

**HB 1679-FN – AS AMENDED BY THE HOUSE**

14Mar2012... 0985h

2012 SESSION

12-2356

01/09

**HOUSE BILL *1679-FN***

AN ACT relative to partial-birth abortion.

SPONSORS: Rep. Terrio, Hills 14

COMMITTEE: Judiciary

**AMENDED ANALYSIS**

This bill establishes the partial-birth abortion ban act.

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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Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

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STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Twelve*

AN ACT relative to partial-birth abortion.

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

1 Findings.

I. The general court of the state of New Hampshire finds that:

- (a) Partial-birth abortion is a gruesome and inhumane procedure that is never medically necessary and, as such, should be prohibited.
- (b) In 2003, the 108th United States Congress passed the “Partial-Birth Abortion Ban Act of 2003” (18 U.S.C. section 1531) and President George W. Bush signed it into law.
- (c) Later, on April 18, 2007, the Supreme Court of the United States upheld the “Partial-Birth Abortion Ban Act of 2003” (“the federal ban”) in *Gonzales v. Carhart*, 550 U.S. 124 (2007), specifically ruling that a ban on partial-birth abortion need not include a maternal “health” exception to be constitutional.
- (d) This act’s language stems from and uses as its primary influence the language of the federal ban as upheld in *Gonzales v. Carhart*.
- (e) This act – a state ban on partial-birth abortion – is needed to supplement the federal ban. Importantly, the federal ban was narrowly tailored to reach only those partial-birth abortion procedures that implicate Congress’ power to regulate interstate or foreign commerce. U.S. CONST. art. 1, section 8, cl. 3. Without this act, partial-birth abortions performed, but not affecting these narrow categories of commerce, are not prohibited under the federal ban.
- (f) Partial-birth abortion poses serious risks to women’s long-term health,

- (g) There is a substantial evidentiary record upon which the general court of the state of New Hampshire has based its conclusion that a state ban on partial-birth abortion is not constitutionally required to contain a maternal “health” exception.
- (h) Moreover, the medical evidence clearly supports the informed judgment of the state of New Hampshire that a partial-birth abortion is never medically necessary to preserve a woman’s health and instead poses serious health risks, lying outside the standard of medical care.
- (i) Specifically, partial-birth abortion poses serious risks including, but not limited to: an increased risk of cervical incompetence, a result of cervical dilation that makes it difficult or impossible for a woman to successfully carry a subsequent pregnancy to term; an increased risk of uterine rupture, abruption, amniotic fluid embolus, and trauma to the uterus as a result of converting the child to a footling breech position — a procedure which, according to a leading obstetrics textbook, “there are very few, if any, indications for other than for delivery of a second twin”; and a risk of lacerations and secondary hemorrhaging as a result of the physician blindly forcing a sharp instrument into the base of the unborn child’s skull while he or she is lodged in the birth canal — an act which could result in severe bleeding and subsequent shock.
- (j) There is no credible medical evidence that partial-birth abortions are safer than other abortion procedures. No controlled studies of partial-birth abortion have been conducted nor have any comparative studies been conducted to demonstrate its safety and efficacy compared to other abortion methods. Furthermore, there have been no articles published in peer-reviewed journals that establish that partial-birth abortions are superior in any way to established abortion procedures.
- (k) In light of this overwhelming evidence, the state of New Hampshire has a compelling interest in prohibiting partial-birth abortion. Both *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), recognized a governmental interest in protecting the life of a child during the birth process. This interest is specifically implicated during a partial-birth abortion because labor is induced and the birth process is begun before an abortion is attempted or the child is actually aborted.
- (l) In fact, partial-birth abortion kills a child who is mere inches away from birth and being considered a “person” under *Roe*. Thus, the state clearly has a heightened interest in protecting the life of the partially-born child.
- (m) The public’s perception of the appropriate role of a physician during a child’s birth is undermined by aborting a child in the manner that purposefully seeks to kill the child inches from birth.

(n) Partial-birth abortion is disturbingly similar to the killing of a newborn infant and blurs the legal and moral lines between infanticide and abortion. This act reinforces that line at birth — just as the Supreme Court established in *Roe v. Wade* — while also preserving the integrity of the medical profession and promoting respect for human life.

