

HB 625-FN - AS INTRODUCED

2021 SESSION

21-0541

05/04

HOUSE BILL **625-FN**

AN ACT relative to the protection of fetal life.

SPONSORS: Rep. Folsom, Graf. 11; Rep. Stapleton, Sull. 5; Rep. Prudhomme-O'Brien, Rock. 6;
Rep. Mooney, Hills. 21; Rep. Gould, Hills. 7; Rep. Notter, Hills. 21; Sen. Birdsell,
Dist 19; Sen. Ward, Dist 8

COMMITTEE: Judiciary

ANALYSIS

This bill prohibits a health care provider from performing an abortion if the gestational age of the fetus is at least 24 weeks unless there is a medical emergency.

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears ~~[in brackets and struckthrough]~~
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty One

AN ACT relative to the protection of fetal life.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 Title. This act may be known and cited as the “Fetal Life Protection Act.”

2 2 Legislative Findings and Purpose.

3 I. The general court finds that:

4 (a) The prohibition of late-term abortion is supported by history and the common law.
5 The Hippocratic Oath as Literary Text: A Dialogue Between Law and Medicine, 2 Yale J. Health
6 Policy L. & Ethics 299, 308 (discussing the Hippocratic Oath’s prohibition on abortion); Digest of
7 Justinian: Digest 4.48.8.8 (classifying abortion as a form of homicide); 2 Bracton on Laws and
8 Customs of England 341 (S. Thorne trans. 1968) (classifying abortion as a form of homicide
9 “especially if [the fetus] is quickened”); 1 W. Blackstone, Commentaries on the Law of England 125
10 (1773) (stating that the common law has historically prohibited abortion “as soon as an infant is able
11 to stir in the mother’s womb.”). The New Hampshire supreme court has observed that “The common
12 law has always been most solicitous for the welfare of the fetus in connection with its inheritance
13 rights as well as protecting it under the criminal law.” *Poliquin v. Donald*, 101 N.H. 104, 107 (1957).

14 (b) The United States Supreme Court, in holding that the United States Constitution
15 protects abortion, also stated that “The pregnant woman cannot be isolated in her privacy. She
16 carries an embryo and, later, a fetus... The situation therefore is inherently different from marital
17 intimacy [etc.]... it is reasonable and appropriate for a State to decide that at some point in time
18 another interest, that of... [fetal] life, becomes significantly involved. The woman's privacy is no
19 longer sole and any right of privacy she possesses must be measured accordingly.” *Roe v. Wade*, 410
20 U.S. 113, 159 (1973).

21 (c) The *Roe* Court specifically rejected the view that “the woman's right is absolute and
22 that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever
23 reason she alone chooses.” *Roe v. Wade*, 410 U.S. 113, 153 (1973).

24 (d) The *Roe* Court affirmed that “For the stage subsequent to viability, the State in
25 promoting its interest in the potentiality of human life may, if it chooses, regulate, and even
26 proscribe, abortion except where it is necessary, in appropriate medical judgment, for the
27 preservation of the life or health of the mother.” *Roe v. Wade*, 410 U.S. 113, 164-165 (1973).

28 (e) The United States Supreme Court, in rejecting the trimester framework of *Roe*,
29 reaffirmed “the State's power to restrict abortions after fetal viability, if the law contains exceptions
30 for pregnancies which endanger the woman's life or health” and stated that “the State has legitimate

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1 interests from the outset of the pregnancy in protecting... the life of the fetus that may become a
2 child.” *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

3 (f) Already in 1973, the Supreme Court had observed that “Viability is usually placed at
4 about seven months (28 weeks) but may occur earlier, even at 24 weeks.” *Roe v. Wade*, 410 U.S. 113,
5 160 (1973). Since that time, however, there has been “dramatic improvement in survival for infants
6 born at the border of viability (≤ 24 weeks).” Barbara Luke and Morton B. Brown, The changing risk
7 of infant mortality by gestation, plurality, and race: 1989-1991 versus 1999-2001, *Pediatrics*, Dec.
8 2006, 118 (6): 2488-2497.

