Written Testimony of Danielle Pimentel, J.D.
Policy Counsel, Americans United for Life
In Support of House Bill No. 625
Submitted to the House Committee on the Judiciary
February 27, 2023

Dear Chair Regier, Vice-Chair Ler, Vice-Chair Bishop, and Members of the Committee:

My Name is Danielle Pimentel, and I serve as Policy Counsel at Americans United for Life ("AUL"). Established in 1971, AUL is a national law and policy nonprofit organization with a specialization in abortion, end-of-life issues, and bioethics law. AUL publishes pro-life model legislation and policy guides on end-of-life issues,[1] tracks state bioethics legislation,[2] and regularly testifies on pro-life legislation in Congress and the states. Our vision at AUL is to strive for a world where everyone is welcomed in life and protected in law. As Policy Counsel, I specialize in life-related legislation, constitutional law, and abortion jurisprudence.

Thank you for the opportunity to provide written testimony in support of House Bill No. 625, the Infant Safety and Care Act ("H.B. 625" or "bill"). The bill establishes legal protections for infants born alive during an attempted abortion. I have thoroughly examined H.B. 625, and I urge the Committee to support this bill because (1) Montana has a legitimate interest to protect human life; (2) the bill will increase the survival rates and provision of comfort care to born-alive infants; and (3) the bill is a critical supplement to federal protections for born-alive infants.

I. Montana Has Robust Powers to Protect Infant Survivors of Botched Abortions Through H.B. 625

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[3] and held that "States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies.'"[4] A State's legitimate interests include "respect for and

[1] *Pro-Life Model Legislation and Guides*, AMS. UNITED FOR LIFE, https://aul.org/law-and-policy/ (last visited Feb. 13, 2022).
[2] *Defending Life: State Legislation Tracker*, AMS. UNITED FOR LIFE, https://aul.org/law-and-policy/state-legislation-tracker/ (last visited Feb. 13, 2022).
[3] Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2242–2243 (2022).
[4] *Id*. at 2283–2284 (citations omitted).

preservation of prenatal life at all stages of development . . . [and] the preservation of the integrity of the medical profession."[5]

Accordingly, Montana has robust powers to pass protections for infants who survive an abortion procedure. This bill would allow Montana to further its legitimate interest in protecting human life by providing greater protection for newborns than what is currently offered in Montana, as well as the federal Born-Alive Infant Protection Act ("BAIPA").

II. Medical Intervention Is Critical to Increasing the Survival Rates and Alleviating the Suffering of Born-Alive Infant Survivors

a. *This Bill Ensures that Born-Alive Infants Are Treated with Human Dignity and Given Appropriate Medical Care*

As advancements in medical technology progress, medical professionals have been able to save prematurely born children at younger gestational ages. Now, preborn children as young as 21 weeks' gestation have been able to survive outside the womb.[6] Furthermore, "[r]ecent studies reveal that, with active treatment, infants born at 22 weeks' gestation can achieve survival rates of 25% to 50%."[7] Medical pioneering teams are working to increase the survival rates for extremely premature babies.[8] However, "[a] periviable infant (variously interpreted in the United States as one between 20 and 24 weeks gestational age) is a critically ill patient due to developmental immaturity."[9] Consequently, periviable infants need critical medical care, such as "goal-oriented intensive care including resuscitation and invasive interventions or . . . comfort-oriented end of life care such as warming, morphine for air hunger, and feeding if applicable."[10]

Periviable infants that are born alive during attempted abortions deserve to be protected under the law, especially when there are as many as 10,000 abortions in the United States that occur at or after 21 weeks' gestation.[11] It is a common misconception that most late-term abortions are performed only for reasons of medical necessity.[12] Instead, women often choose abortion because they believe "that childbearing would interfere with their education, work, and ability to care for existing dependents; [the child] would be a financial

