. That portion of pregnancy beginning with the 25th week of gestation.

Current law does not define “gestation”.<sup>49</sup>

For clinics performing only first trimester abortions, AHCA is required to adopt rules which are comparable to rules that apply to all surgical procedures requiring approximately the same degree of skill and care as the performance of first trimester abortions.<sup>50</sup> AHCA has not adopted a rule specific to first trimester-only facilities; rather, the regulations are those stated in the statute: abortions must be performed by a licensed physician at a licensed facility, and clinics must meet some minimal record-keeping and reporting requirements.<sup>51</sup> Other regulations related to first trimester abortions have been held unconstitutional, including rules which required first trimester abortion clinics and physicians to:<sup>52</sup>

- Maintain specified equipment in the clinic;
- Prepare a written pamphlet outlining post-operative treatment;
- Perform specified tests prior to the abortion procedure;
- Make available certain medications for post-operative treatment;
- Establish procedures to maintain proper sanitation; and
- Dispose of fetal remains in a nuisance-free manner.

AHCA has greater authority to establish rules for abortion clinics which perform abortions after the first trimester. Pursuant to s. 390.012(3), F.S., AHCA established by rule standards for:<sup>53</sup>

<sup>41</sup> Section 797.03 (2), F.S.

<sup>42</sup> Section 797.03(3), F.S. The violation of any of these provisions results in a second degree misdemeanor.

<sup>43</sup> Section 390.0111(4), F.S.

<sup>44</sup> Section 390.0111(6), F.S.

<sup>45</sup> Section 390.0111(3), F.S. A physician violating this provision is subject to disciplinary action.

<sup>46</sup> Section 390.0111(3)(a)1.b., F.S.

<sup>47</sup> Section 390.0111(8), F.S. A person who improperly disposes of fetal remains commits a second degree misdemeanor.

<sup>48</sup> Section 390.01114(3), F.S. A physician who violates this provision is subject to disciplinary action.

<sup>49</sup> Ten states use gestation to measure trimesters, and measure gestation from fertilization: Georgia (Ga. Code Ann., § 31-9B-1); Idaho (I.C. § 18-604); Illinois (720 ILCS 510/2); Indiana (IC 16-18-2-287.5); Kentucky (KRS § 311.720); Minnesota (M.S.A. § 145.4241); Oklahoma (63 Okl.St. Ann. § 1-730); North Dakota (NDCC, 14-02.1-02); South Carolina (Code 1976 § 44-41-10); and South Dakota (SDCL § 34-23A-1). Other states measure gestation from the woman’s last menstrual period, or do not specify.

<sup>50</sup> Section 390.012(2), F.S.

<sup>51</sup> Sections 390.0111(2); 390.0112; 390.014, F.S.

<sup>52</sup> *Florida Women’s Medical Clinic, Inc. v. Smith*, 536 F.Supp. 1048 (S.D. Fla. 1982).

<sup>53</sup> Ch. 59A-9, F.A.C.

- Adequate private space for interviewing, counseling, and medical evaluations;
- Dressing rooms for staff and patients;
- Appropriate lavatory areas;
- Areas for pre-procedure hand-washing;
- Private procedure rooms;
- Adequate lighting and ventilation for procedures;
- Surgical or gynecological examination tables and other fixed equipment;
- Post-procedure 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;
- Medical directors, personnel and staff training; and
- Conspicuous display of the clinic's license.

AHCA has broad authority to inspect abortion clinics, which must occur biennially and be unannounced.<sup>54</sup> AHCA has authority to inspect all records of abortion clinics.<sup>55</sup> The law does not specify the number or percent of records AHCA must review during an inspection.

DOH and AHCA have authority to take licensure action against practitioners and clinics, respectively, which violate licensure statutes or rules.<sup>56</sup> Additionally, abortion clinics are subject to criminal penalties for violation of certain statutes and rules.