9 (g) The Supreme Court has observed that “In some broad sense it might be said that a
10 woman who fails to act before viability has consented to the State's intervention on behalf of the
11 developing child.” *Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992).

12 (h) New Hampshire has historically seen the fetus as a separate entity from the mother
13 with distinct legal interests. *Bennett v. Hymers*, 101 N.H. 483, 485 (1958) (“We adopt the opinion
14 that the fetus from the time of conception becomes a separate organism and remains so throughout
15 its life.”); N.H. Rev. State. Ann § 630:1-a: IV (stating that “the meaning of ‘another’ shall include a
16 fetus” under specified criminal laws).

17 (i) “[R]espect for the dignity of human life” is a legitimate state purpose. *Gonzales v.*
18 *Carhart*, 550 U.S. 124, 157 (2007). The United States Supreme Court has said that “Respect for
19 human life finds an ultimate expression in the bond of love the mother has for her child... While we
20 find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women
21 come to regret their choice to abort the infant life they once created and sustained.” *Id.* at 159.

22 (j) In addition, there is substantial medical evidence that a fetus by at least 20 weeks’
23 gestation has the capacity to feel pain during an abortion. K. Anand and P. R. Hickey, Pain and its
24 effects in the human neonate and fetus, *N.E.J.M.*, 1987, 317:1321.

25 II. Based on the findings in paragraph I, the general court’s purposes in promulgating this
26 act are:

27 (a) Based on the state’s interest in protecting fetal life, to prohibit abortions at or after
28 24 weeks gestation, except in cases of a medical emergency.

29 (b) To define “medical emergency” to encompass “significant health risks,” namely those
30 circumstances in which a pregnant woman’s life or a major bodily function is threatened. *Gonzales v.*
31 *Carhart*, 550 U.S. 124, 161 (2007).

32 2 New Subdivision; Fetal Life Protection Act. Amend RSA 329 by inserting after section 42 the
33 following new subdivision:

Fetal Life Protection Act

34 329:43 Definitions. In this subdivision:

35 I. “Abortion” means the act of using or prescribing any instrument, medicine, drug, or any
36 other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy
37

1 of a woman with knowledge that the termination by those means will with reasonable likelihood
2 cause the death of the fetus. Such use, prescription, or means is not an abortion if done with the
3 intent to:

- 4 (a) Save the life or preserve the health of the fetus;
- 5 (b) Remove a dead fetus caused by spontaneous abortion; or
- 6 (c) Remove an ectopic pregnancy.

7 II. "Attempt to perform" means an act or omission of a statutorily required act that, under
8 the circumstances as the actor believes them to be, constitutes a substantial step in a course of
9 conduct planned to culminate in the performance or inducement of an abortion.

10 III. "Conception" means the fusion of a human spermatozoon with a human ovum.

11 IV. "Gestational age" means the time that has elapsed since the first day of the woman's last
12 menstrual period.

13 V. "Major bodily function" includes, but is not limited to, functions of the immune system,
14 normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory,
15 endocrine, and reproductive functions.

16 VI. "Medical facility" means any public or private hospital, clinic, center, medical school,
17 medical training institution, health care facility, physician's office, infirmary, dispensary,
18 ambulatory surgical treatment center, or other institution or location wherein medical care is
19 provided to any person.

20 VII. "Health care provider" means any person who provides health care services. The term
21 includes but is not limited to medical doctors, doctors of osteopathy, nurses, or any employee of a
22 medical facility.

23 VIII. "Pregnant" or "pregnancy" means the female reproductive condition of having one or
24 more developing embryos or fetuses implanted in the uterus or elsewhere in the female body.

25 IX. "Probable gestational age" means what, in reasonable medical judgment, will with
26 reasonable probability be the gestational age of the fetus at the time the abortion is considered,
27 performed, or attempted.

28 X. "Reasonable medical judgment" means that medical judgment that would be made by a
29 reasonably prudent physician in the community, knowledgeable about the case and the treatment
30 possibilities with respect to the medical conditions involved.

31 XI. "Fetus" means an unborn offspring, from the embryo stage which is the end of the
32 twentieth week after conception or, in the case of in vitro fertilization, the end of the twentieth week
33 after implantation, until birth.