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[5] *Id*. at 2284.
[6] Charlotte Lozier Institute, *Saving Extremely Premature Babies*, VOYAGE LIFE (last updated Jan. 14, 2023), https://lozierinstitute.org/dive-deeper/saving-extremely-premature-babies/.
[7] Annie Janvier et al., *Does It Matter if This Baby Is 22 or 23 Weeks?*, PEDIATRICS, Sept. 1, 2019, at 1, 1 (2019).
[8] Charlotte Lozier Institute, *supra* note 6.
[9] AM. ASSOC. OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, STATE RESTRICTIONS ON ABORTION: EVIDENCE-BASED GUIDANCE FOR POLICYMAKERS, Comm. Op. 10, at 6 (updated Sept. 2022), https://aaplog.org/wp-content/uploads/2022/06/CO-10-State-Level-Restrictions-1.pdf.
[10] *Id*.
[11] *Questions and Answers on Born-Alive Abortion Survivors*, CHARLOTTE LOZIER INST. (last updated Jan. 2023), https://lozierinstitute.org/questions-and-answers-on-born-alive-abortion-survivors/ (citing Katherine Kortsmit et al., *Abortion Surveillance—United States, 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION MORBIDITY & MORTALITY WEEKLY REP., Nov. 25, 2022, at 1, 2, tbl. 10).
[12] James Studnicki, *Late-Term Abortion and Medical Necessity: A Failure of Science*, HEALTH SERVS. RSCH. & MANAGERIAL EPIDEMIOLOGY, Apr. 9, 2019, at 1, 1.

burden; and would disrupt partner relationships."[13] As a result, most abortions occur for elective reasons of the mother, not because of the baby's medical condition.

Regardless of a woman's reasons for choosing to abort her baby, born-alive infant survivors should be treated with human dignity and given comfort care, which they would receive under this bill. As the American Association of Pro-Life Obstetricians & Gynecologists recognizes, "[a] previable infant born alive (variously interpreted as a fetus delivered before 20 to 24 weeks, with those before 20 weeks being termed *abortus* or miscarriage in medical literature) is a patient at the end of his or her natural life."[14] Medical professionals can provide perinatal palliative care to these young patients, which "focus[es] on maximizing quality of life and comfort for newborns with a variety of conditions considered to be life-limiting in early infancy," which "includes lethal fetal conditions" such as extremely premature delivery after a botched abortion.[15] Perinatal palliative care plans "must include plans for assessment and care of the newborn and should include considerations such as newborn bonding and skin-to-skin contact, warmth, hydration, feeding and lactation, management of respiratory distress, and pain control."[16] This bill would ensure that born-alive infant survivors receive perinatal palliative care to increase their chance of survival and alleviate their pain.

b. State Abortion Data Shows that Infants Are Surviving Abortion Procedures

It is not a myth that there are infants born alive following an abortion procedure,[17] which is why it is necessary for Montana to extend legal protections to born-alive infant survivors. For example, one CDC report found that over a 12-year period, at least 143 babies survived the abortion procedure before ultimately passing away.[18] The CDC even admits that this number of born-alive infants is possibly underestimated.[19] Similarly, a study published in *Obstetrics & Gynecology* found that of the 241 preborn children aborted for having a fetal anomaly between 20 and 24 weeks gestational age, 122 infants survived the procedure before ultimately passing away.[20]

Eight states voluntary report abortion information on born-alive infants, including Arizona, Arkansas, Florida, Indiana, Michigan, Minnesota, Oklahoma, and Texas.[21] These

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[13] *Id*. at 1.
[14] AM. ASSOC. OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, *supra* note 9, at 6.
[15] AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS COMM. ON OBSTETRIC PRACTICE & COMM. ON ETHICS, PERINATAL PALLIATIVE CARE, Comm. Op. at e84 (reaffirmed 2021).
[16] *Id*. at e86.
[17] *See Planned Parenthood Exposed: Examining the Horrific Abortion Practices at the Nation's Largest Abortion Provider: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. (2015) (written testimony of Melissa Ohden, Abortion Survivor & Founder, Abortion Survivors Network).
[18] Nat'l Ctr. for Health Stat., *Mortality Records With Mention of International Classification of Diseases-10 Code P96.4 (Termination of Pregnancy): United States, 2003-2014*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 11, 2016), https://www.cdc.gov/nchs/health_policy/mortality-records-mentioning-termination-of-pregnancy.htm.
[19] *Id.*
[20] Stephanie Springer et al., *Fetal Survival in Second-Trimester Termination of Pregnancy Without Feticide*, 131 OBSTETRICS & GYNECOLOGY 575 (2018).
[21] *Questions and Answers on Born-Alive Abortion Survivors*, *supra* note 11.

