No. 24-____

IN THE

Supreme Court of the United States

THE CENTER FOR REPRODUCTIVE MEDICINE, P.C.; AND MOBILE INFIRMARY ASSOCIATION D/B/A MOBILE INFIRMARY MEDICAL CENTER,
Petitioners,

v.

FELICIA BURDICK-AYSENNE AND SCOTT AYSENNE, IN THEIR INDIVIDUAL CAPACITIES AND AS PARENTS AND NEXT OF FRIEND OF BABY AYSENNE, DECEASED EMBRYO/MINOR,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Alabama's civil wrongful death statute, codified in 1872, imposes civil liability, including punitive damages, for the "death of a minor child . . . caused by the wrongful act, omission, or negligence of any person." Ala. Code § 6-5-391. In an astonishing decision, and ignoring over 150 years of the statute's interpretive history, the Supreme Court of Alabama held here that an unimplanted, *in vitro* embryo constitutes a "minor child" for purposes of the statute, upending the commonsense understanding of the statute around which many Alabamians, including Petitioners, have ordered their businesses and lives.

The first question presented is: Does a state supreme court's unprecedented and unwarranted interpretation of a statute, which has the effect of imposing previously unanticipated punitive liability, violate due process and fair notice rights guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. This Court has described the adversarial system of adjudication as a pillar of the American legal process. *See, e.g.*, *United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020). To guarantee that parties are requisitely opposed, courts have historically ensured that litigants have proper standing to bring suit—that is, courts generally mandate that litigating parties each have a "personal stake in the outcome of" a case. *Baker v. Carr*, 369 U.S. 186, 205 (1962). Otherwise, given the binding nature of *stare decisis*, non-parties and future litigants that will ultimately be bound by a court's decision have no guarantee that their legal interests, which include due process rights to notice and a hearing, are being adequately protected.

The Supreme Court of Alabama neglected to consider whether Respondents have requisite standing to bring the case here. Instead, that court forged ahead and introduced a troubling new legal regime for which scores of Alabamians "had neither input, nor redress, nor a hearing," yet to which those citizens remain bound, contrary to the fundamental due process protections guaranteed by the Fourteenth Amendment. Pet.App.106a (Sellers, J., dissenting).

The second question presented is: Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution demand that a court ensure that a litigant has standing to bring a lawsuit before addressing the merits of an action?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners The Center For Reproductive Medicine, P.C. and Mobile Infirmary Association (d/b/a Mobile Infirmary Medical Center) were defendants in the state circuit court and appellees before the Supreme Court of Alabama.

Respondents Felicia Burdick-Aysenne and Scott Aysenne, in their individual capacities and as parents and next of friend of Baby Aysenne, deceased embryo/minor, were plaintiffs in the state circuit court and appellants before the Supreme Court of Alabama.

The Center For Reproductive Medicine, P.C., has no parent corporation, and no publicly held company owns 10% or more of its stock. Mobile Infirmary Association (d/b/a Mobile Infirmary Medical Center) has no parent corporation, and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

Supreme Court of Alabama:

Felicia Burdick-Aysenne and Scott Aysenne, in their individual capacities and as parents and next of friend of Baby Aysenne, deceased embryo / minor, No. SC-2022-0579 (judgment entered on Feb. 16, 2024)

Circuit Court of Mobile County, Alabama:

Felicia Burdick-Aysenne and Scott Aysenne, in their individual capacities and as parents and next of friend of Baby Aysenne, deceased embryo / minor, No. CV-21-901640 (judgment entered on Apr. 13, 2022)

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INTRODUCTION

Petitioners are two Alabama medical providers who have, for years, provided routine but important reproductive health services to Alabamians with the logical expectation that Alabama's civil wrongful death statute did not apply to the disposal of unimplanted embryos, a necessary byproduct of the *in vitro* fertilization services that Petitioners provide. That expectation changed on February 16, 2024, when the Supreme Court of Alabama held that frozen embryos are "minor children" for purposes of the statute, which imposes punitive penalties on those that negligently cause the "death" of a minor child. Pet.App.1a–20a.