34 329:44 Prohibition.

35 I. Except in the case of a medical emergency as specifically defined in paragraph III, no
36 abortion shall be performed, induced, or attempted by any health care provider unless a physician
37 has first made a determination of the probable gestational age of the fetus. In making such a

1 determination, the physician shall make such inquiries of the pregnant woman and perform or cause
2 to be performed all such medical examinations, imaging studies, and tests as a reasonably prudent
3 physician in the community, knowledgeable about the medical facts and conditions of both the
4 woman and the fetus involved, would consider necessary to perform and consider in making an
5 accurate diagnosis with respect to gestational age, provided, however, that the physician shall
6 conduct an obstetric ultrasound examination of the patient for the purpose of making the
7 determination.

8 II. Except in a medical emergency as specifically defined in paragraph III, no health care
9 provider shall knowingly perform, induce, or attempt to perform an abortion upon a pregnant
10 woman when the probable gestational age of her fetus has been determined to be at least 24 weeks
11 or in the absence of a determination by a physician pursuant to paragraph I as to the fetus' probable
12 gestational age.

13 III. For the purposes of this subdivision only, "medical emergency" means a condition in
14 which an abortion is necessary to preserve the life of the pregnant woman whose life is endangered
15 by a physical disorder, physical illness, or physical injury, including a life-endangering physical
16 condition caused by or arising from the pregnancy itself, or when continuation of the pregnancy will
17 create a serious risk of substantial and irreversible impairment of a major bodily function, as defined
18 in RSA 329:43, V, of the pregnant woman.

19 329:45 Reporting.

20 I. Any health care provider who performs an abortion under this subdivision shall report, in
21 writing, to the medical facility in which the abortion is performed the reason for the determination
22 that a medical emergency existed. The health care provider's written report shall be included in a
23 written report from the medical facility to the department of health and human services. If the
24 abortion is not performed in a medical facility, the health care provider shall report, in writing, the
25 reason for the determination that a medical emergency existed to the department of health and
26 human services as part of the written report made by the health care provider to the department.
27 The health care provider and the medical facility shall retain a copy of the written reports required
28 under this section for not less than 5 years.

29 329:46 Criminal Penalties. Any health care provider who intentionally or knowingly performs
30 or induces an abortion in violation of this subdivision shall be guilty of a class B felony and shall be
31 fined not less than \$10,000 nor more than \$100,000, or both.

32 329:47 Civil Remedies.

33 I. The woman, the father of the fetus if married to the mother at the time she receives an
34 abortion in violation of this subdivision, and/or, if the mother has not attained the age of 18 years at
35 the time of the abortion, the maternal grandparents of the fetus may in a civil action obtain
36 appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or, if brought
37 by the maternal grandparents, the maternal grandparents consented to the abortion.

1 II. Such relief shall include monetary damages for all psychological and physical injuries
2 caused by the violation of this subdivision.

3 329:48 Review by New Hampshire Board of Medicine.

4 I. A defendant health care provider accused of violating this subdivision may seek a hearing
5 before the board of medicine as to whether the health care provider's conduct was necessary to save
6 the life of the mother whose life was endangered by a physical disorder, physical illness, or physical
7 injury, including a life-endangering physical condition caused by or arising from the pregnancy itself;
8 and/or as to whether the continuation of the pregnancy would have created a serious risk of
9 substantial and irreversible impairment of a major bodily function, as defined in RSA 329:43, V, of
10 the pregnant woman.

11 II. The findings on this issue are admissible at the criminal and civil trials of the defendant.
12 Upon a motion of the defendant, the court shall delay the beginning of the trial for not more than 30
13 days to permit such a hearing to take place.

14 329:49 Construction. Nothing in this subdivision shall be construed as creating or recognizing a
15 right to abortion.

16 329:50 Severability. If any provision of this subdivision or the application thereof to any person
17 or circumstances is held invalid, such invalidity shall not affect other provisions or applications of
18 the subdivision which can be given effect without the invalid provision or application, and to this end
19 the provisions of this subdivision are declared to be severable.