reports show that thirty-five infants were born alive in Arizona, Florida, Minnesota, and Texas in 2020 and 2021.[22] Another eight babies were born alive in Florida in 2022.[23] In this regard, infants are surviving attempted abortions, and they are in critical need of medical intervention to increase their chances of survival and to provide comfort care. This bill ensures that infants born alive following an abortion receive the same level of medical care and treatment as any other infant of the same gestational age would. As a result of these protections, the survival rate of born-alive infants will increase, and more infants will receive essential, perinatal palliative care.

III. H.B. 625 Supplements the Federal BAIPA, Providing Necessary, Commonsense Protection for Born-Alive Infants

Congress enacted BAIPA to clarify that federal law recognizes infants born alive at any stage of development are persons.[24] Yet, the law does not ensure that infants will receive life-saving protection and medical intervention if they need it. It is therefore necessary to require an affirmative action by a physician to ensure that an infant born alive after an abortion receives the same level of medical care as any other infant would.

This bill is more comprehensive than the federal BAIPA and fills in its gaps by expanding protections for born-alive infants. First, the bill acknowledges that a born-alive infant survivor is a legal person for all purposes under Montana law and is entitled to the same legal protections as any other person. Under Section 4, the bill requires that a health care provider "exercise the same degree of professional skill, care, and diligence to preserve the life and health of the infant as a reasonably diligent and conscientious health care provider would to any other infant born alive at the same gestational age." Any health care provider who purposefully or knowingly violates Section 4, would be guilty of a felony. Notably, the bill states that Section 4 is not to be misconstrued to prevent the infant's parents "from refusing to give consent to medical treatment or surgical care that is not medically necessary or reasonable."

Currently, Montana has the Protection of Premature Infants Born Alive Act, which only prohibits a person from "purposely, knowingly, or negligently causing the death of a premature infant born alive, *if the infant is viable*."[25] Unlike H.B. 625, the Protection of Premature Infants Born Alive Act does not recognize the legal protection of *all* born-alive infant survivors, nor does it create an enforcement mechanism to ensure that these infants receive medical care. If H.B. 625 is passed, Montana would join thirty-five other states that have some form of protection for newborns who survive the abortion procedure.[26]

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[22] *Id*.
[23] *Id*.
[24] 1 U.S.C. § 8.
[25] MONT. CODE ANN. § 50-20-108 (emphasis added).
[26] These states are Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

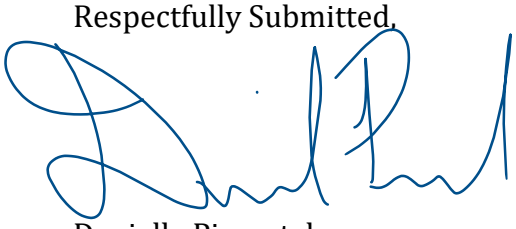
This bill is also necessary because the federal BAIPA only extends to hospitals operated by the federal government or those which receive federal funding, and the hospital's employees. It would not require many private or state-operated clinics and hospitals to provide care or medical attention to born-alive infants. However, the ability to have an abortion in Montana does not include the right to commit infanticide, nor justify the denial of basic protections for born, living human infants. H.B. 625 would create the affirmative duty of healthcare providers to give medically appropriate and reasonable care for the most vulnerable members of Montana's community.

The bill furthers Montana's interests to protect living newborns. By providing for civil and criminal penalties for violation of the law, in line with violations of other codes of professional conduct, this bill ensures that infant protections will be properly and consistently enforced, making these safeguards more than just a rule on paper.

IV. Conclusion

For these reasons, I strongly encourage the Members of this Committee to support H.B. 625 and continue to uphold Montana's duty to protect the lives of all its citizens, no matter the circumstances in which they were born.

Respectfully Submitted,



Danielle Pimentel
Policy Counsel
AMERICANS UNITED FOR LIFE