

ISSUE BRIEF

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The Necessity of the Born-Alive Abortion Survivors Protection Act

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Current federal law recognizes that all infants born at any stage of development, regardless of the circumstances surrounding the birth, are “persons.” But this recognition alone is insufficient to provide protections for infants born alive following an attempted abortion. The federal Born-Alive Abortion Survivors Protection Act would augment current law to require that proper medical care be given to an infant born alive following an abortion procedure and impose criminal consequences on health care providers who violate the law.

In the past decade, states have enacted more than 300 laws that protect innocent human life. In response to this wave of significant pro-life victories, some state legislatures across the country are passing or considering sweeping pro-abortion legislation that far exceeds *Roe v. Wade* and its progeny. These bills are radically out of step with the American people’s consensus that abortion should be significantly restricted.¹

While the bills in various states differ based on current state law, they have generally sought to allow for elective abortion up to birth, reduce or eliminate health and safety standards for clinics and practitioners, and end requirements to provide medical care to babies born alive following an abortion procedure.

In response to these radical proposals, Members of the United States Congress are working to advance pro-life policies, including the Born Alive Abortion Survivors Protection Act, to protect women and their babies—born and unborn.

This *Issue Brief* provides historical context surrounding the topics of extremely late-term abortion and born-alive infants, and the federal legislation responding to these issues.

Background: Partial-Birth Abortion Bans and Born-Alive Infants

In the mid-1990s through the early 2000s, more than two dozen states and the United States Congress passed legislation banning partial-birth abortion (PBA). It is a gruesome procedure in which a living baby is vaginally delivered until it is partially outside the mother’s body and then killed (typically by puncturing the skull and removing the brains). In 2000, the Supreme Court struck down a Nebraska ban on partial-birth abortion.² The Court “considered the location of an infant’s body at the moment of death during a partial-birth abortion—delivered partially outside the body of the mother—to be of no legal significance” under the precedence of *Roe v. Wade*, which created the right to abort “unborn children.”

In a later Third Circuit Court of Appeals decision,³ that logic led the Court to conclude that an infant’s status under law, regardless of the child’s location, was entirely dependent on whether or not the mother intended to have an abortion or give birth.

In response to these rulings, Congress sought to provide protection for infants who are born alive. The committee report for the proposed Born-Alive Infants Protection Act (BAIPA) stated:⁴

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The logical implications of *Carhart* and *Farmer* are both obvious and disturbing. Under the logic of these decisions, once a child is marked for abortion, it is wholly irrelevant whether that child emerges from the womb as a live baby. That child may still be treated as though he or she did not exist, and would not have any rights under the law—no right to receive medical care, to be sustained in life, or to receive any care at all. And if a child who survives an abortion and is born alive would have no claim to the protections of the law, there would, then, be no basis upon which the government may prohibit an abortionist from completely delivering an infant before killing it or allowing it to die. The “right to abortion,” under this logic, means nothing less than the right to a dead baby, no matter where the killing takes place.

The report went on to explain the purpose of the proposed bill:

(1) to repudiate the flawed notion that a child’s entitlement to the protections of the law is dependent upon whether that child’s mother or others want him or her;

(2) to repudiate the flawed notion that the right to an abortion means the right to a dead baby, regardless of where the killing takes place;

(3) to affirm that every child who is born alive—whether as a result of induced abortion, natural labor, or caesarean section—bears an intrinsic dignity as a human being which is not dependent upon the desires, interests, or convenience of any other person, and is entitled to receive the full protections of the law; and

(4) to establish firmly that, for purposes of Federal law, the term “person” includes an infant who

is completely expelled or extracted from his or her mother and who is alive, regardless of whether or not the baby’s development is believed to be, or is in fact, sufficient to permit long-term survival, and regardless of whether the baby survived an abortion.