20 3 Effective Date. This act shall take effect 60 days after its passage.

HB 625-FN- FISCAL NOTE
AS INTRODUCED

AN ACT relative to the protection of fetal life.

FISCAL IMPACT: ☒ State ☐ County ☐ Local ☐ None

STATE:	Estimated Increase / (Decrease)			
	FY 2021	FY 2022	FY 2023	FY 2024
Appropriation	\$0	\$0	\$0	\$0
Revenue	\$0	\$0	\$0	\$0
Expenditures	\$0	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase
Funding Source:	<input checked="" type="checkbox"/> General	<input type="checkbox"/> Education	<input type="checkbox"/> Highway	<input type="checkbox"/> Other

COUNTY:				
Revenue	\$0	\$0	\$0	\$0
Expenditures	\$0	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase

METHODOLOGY:

This bill prohibits a health care provider from performing an abortion if the gestational age of the fetus is at least 24 weeks unless there is a medical emergency. This bill contains a penalty that may have an impact on the New Hampshire judicial and correctional systems. There is no method to determine how many charges would be brought as a result of the changes contained in this bill to determine the fiscal impact on expenditures. However, the entities impacted have provided the potential costs associated with these penalties below.

Judicial Branch	FY 2021	FY 2022
Routine Criminal Felony Case	\$494	\$494
Appeals	Varies	Varies
It should be noted that average case cost estimates for FY 2021 and FY 2022 are based on data that is more than ten years old and does not reflect changes to the courts over that same period of time or the impact these changes may have on processing the various case types.		
Judicial Council		
Public Defender Program	Has contract with State to provide services.	Has contract with State to provide services.
Contract Attorney – Felony	\$825/Case	\$825/Case

Assigned Counsel – Felony	\$60/Hour up to \$4,100	\$60/Hour up to \$4,100
It should be noted that a person needs to be found indigent and have the potential of being incarcerated to be eligible for indigent defense services. The majority of indigent cases (approximately 85%) are handled by the public defender program, with the remaining cases going to contract attorneys (14%) or assigned counsel (1%).		
Department of Corrections		
FY 2020 Average Cost of Incarcerating an Individual	\$47,691	\$47,691
FY 2020 Annual Marginal Cost of a General Population Inmate	\$6,407	\$6,407
FY 2020 Average Cost of Supervising an Individual on Parole/Probation	\$584	\$584
NH Association of Counties		
County Prosecution Costs	Indeterminable	Indeterminable
Estimated Average Daily Cost of Incarcerating an Individual	\$105 to \$120	\$105 to \$120

The Department of Justice indicates the proposed legislation does not appear to impose professional sanctions against health care providers who may violate the law. It is unknown to the Department how many abortions are currently carried out for the purpose outlined in the proposed legislation. The Department of Justice, however, would not necessarily be involved in the criminal prosecution of such offenses, the majority of which would instead, be handled by the county attorneys. Appeals from any convictions from any such offenses would be handled by the Criminal Justice Bureau and likely could be done within the current budget. Because the legislation does not appear to create professional sanctions for health care providers, the Department's Administrative Prosecutions Unit would not be involved in bringing such claims before the Board of Medicine or other professional licensing boards. Thus, the Department does not anticipate an increase in workload or costs for the Administrative Prosecutions Unit.

The Judicial Branch indicates this bill creates a criminal penalty and provides for disciplinary action before the Board of Medicine which would be subject to appeal to the Supreme Court. While it is likely this would result in additional criminal actions filed in superior court, appeals of criminal verdicts to the Supreme Court, and appeals of disciplinary action by the Board of Medicine to the Supreme Court, it is not possible to calculate how many new cases would be filed under the new provision or the impact on the Judicial Branch's resources. In addition, the new criminal penalties will require updates to the uniform charge table, notification and training of judges and staff, updating the Judicial Branch's Odyssey database, modifying or creating new forms, and/or making any changes to the e-filing system. Those costs will be collectively determined based on all legislation that is passed into law during the session.

AGENCIES CONTACTED:

Judicial Branch, Judicial Council, Departments of Justice and Corrections, and New Hampshire
Association of Counties