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FISCAL IMPACT REPORT

SPONSOR	Baca/Brandt/Diamond/Gallegos/ Griggs	**LAST UPDATED**	02/28/2023
		ORIGINAL DATE	02/27/2023
SHORT TITLE	Partial and Late-Term Abortion Bans	**BILL NUMBER**	Senate Bill 459
		ANALYST	Chilton

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT*
(dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
		$0-$230.0	$0-$230.0	$0-$460.0	Recurring	General Fund

Parentheses ( ) indicate expenditure decreases.
*Amounts reflect most recent analysis of this legislation.

Relates to House Bills 7, 258, 438, 441, 468, 511 and 512; Senate Bill 13

Sources of Information

LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Office of the Attorney General (NMAG)
Department of Health (DOH)

SUMMARY

Synopsis of Senate Bill 459

Senate Bill 459 amends and extends Section 30-5A NMSA 1978, "Partial-Birth Abortion Ban", renaming it the "Late-Term and Partial-Birth Abortion Ban Act." Partial-birth abortion consists of destruction of an unborn infant's cranial contents prior to delivery and has always been a rare procedure. "Late term," according to this bill, is defined as after the infant could possibly live outside the womb, which the bill defines as 20 weeks gestation.

Section 1 of the bill establishes its name. Section 2 establishes definitions used in the act, amending Section 30-5A-2. It adds a definition of "viability" as referring to an infant capable of life outside the womb either with or without artificial life-support.

Section 3 and 4 amend Section 30-5A-4, and 30-5A-6NMSA 1978, substituting the sections of statute for the sections of the previous act.

Section 5 enacts a new section of the act, defining late-term abortion as an abortion, surgical or medical, performed on any woman intending to abort an infant at 20 or more weeks gestational

age. Physicians must perform tests to assure that a pregnant woman's fetus is less than 20 weeks gestation if there is any question of that, before an abortion can be performed. If testing shows the woman to be at 20 or greater weeks gestation, an abortion shall not be performed. An exception is made for "whose life 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; provided, however, that the physician shall take all reasonable steps to preserve the life and health of the unborn child."

Section 6 establishes a civil penalty for a physician who has violated these statutes: a fine of at least $5,000 and either revocation or suspension of the medical license for at least one year.

Section 7 establishes the effective date of this bill as July 1, 2023.

FISCAL IMPLICATIONS

There is no appropriation in Senate Bill 459. However, if SB459 were to be passed, NMAG and AOC anticipate litigation related to the bill, which would require additional resources for the courts and the district attorney's office. It is difficult to estimate the costs related to publication of new regulations and even more difficult to estimate the costs related to litigation surrounding so-called late-term abortion. If, as indicated in data below, 1 percent of abortions in New Mexico would be considered "late-term," and in 2017, the last year data are available through Guttmacher.org, there were 4,620 abortions performed in New Mexico, and if the average case of the 46 "late-term abortions" cost the NMAG and AOC $5,000, then the cost would be $230 thousand.

SIGNIFICANT ISSUES

NMAG raises a number of questions regarding this bill and possible conflicts with state constitutional and case-based-law:

> However, it is axiomatic that the state Legislature may not enact laws that restrict rights protected by the state constitution. Legislation restricting the right to an abortion, even in limited manner—such as restricting abortions after twenty weeks' gestation time—may be unconstitutional under the New Mexico Constitution. The New Mexico Constitution contains multiple provisions that a court may find override SB459's provisions.

1) The New Mexico Equal Rights Amendment – N.M. Const. art. II, § 18. Section 18 originally stated, "No person shall be deprived of life, liberty, or property without due process of law; nor shall any person be denied equal protection of the laws." In 1972, New Mexico voters ratified an addition to this section, which added, "Equality of rights under law shall not be denied on account of the sex of any person." The New Mexico Supreme Court has held that, by adopting this language, the people of New Mexico intended to provide "something beyond that already afforded by the general language of the Equal Protection Clause." *N.M. Right to Choose/NARAL v. Johnson*, 1995-NMSC-005, ¶ 30, 126 N.M. 788, 975 P.2d 841. In examining gender-based classifications and discrimination through the lens of the Equal Rights Amendment, the New Mexico Supreme Court has stated that courts must conduct a "searching judicial inquiry" that "must being from the premise that such classifications are presumptively unconstitutional, and it is the [government's] burden to rebut this

presumption." *Id.* ¶ 36. As the Court noted, women's biology and ability to bear children has constituted the basis for a government discrimination throughout history. *Id.* ¶ 41. The government must show a "compelling justification" for restricting medical care on the basis of the ability to become pregnant and bear children. It is not clear that such a compelling justification is present.