#### *Fetal Tissue Regulation*

Section 873.05, F.S., prohibits anyone from advertising, selling, purchasing or otherwise transferring a human embryo for valuable consideration. "Valuable consideration" does not include the reasonable costs associated with the removal, storage, and transportation of a human embryo, and there is no prohibition against the donation of a human embryo. A violation of this section is a second degree felony. Section 873.01, F.S., prohibits the sale of any human organ or tissue for valuable consideration. In this section, "valuable consideration" does not include the reasonable costs associated with the removal, storage, and transportation of a human organ or tissue. Florida law does not address donation of fetal remains, or advertising for the transfer of fetal remains.<sup>57</sup>

Chapter 390, F.S., contains two standards for the disposal of fetal remains. Pursuant to s. 390.0111, F.S., all fetal remains must be disposed of in a "sanitary and appropriate" manner and in accordance with standard health practices established by DOH. Failure to dispose of fetal remains in accordance with department rules is a second degree misdemeanor.<sup>58</sup> Pursuant to s. 390.012, F.S., abortion clinics are required to dispose of fetal tissue in a "competent professional manner" consistent with the manner in which other human tissue is disposed.<sup>59</sup> Failure to adhere to this requirement is a first degree misdemeanor.<sup>60</sup>

#### *Abortion Data Collection and Reporting Requirements*

Section 390.0112 (1), F.S., requires facilities that perform abortions to submit a monthly report to AHCA containing the number of abortions performed, the reason for the procedure, and the gestational age of the fetus.

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<sup>54</sup> Section 408.811, F.S.

<sup>55</sup> Id.

<sup>56</sup> Section 390.018, F.S.

<sup>57</sup> Florida law also prohibits experimentation on any live fetus or infant either prior to or subsequent to an abortion unless it is necessary to preserve the life of such fetus or infant. S. 390.0111(6), F.S.

<sup>58</sup> Section 390.0111(7), F.S.

<sup>59</sup> Section 390.012(7), F.S.

<sup>60</sup> Id.

AHCA must keep this information in a central location from which statistical data can be drawn.<sup>61</sup> If the abortion is performed in a location other than a medical facility, the physician who performed the abortion is responsible for reporting the information to AHCA.<sup>62</sup> The reports are confidential and exempt from public records requirements.<sup>63</sup> AHCA may impose fines for violations of the reporting requirements.<sup>64</sup>

In 2014, DOH reported that there were 220,138 live births in the state of Florida.<sup>65</sup> In the same year, AHCA reported that there were 72,073 abortion procedures performed in the state. Of those:<sup>66</sup>

- 65,902 were performed in the first trimester (12 weeks and under);
- 6,171 were performed in the second trimester (13 to 24 weeks); and
- None were performed in the third trimester (25 weeks and over).

The majority of the procedures (65,210) were elective.<sup>67</sup> The remainder of the abortions were performed due to:<sup>68</sup>

- Emotional or psychological health of the mother (76);
- Physical health of the mother that was not life endangering (158);
- Life endangering physical condition (69);
- Rape (749);
- Serious fetal genetic defect, deformity, or abnormality (560); and
- Social or economic reasons (5,115).

The federal Centers for Disease Control and Prevention (CDC), compiles statistics voluntarily reported by the 50 states, the District of Columbia and New York City, related to termination of pregnancies to produce a national data report.<sup>69</sup> The last national data report was issued in 2012.<sup>70</sup> The CDC requests the following information from states for the U.S. Standard Report of Induced Termination of Pregnancy:

- Facility name (clinic or hospital);
- City, town or location;
- County;
- Hospital or clinic's patient identification number (used for querying for missing information without identifying the patient);
- Age;
- Marital status;
- Date of termination;
- Residence of patient;
- Ethnicity;
- Race;
- Education attainment;
- Date of last menses;
- Clinical estimate of gestation;

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<sup>61</sup> Id.

<sup>62</sup> Section 390.0112(2), F.S.

<sup>63</sup> Section 390.0112(3), F.S.

<sup>64</sup> Section 390.0112(4), F.S.

<sup>65</sup> Correspondence from the Department of Health to the House of Representatives Health Quality Subcommittee dated February 26, 2015, on file with Health Quality Subcommittee Staff.

<sup>66</sup> Reported Induced Terminations of Pregnancy by Reason, By Weeks of Gestation for Calendar Year 2014, AHCA, on file with the Health Quality Subcommittee Staff.

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> *Abortion Surveillance- United States, 2012*, Surveillance Summaries, Centers for Disease Control and Prevention, November 27, 2015 / 64(SS10);1-40 [http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6410a1.htm?s\\_cid=ss6410a1\\_e](http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6410a1.htm?s_cid=ss6410a1_e) (last visited on January 4, 2016).