During hearings on the BAIPA, the Senate Judiciary Committee’s Subcommittee on the Constitution received credible testimony from hospital nurses Jill Stanek and Allison Baker that abortionists performed procedures that resulted in live births. The abortionists then left the babies to die—in some cases without providing care as basic as warmth or nutrition. Summarized in the BAIPA committee report the testimony included accounts of:

- Babies with Down syndrome between 21 and 22 weeks old;
- A baby thought to have spina bifida but born with an intact spine; and
- A healthy infant over 23 weeks old (at which point, had the mother wished, the hospital would have provided access to the neonatal intensive care unit and specialized care for the child).

In another much-publicized case surrounding “Baby Hope,” a mother underwent the first half of a partial-birth abortion procedure and went into labor before she could undergo the second part of the procedure the next morning. She reported to an Ohio medical center and delivered a baby girl approximately 22 weeks old. Doctors did not believe the child would survive and instructed technician Shelly Lowe to take her body to the hospital’s lab. Seeing that the girl was still breathing, Lowe held the child for three hours until she died. Physicians never assessed baby Hope’s condition.⁵

1. Knights of Columbus, “Americans’ Opinions on Abortion,” January 2019, <http://www.kofc.org/un/en/resources/communications/american-attitudes-abortion-knights-of-columbus-marist-poll-slides.pdf> (accessed February 20, 2019).

2. *Stenberg v. Carhart*, 530 U.S. 914, 932 (2000).

3. *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127 (3rd Cir. 2000).

4. Committee on the Judiciary, U.S. House of Representatives, “Report to Accompany H.R. 2175, Born-Alive Infants Protection Act of 2001,” 107th Cong. 1st Sess., Report 107-186, <https://www.congress.gov/107/crpt/hrpt186/CRPT-107hrpt186.pdf> (accessed February 20, 2019).

5. *Ibid.*

In 2002 the BAIPA passed by unanimous consent in the House and Senate and became law in August of 2002.⁶

The following year, Congress passed a federal partial-birth abortion ban,⁷ which was upheld by the Supreme Court in 2007.⁸

Shortcomings in Current Law

The BAIPA clarifies for purposes of federal law that “every infant...who is born alive at any stage of development” is a “person,” regardless of the circumstances—including induced abortion—surrounding birth. But it does not specify the obligations surrounding *duty of care* for such infants.

Data from government sources in countries across the world confirm that late-term abortion procedures on babies who have reached the stage of viability sometimes result in live births.

In the United States, federal abortion reporting statistics are inadequate and incomplete because there is no federal requirement for such data collection. The Centers for Disease Control and Prevention (CDC) compiles information from states on a voluntary basis, and the data is often several years out of date. State policies regarding abortion reporting vary significantly, with only a handful of states collecting data in a timely manner.⁹ Information about born-alive infants is limited, but it is a matter of official public record that infants are born alive following abortion procedures across the country.

In an analysis of infant deaths coded “Termination of pregnancy, affecting fetus and newborn” between 2003 and 2014, the CDC recorded 588 such cases. Of those cases, at least 143 could “definitively be classified as involving an induced termination.” The CDC acknowledges that the number is likely underestimated due to vagueness of terminology and a lack of clarity about the spontaneity of some abortions.¹⁰

In addition to confirmation from the CDC that infants are sometimes born alive following an abortion, various state reports reveal the same.

- Florida reported that in 2017, 11¹¹ infants were born alive following an abortion, and six¹² were born alive in 2018. Florida law includes protections for born-alive babies.¹³
- Arizona reported that in 2017, 10¹⁴ fetuses or embryos were delivered alive following an abortion. Arizona law includes protections for born-alive infants.¹⁵
- Minnesota reported that in 2017, three babies were born alive following an abortion.¹⁶ Minnesota law includes protections for born-alive infants.¹⁷
- Oklahoma’s 2017 report includes a section tallying infants born alive, but the information is “suppressed to maintain confidentiality,” indicating that at minimum one infant was born alive follow-

6. Born-Alive Infants Protection Act, Public Law 107-207.

7. Partial-Birth Abortion Ban Act of 2003, Public Law 108-105.

8. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

9. Charles A. Donovan and Rebecca Gonzales, “Abortion Reporting: Toward A Better National Standard,” Charlotte Lozier Institute, August 2016, <https://s27589.pcdn.co/wp-content/uploads/2016/08/Abortion-Reporting-Toward-a-Better-National-Standard-FINAL.pdf> (accessed February 20, 2019).