2) N.M. Const., art. II, § 10 provides for robust rights to privacy from governmental intrusion and invasion. Further, "New Mexico courts have long held that Article II, Section 10 provides greater protection of individual privacy than the Fourth Amendment." *State v. Crane*, 2014-NMSC-026, ¶ 16, 329 P.3d 689. This right includes both the right to "personal bodily privacy" and "personal dignity." *State v. Chacon*, 2018-NMCA-065, ¶ 15, 429 P.3d 347. The right to freedom from government invasion is further found in Article II, Sec. 18, which states that "No person shall be deprived of . . . liberty . . . without due process of law." While the U.S. Supreme Court found that restriction of abortion was not protected by the U.S. Constitution, it may be that New Mexico Courts—interpreting the New Mexico Constitution as creating more robust protection for privacy against government intrusion—hold that the restriction contemplated in SB459 is unconstitutional.

3) N.M. Const., art. II, § 4 ("All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.") The New Mexico Supreme Court has never interpreted the Inherent Rights Clause to be the sole source of a constitutional right. *Morris v. Brandenburg*, 2016-NMSC-027, ¶ 51, 376. P.3d 836. However, the Court has explained that this clause "should inform our understanding of New Mexico's equal protection guarantee, and may also ultimately be a source of greater due process protections than those provided under federal law." *Id.* (citations omitted). Given the Court's potential to view equal protection and due process guarantees through the lens of the Inherent Rights Clause, a restriction on abortion care may be interpreted as violative of the New Mexico Constitution.

AOC quotes Planned Parenthood's statistics regarding timing of abortion:

> **Nearly 99 percent of abortions occur before 21 weeks**, but when they are needed later in pregnancy, it is often in very complex circumstances. For example, severe fetal anomalies and serious risks to the pregnant person's health — the kind of situations where patients and their doctors need *every* medical option available. (As Axios reported, approximately 93 percent of reported abortions in 2019 were performed at or before 13 weeks of pregnancy, 6 percent were conducted between 14 and 20 weeks and 1 percent were performed at or after 21 weeks, according to the most recent data from the Centers for Disease Control and Prevention. https://www.axios.com/2022/05/14/abortion-state-laws-bans-roe-supreme-court) In New Mexico, in 2019, 1.8 percent of abortions were done at 21 weeks or after. https://www.politifact.com/factchecks/2022/jul/12/focus-family/anti-abortion-group-exaggerates-how-states-regulat/

DOH states, "As proposed, SB459 will limit access to necessary pregnancy termination care for individuals needing such care in cases of rape, incest, fetal anomalies, or other threats to their health and well-being by requiring physicians to engage in unnecessary activities that are not evidence based."

RELATIONSHIP

SB459 relates to the following bills:

- HB7, Reproductive and Gender-Affirming Health Care;
- HB258, Crime of Providing Abortions;
- HB438, Parental Notification of Abortion Act;
- HB441, Medical Care for All Infants Born Alive;
- HB468, Born Alive Act;
- HB511, Standards of Women's Health Care;
- HB513, Abortion Clinic Licensing; and
- SB13, Reproductive Health Provider Protections.

TECHNICAL ISSUES

Medical practitioners would define viability differently than in this bill, with infants born at less than 22 weeks having virtually no chance of survival. From the widely used medical resource Uptodate comes this statement: "Periviability, also referred to as borderline viability, is defined as the earliest stage of fetal maturity (i.e., between 22 and <26 weeks gestation) when there is a reasonable chance, although perhaps not a high likelihood, of extrauterine survival. Infants born at these gestational ages are at significant risk for death, or survival with chronic medical conditions including permanent disability that often requires complex medical care. As a result, management of these infants is challenging, as decision-making must be based on both clinical and ethical considerations."

AOC makes note of the following:

> Unlike in previous versions of the bill, the only exemption to the prohibition of late-term abortions in SB459 is to save the life of the mother, with the health of the mother not an exemption. According to the World Population Report, in 2023:
>
> > [A]ll states have exceptions and allow late-term abortions when pregnancy threatens a woman's health, physical health, and/or life. The exception of "physical health" permits abortion when the woman suffers from a "substantial and irreversible impairment of a major bodily function." In the following states, the pregnancy **must threaten the mother's life** to permit a late-term abortion: Idaho, Michigan, and Rhode Island. In the following states, the pregnancy must either **threaten the mother's life or health** to permit a late-term abortion: Arizona, California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New York, Virginia, and Washington.
> >
> > In the following states, the pregnancy must either **threaten the mother's life or physical health** to permit a late-term abortion: Alabama, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming.

In Arkansas and Utah, late-term abortions are permitted in cases of rape or incest. Late-term abortions are almost [always] permitted in case of fetal abnormality. In Delaware, Georgia, Louisiana, Mississippi, South Carolina, Texas, Utah, and West Virginia the law applies to a lethal abnormality.

https://worldpopulationreview.com/state-rankings/what-states-allow-late-term-abortion

LAC/rl/ne/hg