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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/07/11

SPONSOR Sharer LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Prohibit Certain Late-Term Abortions SB 239

ANALYST Hanika-Ortiz

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	FY12		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the District Attorney (AODA)  
 Attorney General's Office (AGO)  
 New Mexico Corrections Department (NMCD)  
 Children, Youth & Families Department (CYFD)  
 Department of Health (DOH)  
 Children, Youth & Families Department (CYFD)  
 Health Policy Commission (HPC)

### SUMMARY

#### Synopsis of Bill

Senate Bill 239 amends the Partial-Birth Abortion Ban Act to prohibit a late-term abortion after a determination of viability is made by the attending physician.

Specific provisions of the proposed amended act are as follows:

Section 1: renames the act as the "Late-Term Abortion and Partial-Birth Abortion Ban Act";  
 Section 2: adds definitions to include *late-term abortion* to mean an abortion of a viable fetus, and *viable* as surviving outside the womb including indefinitely using artificial life-support;  
 Section 3: prohibits *late-term abortions* except if the pregnant female's life is at risk;  
 Section 4: adds *late-term abortions* to events seeking civil remedies;  
 Section 5: adds *late-term abortions* to events seeking criminal penalties;  
 Section 6: provides that a physician who fails to determine whether the fetus is *viable* before performing an abortion is guilty of a fourth degree felony; and

Section 7: repeals 30-5-3 that previously provided for a second degree felony if an abortion results in the death of the woman.

### **FISCAL IMPLICATIONS**

NMCD believes that the bill is unlikely to result in a substantial number of new felony convictions.

The new amendment defines *viable* as surviving outside the womb even if by artificial life-support systems indefinitely. The family and the State (Medicaid) would incur costs for the initial hospitalization, and later on (if needed) for disability-related care and special education.

### **SIGNIFICANT ISSUES**

A late-term abortion often refers to an induced abortion procedure that occurs after the 20<sup>th</sup> week of gestation. However, the exact point when a pregnancy becomes late-term is not clearly defined. Nearly all pregnancies are viable after the 27<sup>th</sup> week, and no pregnancies are viable before the 21<sup>st</sup> week. In the United States, the success of neonatal intensive care has resulted in the survival of infants born after 22 or 23 weeks in the womb at weights of a pound or less.

Before performing an abortion, a physician shall determine “to a reasonable degree of certainty”, whether the fetus is viable. DOH notes that determining viability is not a precise science and relies on subjective and complex objective data.

SB 239 includes certain late-term abortions in the same category of partial-birth abortions as used in the existing Partial-Birth Abortion Ban Act. Existing law defines a partial birth abortion as a procedure in which any person...*intentionally extracts an independently viable fetus from the uterus into the vagina and mechanically extracts the cranial contents of the fetus in order to induce death.*

The bill adds a 4<sup>th</sup> degree penalty “if the physician fails to ascertain the viability of a fetus to a reasonable degree of certainty and the physician aborts the fetus.”

### **PERFORMANCE IMPLICATIONS**

The AGO states that based on existing settled case law, the amendment appears to be unconstitutional because it fails to adequately protect a woman’s health. The U. S. Supreme Court has rejected the notion that the protection afforded to a woman’s health by an abortion restriction may be so limited as to apply only when necessary to prevent death or great bodily harm.

The Baby Doe Law or Baby Doe Amendment to the Child Abuse Law passed in 1984 sets forth specific criteria and guidelines for the treatment of seriously ill and/or disabled newborns. The law is controversial in that it dictates what must be done for a child, regardless of the wishes of the parents. The Baby Doe Law mandates that states receiving federal money for child abuse programs develop procedures to report medical neglect, which the law defines as the withholding of treatment unless a baby is irreversibly comatose or the treatment is "virtually futile" in terms

of the newborn's survival. Opinions about a child's "quality of life" are not valid reasons for withholding medical care.

### **ADMINISTRATIVE IMPLICATIONS**

CYFD notes that the Department has in its custody, teens of child-bearing age and the need for information for the Juvenile Justice Division and Protective Services Division staff regarding enactment of this law will be the same.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Relates to HB 179 and SB 222; enacts the Pain-Capable Unborn Child Protection Act.

Relates to SB 230 and HB 229; enacts the similar Parental Notification Act and Parental Notice of Abortion Act.

### **TECHNICAL ISSUES**

Section 2 (D) line 11 refers to an independently viable fetus yet section 2 (F) line 20 defines *viable* as including on artificial life support systems.

On page 1, line 12, the word “ban” could be before the word “act”.

### **OTHER SUBSTANTIVE ISSUES**

In 1998 the New Mexico Supreme Court held in *New Mexico Right to Choose/NARAL v. Johnson*, 126 N.M. 788, that the Medicaid regulation restricting state funding of abortions for Medicaid-eligible women violated the Equal Rights Amendment of the state constitution.

Of the 4,771 abortions reported in New Mexico in 2009, none were reported among women in the third trimester of pregnancy and 85 were reported among women with a gestation period of 20 weeks or more.

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

The decision to seek a late-term abortion will continue to be a decision between the pregnant female, her family and her physician.

AHO/svb