(o) The vast majority of infants killed during partial-birth abortions are alive up through the very end of the procedure. Medical science has established that an unborn infant can feel pain when subjected to painful stimuli like that inflicted during a partial-birth abortion procedure. Moreover, fetal pain experts believe that an unborn child's perception of pain can be even more intense than that of newborn infants and older children subjected to the same stimuli.

II. For these reasons, the general court's purposes in establishing this act are to conclusively establish that partial-birth abortion is never medically indicated to preserve the health of the mother and instead poses significant health risks to her; to clearly define the line between abortion and infanticide; and to safeguard the role of a physician during childbirth.

2 New Subdivision; Partial-Birth Abortion Ban Act. Amend RSA 329 by inserting after section 31 the following new subdivision:

#### Partial-Birth Abortion Ban Act

329:32 Title. This act may be known and cited as the “Partial-Birth Abortion Ban Act.”

329:33 Definitions. In this subdivision:

I. “Department” means the department of health and human services.

II. “Medical facility” means any licensed public or private hospital, clinic, center, medical school, medical training institution, health care facility, physician’s office, infirmary, dispensary, ambulatory surgical treatment center, or other institution or location wherein medical care is provided to any person.

III. “Partial-birth abortion” means an abortion in which the person performing the abortion:

(a) Deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

(b) Performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.

IV. "Physician" means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery licensed by the state in which the doctor performs such activity, or any other individual legally authorized by the state to perform abortions; provided, however, that any individual who is not a physician or not otherwise legally authorized by the state to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this subdivision.

329:34 Prohibition; Limitations.

I. A person shall not knowingly perform or attempt to perform a partial-birth abortion.

II. No person shall perform or induce a partial-birth abortion on a viable fetus unless such person is a physician and has a documented referral from another physician not legally or financially affiliated with the physician performing or inducing the abortion and both physicians determine that the life of the mother is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

329:35 Reporting.

I. If a physician determines in accordance with the provisions of RSA 329:34, II that a partial-birth abortion is necessary and performs a partial-birth abortion on the woman, the physician shall report such determination and the reasons for such determination in writing to the medical facility in which the abortion is performed for inclusion in the report of the medical facility to the department; or if the abortion is not performed in a medical facility, the physician shall report the reasons for such determination in writing to the department as part of the written report made by the physician to the department. The physician shall retain a copy of the written reports required under this section for not less than 5 years.

II. Failure to report under this section shall not subject the physician to criminal or civil penalties under RSA 329:36 and 329:37.

III. Paragraph II shall not preclude sanctions, disciplinary action, or any other appropriate action by the board.

329:36 Criminal Penalties.

I. In addition to other penalties under this chapter, any person who intentionally or knowingly violates this subdivision shall be guilty of a class B felony.

II. Any physician who intentionally or knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined not less than \$10,000 nor more than \$100,000 under this subdivision, or be imprisoned not less than one year nor more than 10 years, or both.

329:37 Civil Penalties.

I. The father, if married to the mother at the time she receives a partial-birth abortion procedure, and, if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents of the fetus may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.

II. Such relief shall include:

- (a) Money damages for all injuries, psychological and physical, occasioned by the violation of this subdivision; and
- (b) Statutory damages equal to 3 times the cost of the partial-birth abortion.

329:38 Review by Board.

I. A physician-defendant accused of an offense under this subdivision may seek a hearing before the board as to whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

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

329:39 Penalties for Ambulatory Health Care Facilities.

I. An ambulatory health care facility licensed pursuant to RSA 151 in which the partial-birth abortion is performed in violation of this subdivision shall be subject to immediate revocation of its license by the department.

II. An ambulatory health care facility licensed pursuant to RSA 151 in which the partial-birth abortion is performed in violation of this subdivision shall lose all state funding for 3 years and shall be required to reimburse the state for funds from the fiscal year in which the partial-birth abortion was performed.

329:40 Prosecutorial Exclusion. A woman upon whom a partial-birth abortion is performed may not be prosecuted under this subdivision for a conspiracy to violate RSA 329:34.