10. Centers for Disease Control and Prevention, “Mortality Records with Mention of International Classification of Diseases: 10 Code P96.4 (Termination of Pregnancy); United States, 2003–2014,” April 11, 2016, https://www.cdc.gov/nchs/health_policy/mortality-records-mentioning-termination-of-pregnancy.htm (accessed February 20, 2019).

11. Florida Agency for Health Care Administration, “ITOP Report of Infants Born Alive, By County Where Terminations Occurred,” 2017, http://ahca.myflorida.com/MCHQ/Central_Services/Training_Support/docs/ITOPLiveBirthsByCounty2017.pdf (accessed February 20, 2019).

12. *Ibid.*

13. Americans United for Life, “Florida,” <https://aul.org/wp-content/uploads/2019/01/Florida-2019.pdf> (accessed February 20, 2019).

14. Arizona Department of Health Services, “Abortions in Arizona,” 2017, <https://azdhs.gov/documents/preparedness/public-health-statistics/abortions/2017-arizona-abortion-report.pdf> (accessed February 20, 2019).

15. Americans United for Life, “Arizona,” <https://aul.org/wp-content/uploads/2019/01/Arizona-2019.pdf> (accessed February 20, 2019).

16. Minnesota Department of Health, “Induced Abortions in Minnesota,” Report to the Legislature, 2017, <http://www.health.state.mn.us/divs/chs/pubs/abrpt/docs/2017abrptr2.pdf> (accessed February 20, 2019).

17. Americans United for Life, “Minnesota,” <https://aul.org/wp-content/uploads/2019/01/Minnesota-2019.pdf> (accessed February 20, 2019).

ing an abortion.¹⁸ Oklahoma law includes protections for born-alive infants.¹⁹

The disturbing case of abortionist Kermit Gosnell also confirms that babies can be born alive following an abortion. Gosnell is currently serving three life sentences for first-degree murder of three infants born alive following a failed abortion and involuntary manslaughter for the death of a woman undergoing an abortion at his Philadelphia clinic.²⁰ Gosnell actively killed the living babies, which is not to be confused with passively denying medical care (which is what the Born-Alive Abortion Survivors Protection Act addresses). But the facts surrounding the circumstances of the births underscore that abortion procedures do not always result in a dead baby.

Instances of Born-Alive Babies: An International Phenomenon

In Canada, government data compiling causes of death includes a category for conditions in the perinatal period, and a subsection of one of the categories includes “Termination of pregnancy, affecting fetus and newborn.” Since 2000, more than 1,000 babies have been listed in this category. Official coding guidelines instructing officials on how to classify deaths²¹ list examples of scenarios that would fall under this category, one of which is “medical abortion resulted in a liveborn.”²² A Canadian official confirmed to a news outlet in 2012 that the cause of death in this category is abortion (not stillbirths, which is in a separate category).²³

In Australia, government “Termination of Pregnancy” clinical guidelines specify a number of issues to be discussed prior to an abortion, including the potential of an abortion procedure that results in a live birth. Recommendations include ensuring that there are “local procedures for the management of live birth” and that counseling and support services are made available.²⁴ In 2016, a member of Australia’s Queensland Parliament asked the Minister for Health and Minister for Ambulance Services a “Question on Notice”²⁵ regarding babies born alive following an abortion in Queensland. The minister confirmed that between 2005 and 2015 there were 204 abortions resulting in live birth, stating that care of these babies was “individualised to the specific circumstances, and informed by the choices of the family.”²⁶

Born Alive Abortion Survivors Protection Act

It is an undeniable matter of public record that babies can be born alive following an abortion procedure. The BAIPA recognizes these babies as persons under federal law, but the 2002 Act does not provide adequate protections for these babies or establish specific requirements of care on practitioners.