The decision was unwarranted and, in the words of one justice of the Supreme Court of Alabama, "shock[ing]." Pet.App.106a (Sellers, J., dissenting). The unprecedented decision (and the liability it creates) defies the foundational due process mandate that individuals receive fair notice that their conduct is statutorily prohibited *before* it be judged, such that individuals can fashion their conduct according to clear statutory directives. To make matters worse, and despite Petitioners' repeated pleas, the decision of the Alabama Supreme Court lacks any assessment as to whether Respondents—who benefited from the very medical procedure that they now seek to recover damages in connection with—have adequate standing to litigate the issue on behalf of themselves and the Alabamians who now find themselves bound to a legal regime "for which they had neither input, nor redress, nor a hearing." Pet.App.106a (Sellers, J., dissenting).

By upending Petitioners' commonsense understanding of their statutory obligations, and by altogether ignoring Petitioners' repeated submissions regarding Respondents' lack of standing to prosecute the case,

the Supreme Court of Alabama trampled on the fundamental due process protections that animate the Fourteenth Amendment to the United States Constitution. That court's failures implicate questions of exceptional importance related to the constitutional due process rights of each and every individual or entity, across the country, that finds themselves a litigant in a state or federal courtroom. Both issues are presented here and have been pressed or passed upon by the Supreme Court of Alabama. This Court should grant certiorari.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama, with concurrences and dissent (Pet.App.1a–103a), is reported at 2024 WL 656591. The Supreme Court of Alabama's denial of Petitioners' application for rehearing, with dissent (Pet.App.104a–107a), is reported at 2024 WL 1947312. The opinion and order of the Circuit Court of Mobile County, Alabama (Pet.App.108a–118a) is unreported.

JURISDICTION

The Supreme Court of Alabama issued its decision on February 16, 2024. Pet.App.1a–20a. Petitioners timely filed an application for rehearing with that court on March 1, 2024. The Supreme Court of Alabama denied Petitioners' timely application for rehearing on May 3, 2024. Pet.App.104a–107a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

STATEMENT

I. Factual Background

In 2013, Respondents underwent *in vitro* fertilization ("IVF"), performed by Petitioner The Center For Reproductive Medicine, P.C. ("CRM"), followed by implementation and subsequent cryopreservation of a number of embryos which had been fertilized *in vitro*. At that time, Respondents expressly acknowledged, as part of that care, that during the IVF process "multiple eggs (oocytes) are often produced during ovarian stimulation" such that "there are more embryos available than are considered appropriate for transfer." Pet.App.142a. Between 2013 and 2015, as part of their receiving IVF services from Petitioner CRM, the Respondents entered several agreements in which they consented to the IVF procedures; chose to harvest and fertilize all available eggs (i.e., more than could be implanted at one time); acknowledged the risks and limitations of IVF and cryopreservation, as well as the risks and limitations of the thawing process following cryopreservation; and agreed to how and when the frozen embryos could be disposed. These agreements expressly acknowledged that frozen embryos do not always survive the process of freezing and thawing,

and Respondents expressly chose to permit Petitioner CRM to destroy their unused cryopreserved embryos after five years. *See* Pet.App.264a.

On December 20, 2020, more than five years after Respondents signed these agreements—and years after they successfully underwent several implantations, which resulted in the birth of three children—a patient then admitted at Petitioner Mobile Infirmary Medical Center ("MIMC") left their room in MIMC's hospital area, gained unauthorized access to Petitioner CRM's cryogenic embryo storage area in its facility within the hospital, removed several then-frozen embryos including a remaining, unused embryo of Respondents, causing it to thaw and therefore be destroyed. Pet.App.260a–261a.

II. Procedural Background

In 2021, Respondents brought suit in the Circuit Court of Mobile County, Alabama, against Petitioners CRM and MIMC (collectively, "Petitioners"), alleging, among other things, that Petitioners' negligence resulted in the "wrongful death" of their minor child (that is, the frozen, unused embryo Respondents had been storing with Petitioners for over five years), in violation of Alabama's civil wrongful death statute. *See* Pet.App.261a–263a.

On November 22, 2021, Petitioners moved to dismiss certain claims in Respondents' First Amended Complaint, arguing, in part, that Respondents lacked standing to bring such claims. *See* Pet.App.258a–336a. In their motion to dismiss, Petitioners maintained that Respondents did not have standing to prosecute the case because the claims were "[s]peculative and based upon a loss of chance" of a frozen embryo progressing to produce a pregnancy, and because Respondents

authorized the disposal of any remaining embryo after five years (a time period which expired prior to the accident at issue). Pet.App.272a. As such, Respondents "lack[ed] standing to assert a claim as 'parents' before placement of the pre-embryos *in utero*, and the frozen, pre-implantation embryos lack[ed] standing, as they are not 'persons' under the law." Pet.App.272a.