<sup>70</sup> Id.



- Previous pregnancy history;
- Previous abortion history;
- Type of abortion procedure; and
- Name of attending physician and name of person completing report.<sup>71</sup>

The CDC uses this data to provide an annual Abortion Surveillance Report (ASR). The CDC notes that they receive data from some states, but not all.<sup>72</sup> Florida only reports the annual number of terminations that occur in the state,<sup>73</sup> so Florida data is absent from 19 of the 22 statistical charts in the ASR. For example, Florida does not collect information on the number of teenagers who receive abortions, or on the race or ethnicity of abortion patients.<sup>74</sup>

**TABLE 6. Reported abortions among adolescents, by known age and year — selected reporting areas,\* United States, 2003–2012**

Age (yrs)	Year										% change			
	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2003 to 2007	2008 to 2012	2011 to 2012	2003 to 2012
<b>% of abortions</b>														
<15	3.5	3.3	3.4	3.1	3.1	3.0	3.0	3.0	3.0	3.1	-11.4	3.3	3.3	-11.4
15	6.3	6.1	6.4	6.1	5.9	5.8	5.6	5.8	5.5	5.5	-6.3	-5.2	0.0	-12.7
16	11.6	11.6	11.4	11.6	11.3	10.8	10.6	10.3	10.0	9.8	-2.6	-9.3	-2.0	-15.5
17	17.3	16.9	17.1	17.3	17.4	17.1	16.9	16.3	16.1	15.6	0.6	-8.8	-3.1	-9.8
18	28.1	28.3	27.8	28.0	28.1	28.3	28.0	27.7	28.1	27.8	0.0	-1.8	-1.1	-1.1
19	33.2	33.8	33.9	34.0	34.1	34.9	35.9	36.8	37.2	38.2	2.7	9.5	2.7	15.1
<b>Abortion rate<sup>†</sup></b>														
<15	1.4	1.2	1.2	1.2	1.2	1.1	1.0	1.0	0.8	0.7	-14.3	-36.4	-12.5	-50.0
15	5.1	4.7	4.6	4.6	4.4	4.3	3.9	3.6	3.1	2.6	-13.7	-39.5	-16.1	-49.0
16	9.4	9.0	8.5	8.6	8.3	7.8	7.1	6.3	5.5	4.7	-11.7	-39.7	-14.5	-50.0
17	14.0	13.3	13.0	13.2	12.6	12.3	11.2	9.9	8.7	7.3	-10.0	-40.7	-16.1	-47.9
18	22.4	22.0	21.0	21.4	20.8	19.6	18.0	16.2	14.9	12.8	-7.1	-34.7	-14.1	-42.9
19	26.9	25.9	25.3	26.0	25.4	24.9	22.5	21.1	19.0	17.2	-5.6	-30.9	-9.5	-36.1
<b>Abortion ratio<sup>§</sup></b>														
<15	833	764	776	747	770	795	810	833	820	781	-7.6	-1.8	-4.8	-6.2
15	553	531	545	529	504	520	505	540	514	480	-8.9	-7.7	-6.6	-13.2
16	457	440	434	432	414	397	391	393	384	355	-9.4	-10.6	-7.6	-22.3
17	372	361	359	354	345	339	332	329	328	301	-7.3	-11.2	-8.2	-19.1
18	385	381	367	359	346	345	329	335	334	309	-10.1	-10.4	-7.5	-19.7
19	329	324	316	311	299	304	295	300	288	271	-9.1	-10.9	-5.9	-17.6
<b>Total (no.)</b>	<b>117,310</b>	<b>114,501</b>	<b>112,076</b>	<b>115,185</b>	<b>111,046</b>	<b>111,046</b>	<b>101,875</b>	<b>92,511</b>	<b>81,145</b>	<b>69,967</b>	—	—	—	—

\* Data from 40 reporting areas; by year, these areas represent 90%–97% of all abortions reported to CDC for adolescents during 2003–2012. Excludes 12 reporting areas (California, District of Columbia, Florida, Illinois, Louisiana, Maine, Maryland, New Hampshire, Rhode Island, Vermont, West Virginia, and Wyoming) that did not report, did not report age among adolescents by individual year, or did not meet reporting standards for ≥1 year.

