

Sen. Birdsell, Dist 19
Sen. Carson, Dist 14
June 1, 2021
2021-1842s
05/04

Floor Amendment to HB 2-FN-A-LOCAL

1 Amend the bill by replacing sections 37- 40 with the following:

2

3 37 Title. Sections 37-40 of this act may be known and cited as the “Fetal Life Protection Act.”

4 38 Legislative Findings and Purpose.

5 I. The general court finds that:

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

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

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

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

30 (e) The United States Supreme Court, in rejecting the trimester framework of *Roe*,
31 reaffirmed “the State's power to restrict abortions after fetal viability, if the law contains exceptions

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1 for pregnancies which endanger the woman's life or health” and stated that “the State has legitimate
2 interests from the outset of the pregnancy in protecting... the life of the fetus that may become a
3 child.” *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

4 (f) Already in 1973, the Supreme Court had observed that “Viability is usually placed at
5 about seven months (28 weeks) but may occur earlier, even at 24 weeks.” *Roe v. Wade*, 410 U.S. 113,
6 160 (1973). Since that time, however, there has been “dramatic improvement in survival for infants
7 born at the border of viability (≤ 24 weeks).” Barbara Luke and Morton B. Brown, The changing risk
8 of infant mortality by gestation, plurality, and race: 1989-1991 versus 1999-2001, *Pediatrics*, Dec.
9 2006, 118 (6): 2488-2497.

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

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

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

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

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

28 (a) Based on the state’s interest in protecting fetal life, to prohibit abortions at or after
29 24 weeks gestation, except in cases of a medical emergency.

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

33 39 New Subdivision; Fetal Life Protection Act. Amend RSA 329 by inserting after section 42 the
34 following new subdivision:

Fetal Life Protection Act

35
36 329:43 Definitions. In this subdivision:

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1 I. “Abortion” means the act of using or prescribing any instrument, medicine, drug, or any
2 other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy
3 of a woman with knowledge that the termination by those means will with reasonable likelihood
4 cause the death of the fetus. Such use, prescription, or means is not an abortion if done with the
5 intent to:

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

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

12 III. “Conception” means the fusion of a human spermatozoon with a human ovum.

13 IV. “Gestational age” means the time that has elapsed since the first day of the woman’s last
14 menstrual period.

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

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

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

25 VIII. “Pregnant” or “pregnancy” means the female reproductive condition of having one or
26 more developing embryos or fetuses implanted in the uterus or elsewhere in the female body.

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

30 X. “Reasonable medical judgment” means that medical judgment that would be made by a
31 reasonably prudent health care provider in the community, knowledgeable about the case and the
32 treatment possibilities with respect to the medical conditions involved.

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

36 329:44 Prohibition.

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1 I. Except in the case of a medical emergency as specifically defined in paragraph III, no
2 abortion shall be performed, induced, or attempted by any health care provider unless a health care
3 provider has first made a determination of the probable gestational age of the fetus. In making such
4 a determination, the health care provider shall make such inquiries of the pregnant woman and
5 perform or cause to be performed all such medical examinations, imaging studies, and tests as a
6 reasonably prudent health care provider in the community, knowledgeable about the medical facts
7 and conditions of both the woman and the fetus involved, would consider necessary to perform and
8 consider in making an accurate diagnosis with respect to gestational age, provided, however, that
9 the health care provider shall conduct an obstetric ultrasound examination of the patient for the
10 purpose of making the determination.

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

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

22 329:45 Reporting.

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

32 329:46 Criminal Penalties. Any health care provider who knowingly performs or induces an
33 abortion in violation of this subdivision and knows that the fetus has a gestational age of at least 24
34 weeks, or consciously disregards a substantial risk that the fetus has a gestational age of at least 24
35 weeks, shall be guilty of a class B felony and, in addition to any other penalties the court may
36 impose, be fined not less than \$10,000 and not more than \$100,000.

37 329:47 Civil Remedies.

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

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

8 329:48 Review by New Hampshire Board of Medicine.

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

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

19 329:49 Construction. Nothing in this subdivision shall be construed as creating or recognizing a
20 right to abortion.

21 329:50 Severability. If any provision of this subdivision or the application thereof to any person
22 or circumstances is held invalid, such invalidity shall not affect other provisions or applications of
23 the subdivision which can be given effect without the invalid provision or application. This
24 subdivision shall retain its purpose and effect to the maximum extent permitted under the state and
25 federal constitutions, whether through the severance of provisions or applications, judicial injunction
26 or construction, or any other just and proper remedy. The general court further declares that it
27 prefers any judicial remedy whatsoever to one that has the effect of permitting all abortions
28 throughout gestation, whether such permission is effected through the complete invalidation of this
29 subdivision or through any other means.

30 40 Effective Date. Sections 37-40 of this act shall take effect January 1, 2022.