Because current federal law is insufficient, policymakers have proposed the Born Alive Abortion Survivors Protection Act. Recognizing that an infant is a “person” regardless of the circumstances of his or her birth, the bill would augment current law to:

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18. Oklahoma State Department of Health, “Abortion Surveillance in Oklahoma: 2002-2017 Summary Report,” <https://www.ok.gov/health2/documents/2017ITOPReport.pdf> (accessed February 20, 2019).
 19. Americans United for Life, “Oklahoma,” <https://aul.org/wp-content/uploads/2019/01/Oklahoma-2019.pdf> (accessed February 20, 2019).
 20. Larry Miller, “Gosnell Gives Up on Appeals, Gets Life Sentence,” *The Philadelphia Tribune*, May 16, 2013, https://www.phillytrib.com/news/state-and-region/gosnell-gives-up-appeals-gets-life-sentence/article_1a65abaf-6f6e-54a3-b147-463facff86ef.html (accessed February 20, 2019).
 21. Canadian Institute for Health Information, *Canadian Coding Standards for Version 2012: ICD-10-CA and CCI*, September 2012, p. 2015, https://secure.cihi.ca/free_products/canadian_coding_standards_2012_e.pdf (accessed February 20, 2019).
 22. Live birth, for purposes of this data, means that the child “breathes or shows any other evidence of life, such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached.”
 23. “491 Babies Born Alive After Failed Abortions, Left to Die: Statistics Canada Confirms,” *Life Site News*, November 28, 2012, <https://www.lifesitenews.com/news/491-babies-born-alive-after-failed-abortions-left-to-die-in-canada-statscan> (accessed February 20, 2019).
 24. Government of Queensland, Queensland Clinical Guidelines: Termination of Pregnancy,” https://www.health.qld.gov.au/__data/assets/pdf_file/0029/735293/g-top.pdf (accessed February 20, 2019).
 25. Under the rules of the Queensland legislative assembly, a “question on notice” is a formal written question to a government minister by a member of parliament.
 26. Government of Queensland, “Question on Notice: No. 779,” May 11, 2016, <https://www.parliament.qld.gov.au/documents/tableOffice/questionsAnswers/2016/779-2016.pdf> (accessed February 20, 2019).
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- Require that health care practitioners “exercise the same degree of professional skill, care, and diligence to preserve the life and health of a child” born alive following an abortion as the practitioner “would render to any other child born alive”;
- Require that health care practitioners “ensure that the child born alive is immediately transported and admitted to a hospital”;
- Require practitioners and hospital, physician’s office, and abortion clinic employees to report violations;
- Establish criminal penalties (fines and/or imprisonment) for failure to comply; and
- Bar prosecution of the mother of the child born alive and provide her with civil remedies to obtain relief against any person who committed the violation.²⁷

The Born-Alive Abortion Survivors Protection Act provides desperately needed protections for the most vulnerable and innocent members of society. Passing legislation to protect living babies

from infanticide should not be remotely controversial. Roughly half the states currently provide some degree of protection for these babies under state law, but many do not—including states with extremely permissive abortion laws, such as California.²⁸

Despite unfounded and baseless claims to the contrary, the Born-Alive Abortion Survivors Protection Act does not restrict a woman’s access to abortion. It simply ensures that a living newborn infant, regardless of the circumstances of the child’s birth or whether he/she was “wanted” or not, receives proper medical care.

Conclusion

Federal policymakers should recognize the urgent need to enact the Born-Alive Abortion Survivors Protection Act and ensure that all living persons under federal law are treated equally for purposes of the provision of medical care. Failing to do so is not only a rejection of good policy: It is a rejection of human decency.

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27. Born Alive Abortion Survivors Protection Act, S. 130, 116th Cong., 1st Sess., <https://www.congress.gov/bill/116th-congress/senate-bill/130/text> (accessed February 20, 2019).

28. Americans United for Life, *Defending Life: From Conception to Natural Death*, p. 340, <https://aui.org/wp-content/uploads/2018/12/Defending-Life-2019.pdf#page=340> (accessed February 20, 2019).