### Abortion Referral or Counseling Agencies

Chapter 390, F.S., also regulates abortion referral or counseling agencies. An “abortion referral or counseling agency” is any person, group, or organization that provides advice or help to persons in obtaining abortions.<sup>75</sup> These entities may be funded publicly or privately and are prohibited from charging or accepting any referral fees from a physician, hospital, clinic, or other medical facility.<sup>76</sup> Abortion referral or counseling agencies are required to provide an individual with a full explanation of an abortion, including alternatives to this procedure.<sup>77</sup> If the individual is a minor, then this explanation must also be provided to the parent or guardian of the minor.<sup>78</sup>

<sup>71</sup> Centers for Disease Control, Handbook on the Reporting of Induced Termination of Pregnancy, [www.cdc.gov/nchs/data/misc/hb\\_itop.pdf](http://www.cdc.gov/nchs/data/misc/hb_itop.pdf) (last visited on January 4, 2016).

<sup>72</sup> *Abortion Surveillance- United States, 2012*, Surveillance Summaries, Centers for Disease Control and Prevention, November 27, 2015 / 64(SS10);1-40 [http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6410a1.htm?s\\_cid=ss6410a1\\_e](http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6410a1.htm?s_cid=ss6410a1_e) (last visited on January 4, 2016).

<sup>73</sup> Id.

<sup>74</sup> Id.

<sup>75</sup> Section 390.025, F.S.

<sup>76</sup> Id.

<sup>77</sup> Id.

<sup>78</sup> Id.

These requirements are not enforced by AHCA; rather, the law makes a violation of this section a first degree misdemeanor.

### Public Funding for Abortion Providers and Affiliated Entities

DOH contracts with some providers to perform services under the Title V Maternal and Child Health<sup>79</sup> and Title X Family Planning<sup>80</sup> programs and for other contracted services like disability determinations and screening for sexually transmitted diseases. Some of those contracted providers perform, or are affiliated with entities that perform, abortions. For example, in Fiscal Year 2014-2015, DOH expended \$139,128.60 on non-abortion contracted services provided by Planned Parenthood, and expects to spend \$162,834.00 in Fiscal Year 2015-2016.<sup>81</sup>

Similarly, the Florida Medicaid program pays for non-abortion services provided by entities that perform, or are affiliated with entities that perform, abortions. For example, from July 2014 to June 2015, the Medicaid fee-for-service program paid \$105,962.03 in claims to Planned Parenthood, and 10 plans in the Medicaid Managed Medical Assistance program contract with Planned Parenthood affiliates for non-abortion services.<sup>82</sup>

### **Effect of Proposed Changes**

CS/CS/HB 1411 amends abortion clinic licensure requirements, prohibits sale or donation of fetal remains, prohibits certain public funding, and creates a registration program for abortion referral and counseling agencies.

### Abortion Regulations

The bill amends the licensure requirements for abortion clinics in ch. 390, F.S. The bill requires AHCA to perform annual, rather than biennial, licensure inspections of all abortion clinics. In those inspections, AHCA must review at least 50 percent of the patient records generated since the last inspection. AHCA is also required to promptly investigate allegations that unlicensed abortions are being performed at a clinic. The bill requires, AHCA to submit an annual report to the President of the Senate and the Speaker of the House of Representatives which summarizes all regulatory actions taken by it against abortion clinics and referral or counseling agencies during the prior year, beginning February 1, 2017.

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<sup>79</sup> Title V of the Social Security Act authorizes federal funding for mothers and children through the Maternal and Child Services Program block grant. States apply for funding established by Congress, which is then allocated by a formula which considers the proportion of the number of low-income children in a particular state compared to the total number of low-income children in the United States. States must match every four dollars of federal Maternal and Child Services Block Grant money that they receive with at least three dollars of nonfederal money (state and/or local funds). The Maternal and Child Health program provides services for infants, children and pregnant women, particularly children with special health care needs, including: Comprehensive prenatal and postnatal care for women, especially low-income and at-risk pregnant women; health assessments and follow-up diagnostic and treatment services; preventive and child care services, and rehabilitative services for certain children; family-centered, community-based systems of coordinated care for children with special healthcare needs; and toll-free hotlines and assistance in applying for services to pregnant women with infants and children who are eligible for Medicaid. See, *MCH Block Grant*, Florida Department of Health, <http://www.floridahealth.gov/programs-and-services/womens-health/pregnancy/mch-block-grant.html> (last visited January 25, 2016); *Title V Maternal and Child Health Services Block Grant Program*, U.S. Department of Health and Human Services, <http://mchb.hrsa.gov/programs/titlevgrants/> (last visited January 25, 2016).

