AN ACT to amend 253.10 (3) (c) 1. b. and 253.10 (3) (d) 1.; and to create 69.186 (1) (hf), 69.186 (1) (k) and (L), 253.10 (2) (dr), 253.10 (3) (c) 2. em. and 253.107 of the statutes; relating to: requiring a determination of probable postfertilization age of an unborn child before abortion, prohibiting abortion of an unborn child considered capable of experiencing pain, informed consent, abortion reporting, and providing a criminal penalty.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 69.186 (1) (hf) of the statutes is created to read:

69.186 (1) (hf) The probable postfertilization age of the unborn child, as defined in s. 253.107 (1) (c), and whether an ultrasound was used to assist in making the determination of postfertilization age of the unborn child, or, if the probable postfertilization age of the unborn child was not determined, the nature of the medical emergency, as defined in s. 253.10 (2) (d).

SECTION 2. 69.186 (1) (k) and (L) of the statutes are created to read:

69.186 (1) (k) If the unborn child is considered to be capable of experiencing pain under s. 253.107 (3) (a), the nature of the medical emergency, as defined in s. 253.10 (2) (d), that the pregnant woman had.

(L) If the unborn child is considered to be capable of experiencing pain under s. 253.107 (3) (a), a statement whether the method of abortion used was one that, in reasonable medical judgment, provided the best opportunity for the unborn child to survive or, if such a method was not used, the basis of the determination that termination of the pregnancy in that manner posed a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function of the woman than other available methods.

SECTION 3. 253.10 (2) (dr) of the statutes is created to read:

253.10 (2) (dr) “Perinatal hospice” means comprehensive support that includes support from the time of a terminal diagnosis of an unborn child through the birth and death of the child and through the postpartum period and may include the supportive care of maternal–fetal medical specialists, obstetricians, neonatologists, anesthesia specialists, specialty nurses, psychiatrists, psychologists, mental health professionals, clergy, social workers, and other professionals.

SECTION 4. 253.10 (3) (c) 1. b. of the statutes is amended to read:

253.10 (3) (c) 1. b. The probable gestational age of the unborn child, the probable postfertilization age of the unborn child, as defined in s. 253.107 (1) (c), and the numerical odds of survival for an unborn child delivered at that probable postfertilization age, at the time that the information is provided. The physician or other qualified physician shall also provide this information to the woman in writing at this time.

SECTION 5. 253.10 (3) (c) 2. em. of the statutes is created to read:

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* Section 991.11, WISCONSIN STATUTES: Effective date of acts. “Every act and every portion of an act enacted by the legislature over the governor’s partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication.”
253.10 (3) (c) 2. em. That the printed materials described in par. (d) contain information on the availability of perinatal hospice.

Section 6. 253.10 (3) (d) 1. of the statutes is amended to read:

253.10 (3) (d) 1. Geographically indexed materials that are designed to inform a woman about public and private agencies, including adoption agencies, and services that are available to provide information on family planning, as defined in s. 253.07 (1) (a), including natural family planning information, to provide ultrasound imaging services, to assist her if she has received a diagnosis that her unborn child has a disability or if her pregnancy is the result of sexual assault or incest and to assist her through pregnancy, upon childbirth and while the child is dependent. The materials shall include a comprehensive list of the agencies available, a description of the services that they offer and a description of the manner in which they may be contacted, including telephone numbers and addresses, or, at the option of the department, the materials shall include a toll-free, 24-hour telephone number that may be called to obtain an oral listing of available agencies and services in the locality of the caller and a description of the services that the agencies offer and the manner in which they may be contacted. The materials shall provide information on the availability of governmentally funded programs that serve pregnant women and children. Services identified for the woman shall include medical assistance for pregnant women and children under s. 49.47 (4) (am) and 49.471, the availability of family or medical leave under s. 103.10, the Wisconsin works program under ss. 49.141 to 49.161, child care services, child support laws and programs and the credit for expenses for household and dependent care and services necessary for gainful employment under section 21 of the Internal Revenue Code. The materials shall state that it is unlawful to perform an abortion for which consent has been coerced, that any physician who performs or induces an abortion without obtaining the woman’s voluntary and informed consent is liable to her for damages in a civil action and to assist her through pregnancy, upon childbirth and while the child is dependent. The materials shall include information, for a woman whose pregnancy is the result of sexual assault or incest, on legal protections available to the woman and her child if she wishes to oppose establishment of paternity or to terminate the father’s parental rights. The materials shall include information on services in the state that are available for victims or individuals at risk of domestic abuse. The materials shall include information on the availability of perinatal hospice.

