

2007 BILL

1 **AN ACT** *to repeal* 895.038 (1) (a); *to consolidate, renumber and amend*
2 895.038 (1) (intro.) and (b); *to amend* 895.038 (2) (a) (intro.), 895.038 (2) (a) 1.,
3 895.038 (2) (a) 2. and 895.038 (4); and *to repeal and recreate* 940.16 of the
4 statutes; **relating to:** partial-birth abortion and creating a penalty.

Analysis by the Legislative Reference Bureau

Current law prohibits the performance of a partial-birth abortion and defines a partial-birth abortion as one during which a person partially delivers a living fetus, causes the death of the living fetus with the intent to kill the fetus, and then completes delivery of the fetus. A person who performs a partial-birth abortion is guilty of a Class A felony, and is subject to life imprisonment. Current law allows an exception if the partial-birth abortion is performed in order to save the life of the pregnant woman and no other option is available, and current law does not permit the prosecution of the woman upon whom a partial-birth abortion is performed. Current law also grants a civil cause of action to the father or, if the pregnant woman who received the partial-birth abortion was a minor, the maternal grandparent, of a fetus aborted by a partial-birth abortion if the father or grandparent did not consent to the partial-birth abortion procedure.

After the United States Supreme Court invalidated a Nebraska statute that prohibited “partial-birth abortion,” in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Seventh Circuit Court of Appeals held that the current Wisconsin law prohibiting partial-birth abortion had the same constitutional flaws as the Nebraska statute

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and enjoined its enforcement. *Planned Parenthood of Wisconsin et al. v. Doyle, et al.*, 249 F.3d 603 (7th Cir. 2001).

In 2007, the United States Supreme Court upheld a federal ban on partial-birth abortion, finding that the federal ban did not unduly burden a woman's right to an abortion and that the federal statute set forth specific "landmarks" that clearly delineate when a partial-birth abortion is being performed. *Gonzales v. Carhart*, ___ U.S. ___ (2007).

This bill changes the current prohibition on the performance of a partial-birth abortion to define "partial-birth abortion" as an abortion during which a person vaginally delivers a living fetus until a certain proportion of the fetal body is outside of his or her mother's body and then kills the partially delivered fetus. This definition is the same as that under the federal ban, as upheld by *Gonzales*.

The bill grants a physician who is prosecuted for performing a partial-birth abortion the right to a hearing before the medical examining board to determine if the partial-birth abortion was necessary to save the life of the mother.

The bill also specifies that a civil cause of action is granted to the father of a fetus aborted by a partial-birth abortion is limited to cases in which the father was married to the mother at the time the abortion was performed.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

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

1 **SECTION 1.** 895.038 (1) (intro.) and (b) of the statutes are consolidated,
2 renumbered 895.038 (1) and amended to read:

3 895.038 (1) In this section: ~~(b)~~ "Partial-birth, "partial birth abortion" has the
4 meaning given in s. 940.16 (1) (a).

5 **SECTION 2.** 895.038 (1) (a) of the statutes is repealed.

6 **SECTION 3.** 895.038 (2) (a) (intro.) of the statutes is amended to read:

7 895.038 (2) (a) (intro.) Except as provided in par. (b), any of the following
8 persons has a claim for appropriate relief against a person who performs a
9 partial-birth abortion and thereby kills a fetus:

10 **SECTION 4.** 895.038 (2) (a) 1. of the statutes is amended to read:

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1 895.038 **(2)** (a) 1. If the ~~person~~ mother on whom a partial–birth abortion was
2 performed ~~was a minor, the parent of the minor~~ has not attained the age of 18 years
3 at the time of the abortion, the maternal grandparents of the fetus.

4 **SECTION 5.** 895.038 (2) (a) 2. of the statutes is amended to read:

5 895.038 **(2)** (a) 2. The father, if married to the mother at the time she receives
6 the partial–birth abortion procedure, of the ~~child~~ fetus aborted by the partial–birth
7 abortion.

8 **SECTION 6.** 895.038 (4) of the statutes is amended to read:

9 895.038 **(4)** Subsection (2) applies even if the mother of the ~~child~~ fetus aborted
10 by the partial–birth abortion consented to the performance of the partial–birth
11 abortion.

12 **SECTION 7.** 940.16 of the statutes is repealed and recreated to read:

13 **940.16 Partial–birth abortion. (1)** In this section:

14 (a) “Partial–birth abortion” means an abortion in which the person performing
15 the abortion does all of the following:

16 1. Deliberately and intentionally vaginally delivers a living fetus until, in the
17 case of a head–first presentation, the entire fetal head is outside the body of the
18 mother, or, in the case of breech presentation, any part of the fetal trunk past the
19 navel is outside the body of the mother, for the purpose of performing an overt act that
20 the person knows will kill the partially delivered living fetus.

21 2. Performs the overt act specified in subd. 1., other than completion of the
22 delivery, that kills the partially delivered living fetus.

23 (b) “Physician” has the meaning given in s. 448.01 (5).

24 **(2)** Except as provided in sub. (3), any physician or any other person who
25 intentionally performs a partial–birth abortion is guilty of a Class I felony.

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1 **(3)** Subsection (2) does not apply to a partial–birth abortion that is necessary
2 to save the life of a mother whose life is endangered by a physical disorder, physical
3 illness, or physical injury, including a life–endangering physical condition caused by
4 or arising from the pregnancy itself.

5 **(4)** A physician who is charged under sub. (2) may seek a hearing before the
6 medical examining board on whether the physician’s conduct was necessary to save
7 the life of the mother whose life was endangered by a physical disorder, physical
8 illness, or physical injury, including a life–endangering physical condition caused by
9 or arising from the pregnancy itself. The findings of the medical examining board
10 on that issue shall be admissible on that issue at the defendant’s trial. Upon the
11 defendant’s motion, the trial court shall delay the beginning of the defendant’s trial
12 for not more than 30 days to permit the hearing to take place.

13

(END)