<sup>80</sup> The Title X Family Planning program is a federal program that provides low-income or uninsured individuals with comprehensive family planning and related preventive health services. Nearly 4,200 Title X-funded family planning centers serve about 4.5 million clients a year, including state and local health departments, community health centers, Planned Parenthood centers and private, nonprofit programs (hospital-based, school-based and faith-based). Family planning centers offer FDA-approved contraceptive methods and related counseling, breast and cervical cancer screening, pregnancy testing and counseling, and screening and treatment for sexually transmitted infections, including HIV testing. Title X does not fund abortion as a method of family planning. (Title 42 U.S. Code § 300a-6.) See, *Title X: The National Family Planning Program*, U.S. Department of Health and Human Services, <http://www.hhs.gov/opa/title-x-family-planning/> (last visited January 25, 2016).

<sup>81</sup> DOH email correspondence dated August 10, 2015, on file with Health Quality Subcommittee staff.

<sup>82</sup> AHCA email correspondence dated September 17, 2015, on file with Health Quality Subcommittee staff.

The bill requires all physicians who perform abortions in a clinic prior to the third after the first trimester to have admitting privileges with a hospital within a reasonable proximity of the clinic unless the clinic has a written transfer agreement with a hospital within a reasonable proximity to the clinic which includes the transfer of the patient's medical records held by both the clinic and the treating physician.

The bill defines "gestation" and the trimesters of pregnancy to delineate when the first, second and third trimesters begin and end. Under the bill, "gestation" is the development of a human embryo or fetus between fertilization and birth, and the trimesters are defined by 12-week increments counting from gestation.

The bill removes the abortion clinic statutory license fee cap of not less than \$70 and not more than \$500 and requires AHCA to establish fees which may not be more than required to pay for the costs incurred by AHCA in licensing and regulating abortion clinics.

#### *Abortion Data Collection and Reporting*

In addition to current reporting requirements, the bill requires all abortion clinics, by January 1, 2017, to report to AHCA information consistent with the United States Standard Report of Induced Termination of Pregnancy adopted by the CDC. AHCA must submit this data to the CDC upon request.

#### *Fetal Remains*

Chapter 390, F.S., currently contains two methods, each with different standards and levels of criminal penalties, for the disposal of fetal remains. The bill eliminates this potential conflict by amending s. 390.0111, F.S., to require disposal of fetal remains in a sanitary manner pursuant to s. 381.0098, F.S., rules adopted thereunder and rules adopted by AHCA under this provision. Violations of this requirement are first degree misdemeanors.

The bill amends s. 873.025, F.S., to prohibit selling, purchasing, donating or transferring fetal remains obtained through an abortion, as well as advertising or offering to do any of those acts. These prohibitions do not apply to transfers that comply with s. 390.0111, F.S. (above).

#### Public Funding

The bill prohibits state agencies, local governmental entities, and Medicaid managed care plans from expending funds for the benefit of, pay funds to, or initiating or renewing a contract with an organization that owns, operates, or is affiliated<sup>83</sup> with a licensed abortion clinic. The bill provides exceptions to this prohibition for any of the following circumstances:

- All abortions performed by the organization are due to rape or incest or are medically necessary to preserve the life of the pregnant woman;
- The public funds are expended to fulfill the terms of a contract entered into before July 1, 2016; and
- The funds are expended as reimbursement for Medicaid services provided on a fee-for-service basis.

State agencies and local governmental entities, including DOH and Medicaid managed care plans, may contract with other providers and organizations to perform services.