Section 7. 253.107 of the statutes is created to read:

253.107 Probable postfertilization age; later-term abortions. (1) Definitions. In this section:

(a) “Abortion” has the meaning given in s. 253.10 (2) (a).

(b) “Medical emergency” has the meaning given in s. 253.10 (2) (d).

(c) “Probable postfertilization age of the unborn child” means the number of weeks that have elapsed from the probable time of fertilization of a woman’s ovum.

(2) Probable postfertilization age. Except in the case of a medical emergency, no physician may perform or induce an abortion, or attempt to perform or induce an abortion, unless the physician performing or inducing it has first made a determination of the probable postfertilization age of the unborn child or relied upon such a determination made by another physician.

(3) Protection of unborn child capable of feeling pain from abortions. (a) No person shall perform or induce or attempt to perform or induce an abortion upon a woman when the unborn child is considered capable of experiencing pain unless the woman is undergoing a medical emergency. For purposes of this subsection, an unborn child is considered to be capable of experiencing pain if the probable postfertilization age of the unborn child is 20 or more weeks.

(b) When the unborn child is considered capable of experiencing pain and the pregnant woman is undergoing a medical emergency, the physician shall terminate the pregnancy in the manner that, in reasonable medical judgment, provides the best opportunity for the unborn child to survive, unless the termination of the pregnancy in that manner poses a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function of the woman than other available methods.

(4) Penalty. Any person who violates sub. (3) (a) is guilty of a Class I felony. No penalty may be assessed against a woman upon whom an abortion is performed or induced or attempted to be performed or induced.

(5) Civil remedies; injunctions. (a) Any of the following individuals may bring a claim for damages, including damages for personal injury and emotional and psychological distress, against a person who performs, or attempts to perform, an abortion in violation of this section:

1. A woman on whom an abortion is performed or induced or attempted to be performed or induced.

2. The father of the aborted unborn child or the unborn child that is attempted to be aborted, unless the pregnancy is the result of sexual assault under s. 940.225 (1), (2), or (3) or incest under s. 948.06 (1) or (1m).

(b) A person who has been awarded damages under par. (a) shall, in addition to any damages awarded under par. (a), be entitled to punitive damages for a violation that satisfies a standard under s. 895.043 (3).
The best current evidence confirms:

- The presence of pain receptors (unborn child’s entire body nociceptors) is present no later than 16 weeks after fertilization and nerves link these receptors to the brain’s thalamus and subcortical plate by no later than 20 weeks.

- Mus and subcortical plate by no later than 20 weeks.

- Visceral pain and nerves link these receptors to the brain’s thalamus.

- The position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy than 20 weeks after fertilization predominately rests on the assumption that the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex. However, recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain.

- Consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain by 20 weeks after fertilization. The legislature has the constitutional authority to make this judgment. As the U.S. supreme court has noted in Gonzales v. Carhart, 550 U.S. 124, 164–64 (2007): “The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty...See Marshall v. United States, 414 U.S. 417, 427 (1974) (‘When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad.’) The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community. ...Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.”
(k) It is the purpose of the state to assert a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain. In enacting this legislation, Wisconsin is not asking the Supreme Court to overturn or replace its holding, first articulated in Roe v. Wade and reaffirmed in Planned Parenthood of Southeastern Pennsylvania v. Casey, that the state interest in unborn human life, which is “legitimate” throughout pregnancy, becomes “compelling” at viability. Rather, it asserts a separate and independent compelling state interest in unborn human life that exists once the unborn child is capable of feeling pain. It is asserted not in replacement of, but in addition, to, the state interest in the viable unborn child.

(l) The U.S. supreme court has established that the “constitutional liberty of the woman to have some freedom to terminate her pregnancy...is not so unlimited...that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State’s interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.” Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 869 (1992).

(m) The Supreme Court decision upholding the Partial−Birth Abortion Ban Act, Gonzales v. Carhart, 550 U.S. 124 (2007) vindicated the dissenting opinion in the earlier decision that had struck down Nebraska’s Partial−Birth Abortion Ban Act. That opinion stated, “[In Casey] We held it was inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion....Casey is premised on the States having an important constitutional role in defining their interests in the abortion debate. It is only with this principle in mind that [a state’s] interests can be given proper weight.... States also have an interest in forbidding medical procedures which, in the State’s reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus.... A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others.” Stenberg v. Carhart, 530 U.S. 914, 958–59 (2000) (Kennedy, J., dissenting.).

SECTION 9. Effective date.

(1) This act takes effect on the first day of the 7th month beginning after publication.