329:41 Construction.

I. Nothing in this subdivision shall be construed as creating or recognizing a right to abortion.

II. It is not the intention of this subdivision to make lawful an abortion that is currently unlawful.

329:42 Severability. If any provision of this subdivision or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the subdivision which can be given effect without the invalid provision or application, and to this end the provisions of this subdivision are declared to be severable.

329:43 Intervenors. The general court, by joint resolution, may appoint one or more of its members, who sponsored or cosponsored this in his or her official capacity, to intervene as a matter of right in any case in which the constitutionality of this law is challenged.

3 Effective Date. This act shall take effect January 1, 2013.

LBAO

12-2356

Revised 01/09/12

## **HB 1679 FISCAL NOTE**

AN ACT relative to partial-birth abortion.

### **FISCAL IMPACT:**

The Judicial Branch, Judicial Council, New Hampshire Association of Counties, and the Departments of Justice and Corrections state this bill will increase state and county expenditures, and state revenue by indeterminable amounts in FY 2013 and each year thereafter. There will be no fiscal impact on local expenditures, or county and local revenue.

### **METHODOLOGY:**

The Judicial Branch states this bill provides a felony level criminal offense for performing a partial-birth or third trimester abortion and provides a civil action for damages against a physician for performing an abortion in violation of this act. In damage actions, the plaintiffs are entitled to treble damages for the cost of the partial-birth abortion in addition to actual damages. The Branch has no information on which to estimate how many felonies will be prosecuted because of this bill, but it does have information on the average cost of processing the cases in the trial court. The cost to the Branch of an average routine criminal case in superior court is estimated to be \$389.84 in FY 2013 and \$401.48 in FY 2014. These amounts do not include the cost of any appeals that may be taken following trial. The civil action for damages would be classified as a complex civil case. The Branch has no information on how many civil cases may be brought, but estimates the cost of an average complex civil case in superior court will be \$633.82 in FY 2013 and \$651.29 in FY 2014, not including the cost of possible appeals. All costs are estimated based on case weight information from the last needs assessment completed in 2005.

The Judicial Council states this bill may result in an indeterminable increase in state general fund expenditures. The Council states if an individual is found to be indigent, the flat fee of \$756.25 per felony is charged by a public defender or contract attorney. If an assigned counsel attorney is used the fee is \$60 per hour with a cap of \$4,100 for a felony charge. The Council also states additional costs could be incurred if an appeal is filed. The public

defender, contract attorney and assigned counsel rates for Supreme Court appeals is capped at \$2,000 per case, with many assigned counsel attorneys seeking permission to exceed the fee cap. Requests to exceed the fee cap are seldom granted. Finally, expenditures would increase if services other than counsel are requested and approved by the court during the defense of a case or during an appeal.

The New Hampshire Association of Counties states to the extent more individuals are charged, convicted, and sentenced to incarceration in a county correctional facility, the counties may have increased expenditures. The Association is unable to determine the number of individuals who might be charged, convicted or incarcerated as a result of this bill to determine an exact fiscal impact. The average annual cost to incarcerate an individual in a county correctional facility is approximately \$35,000. There is no impact on county revenue.

The Department of Justice states the criminal offense created by this bill would typically be prosecuted by a county attorney's office. There would be some fiscal impact to the Department if an appeal is taken to the Supreme Court. The Department states a violation of the bill could also trigger a complaint before the medical licensing board. The Civil Bureau within the Department provides legal counsel to the board. In addition, the Administrative Prosecutions Unit investigates and prosecutes complaints filed before a licensing board. The Department indicates it is not possible to determine if any felony cases would be appealed to the Supreme Court, or how much additional service would be provided by the Civil Bureau and the Administrative Prosecutions Unit.

The Department of Corrections states it is not able to determine the fiscal impact of this bill because it does not have sufficient detail to predict the number of individuals who would be subject to this legislation. The Department of Corrections states the average annual cost of incarcerating an individual in the general prison population for the fiscal year ending June 30, 2011 was \$33,698. The cost to supervise an individual by the Department's division of field services for the fiscal year ending June 30, 2011 was \$672.