#### Abortion Referral or Counseling Agencies

The bill requires abortion referral or counseling agencies to register with AHCA. AHCA will set a registration fee which may not exceed the cost to administer the registration program. Facilities licensed pursuant to chapters 390, 395, 400 and 408, F.S., are exempt from registering, as are health

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<sup>83</sup> For the Florida Medicaid program, s. 409.901, F.S., defines "affiliated" as "any person who directly or indirectly manages, controls, or oversees the operation of a corporation or other business entity that is a Medicaid provider, regardless of whether such person is a partner, shareholder, owner, officer, director, agent, or employee of the entity".

care clinics and health care practitioners defined in s. 456.001, F.S., if they refer less than 6 patients each month. The bill allows AHCA to assess the costs of successful investigations and prosecutions of violations of the registration requirement, which costs do not include attorney's fees.

#### B. SECTION DIRECTORY:

**Section 1:** Amending s. 390.011, F.S., relating to definitions.

**Section 2:** Amending s. 390.0111, F.S., relating to termination of pregnancies.

**Section 3:** Amending s. 390.0112, F.S., relating to termination of pregnancies and reporting.

**Section 4:** Amending s. 390.012, F.S., relating to powers of agency, rules and disposal of fetal remains.

**Section 5:** Amending s. 390.014, F.S., relating to licenses fees.

**Section 6:** Amending s. 390.025, F.S., relating to abortion referral or counseling agencies and penalties.

**Section 7:** Amending s. 873.05, F.S., relating to advertising or sale of human embryos prohibited.

**Section 8:** Provides an appropriation.

**Section 9:** Provides an effective date of July 1, 2016, except as otherwise expressly provided.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

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

##### 1. Revenues:

The bill amends s. 390.014 (3), F.S. giving the agency authority to establish a fee not more than required to pay for the costs incurred by the agency in administering the program. AHCA currently collects \$545 in licensure fees biennially for each clinic. AHCA reports that as of February 1, 2016 there will be 62 licensed abortion clinics. Current revenues received annually are estimated to be \$16,895. If the Agency established fees to fully fund costs incurred with program administration, the Agency would increase the licensure fee by \$1,933.90 for recurring costs and \$5,974.61 to cover the nonrecurring cost. Licensure fees would be \$8,453.51 in year one and \$2,478.90 in year two and beyond. (See Fiscal Comments)

##### 2. Expenditures:

The bill requires AHCA to perform annual, rather than biennial, licensure inspections of all abortion clinics, including a review of at least 50 percent of the patient records generated since the last inspection. AHCA anticipates this will cause an increase in surveyor workload requiring an additional 0.50 full-time equivalent nurse surveyor position. This position will require \$53,651 in recurring funds, \$3,569 in nonrecurring funds, and 39,230 in salary rate.

The bill requires AHCA to collect and report information consistent with the United States Standard Report of Induced Termination of Pregnancy (ITOP) adopted by the CDC. Data systems changes will be required to AHCA's ITOP reporting system to be consistent with the bills reporting requirements. AHCA estimates programming and developer costs of \$187,944 for the first year and \$6,300 in recurring costs thereafter. (See Fiscal Comments)

The bill provides AHCA an appropriation of \$59,951 in recurring and \$185,213 in nonrecurring funding from the Health Care Trust Fund to implement the provisions of the bill. The bill also provides 0.5 FTE for additional inspections and records reviews as required in the bill.

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

##### 1. Revenues:

None.

##### 2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Abortion clinics may incur an indeterminate, negative fiscal impact associated with compliance with the bill's data reporting requirements.

The bill prohibits public funding for an organization that owns, operates, or is affiliated with a licensed abortion clinic. This applies to funding provided through local governmental entities, state agencies and managed care plans. This may result in an indeterminate, negative fiscal impact for clinics and associated business organizations.

Abortion referral and counseling agencies will incur a negative fiscal impact related to the bill's registration requirement.

D. FISCAL COMMENTS:

<b>Revenues</b>				
<b>Annual Clinic Licensure Renewals</b>	<b>License Fee</b>	<b>Year 1</b>	<b>Year 2</b>	<b>Note</b>
31	\$545.00	\$ 16,895.00	\$ 16,895.00	Current Regulatory Fee
31	\$1,730.68	\$ 53,651.08	\$ 53,651.08	Additional Personnel
31	\$115.12	\$ 3,568.72		Nonrecurring personnel costs
31	\$203.23	\$ 6,300.00	\$ 6,300.00	Recurring System Maintenance
31	\$5,859.48	\$ 181,644.00		One time system upgrades and nonrecurring employee costs.
<b>Total</b>		<b>\$ 262,058.80</b>	<b>\$ 76,846.08</b>	
<b>Annual Licensure Fee</b>		<b>\$ 8,453.51</b>	<b>\$ 2,478.91</b>	
<b>Expenditures</b>				
<b>Annual Licensure Expenditures</b>	<b>FTE</b>	<b>Year One</b>	<b>Year Two</b>	<b>Note</b>
Current Licensure Administration Costs		\$ 16,895.00	\$ 16,895.00	Current Costs
Additional 0.5 FTE-Recurring	0.5	\$ 53,651.00	\$ 53,651.00	Recurring FTE costs
Additional 0.5 FTE nonrecurring	0.5	\$ 3,569.00		Nonrecurring FTE costs
System Enhancements		\$ 6,300.00	\$ 6,300.00	Recurring System Maintenance
System Enhancements		\$ 181,644.00		Nonrecurring System Modifications
<b>Total</b>		<b>\$ 262,059.00</b>	<b>\$ 76,846.00</b>	
<b>Annual Licensure Costs</b>		<b>\$ 8,453.52</b>	<b>\$ 2,478.90</b>	

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties and municipalities have to raise revenue in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The bill requires clinics which perform only first trimester abortions to have a written patient transfer agreement with a hospital within a reasonable proximity, or the physician who performs the abortion must have admitting privileges at such a hospital. Florida courts have limited regulation of first trimester abortions to certain minimal requirements, and invalidated prior regulations which exceeded these.<sup>84</sup>

<sup>84</sup> Florida Women's Medical Clinic, Inc. v. Smith, 536 F.Supp. 1048 (S.D. Fla. 1982).  
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Some federal courts have found that physician privilege requirements for abortion providers violate the U.S. Constitution.<sup>85</sup> Other courts have upheld these requirements, finding they do not violate the constitution.<sup>86</sup> The issue is currently before the U.S. Supreme Court.<sup>87</sup>

B. RULE-MAKING AUTHORITY:

AHCA currently has sufficient rule-making authority to implement the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 2, 2016, the Health Care Appropriations Subcommittee adopted one amendment. The amendment made the following change:

- Provides an appropriation of \$59,951 in recurring and \$185,213 in nonrecurring funding from the Health Care Trust Fund and 0.5 FTE to implement the provisions of the bill.

On February 9, 2016, the Health & Human Services Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment requires all physicians who perform abortions in a clinic after the first trimester to have admitting privileges with a hospital within a reasonable proximity of the clinic unless the clinic has a written transfer agreement with a hospital within a reasonable proximity to the clinic which includes the transfer of the patient's medical records held by both the clinic and the treating physician.

The analysis is drafted to the committee substitute as passed by the Health & Human Services Committee.

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<sup>85</sup> *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015); *Planned Parenthood Southeast, Inc. v. Strange*, 33 F.Supp.3d 1330 (M.D. Ala. 2014) (non-final order); *June Medical Services, LLC v. Caldwell*, 2014 WL 4296679 (M.D. La. 2014) (non-final order); *Jackson Women's Health Organization v. Currier*, 760 F.3d 448 (5th Cir. 2014) (petition for certiorari currently pending before the United States Supreme Court); *Burns v. Cline*, District Court of Oklahoma County, State of Oklahoma, case number 2014-cv-1896; 339 P.3d 887 (OK 2014)(order remanding to trial court for further proceedings).

<sup>86</sup> *Women's Health Center of West County, Inc. v. Webster*, 871 F.2d 1377 (8th Cir. 1989); *Greenville Women's Clinic v. Comm'r, S.C. Dept. of Health and Environmental Control*, 317 F.3d 357 (4th Cir.) 2002; cert. den. 538 U.S. 1008 (U.S. 2003);

<sup>87</sup> *Whole Woman's Health v. Cole*, 790 F.3d 563 (5<sup>th</sup> Cir. 2015); cert. granted 136 S.Ct. 499 (U.S. 2015).