On April 13, 2022, in its order on Petitioners' motion to dismiss, the Circuit Court of Mobile County, Alabama, dismissed two of Respondents' three claims. Pet.App.108a–118a. The circuit court did not address Petitioners' standing argument, dismissing the claims on other grounds.

On October 20, 2022, Respondents appealed the decision of the circuit court to the Supreme Court of Alabama. Pet.App.124a–163a. In their responsive briefing on appeal, Petitioners renewed their standing arguments, highlighting again the "speculative nature of whether a fertilized embryo will probably progress to produce a pregnancy," an uncertainty that Respondents had acknowledged in the contracts they had previously signed and, as referenced above, which instructed Petitioners to destroy Respondents' cryopreserved embryos after five years. Pet.App.186a. As such, Petitioners' papers before the Supreme Court of Alabama underscored the "inconsistent nature of [Respondents'] claims and their flawed standing to bring [their] claims." Pet.App.200a. On this issue, Petitioners again argued that it was "truly inconsistent for [Respondents] to insist that the loss of their cryopreserved embryo should be deemed a killing or homicide, when it is undisputed" that Respondents themselves opted to inseminate more eggs than they were potentially planning to have implanted; Respondents took the position they may not ever have

opted to implant their remaining cryopreserved embryo; and Respondents were given, and exercised, the option of choosing disposal of unused embryos in the event of the passage of a certain number of years—the latter of which occurred, yet served as the basis for Respondents' original lawsuit. Pet.App.217a.

Although the circuit court had not addressed Respondents' standing, Petitioners on appeal reiterated that "[t]here is nothing preventing a trial court from dismissing a case when [the record] . . . demonstrate[s] a lack of standing" which equates to a lack of subject matter jurisdiction, and that Respondents' suggestion otherwise "is incompatible with Alabama and federal law." Pet.App.203a.

On February 16, 2024, the Supreme Court of Alabama issued its opinion reversing the circuit court's dismissal of Respondents' wrongful death claims. *See* Pet.App.1a–20a. As in the circuit court, the Supreme Court of Alabama ruled on the merits of the action without addressing Petitioners' arguments regarding Respondents' standing (or, lack thereof).

In its decision, the Supreme Court of Alabama "shock[ed]" citizens and the medical community by holding that frozen embryos are "minor children" for purposes of Alabama's civil wrongful death statute, thus subjecting individuals and entities—including Petitioners—to the potential of punitive damages for the destruction of those embryos. Pet.App.106a (Sellers, J., dissenting). In so deciding, the Supreme Court of Alabama bucked the commonsense understanding of the statute on which Alabama's IVF providers (and recipients) had come to rely and broke with every court in the United States to have considered similar issues. *See* Pet.App.63a, 96a (Cook, J., concurring in part and dissenting in part) ("Not a single state has held that a

wrongful-death action (or a criminal-homicide action) can be brought for the destruction of a frozen embryo.").

Following the Alabama Supreme Court's remarkably unexpected decision, Petitioners filed an application for rehearing with that court. The Alabama Supreme Court denied Petitioners' application for rehearing on May 3, 2024. Pet.App.104a–107a. Two justices dissented from the denial. Justice Sellers authored a dissenting opinion based, in part, on the fact that "[t]he majority opinion on original submission had significant and sweeping implications for individuals who were entirely unassociated with the parties in the case," and "[b]ecause those individuals never had an opportunity to submit briefs in this case to explain their positions and the law supporting them, [and because] they now have a new regime that has been forced upon them for which they had neither input, nor redress, nor a hearing." Pet.App.106a.

The case was then remanded to the circuit court, Pet.App.121a–122a, where Petitioners sought a stay of the proceedings pending the outcome of this petition for certiorari. As of this filing, there has been no ruling on the motion to stay.

In this petition, Petitioners assert that the Supreme Court of Alabama's unprecedented decision violates Petitioners' Fourteenth Amendment due process right that they be provided fair notice that their conduct—i.e., alleged negligence resulting in the destruction of frozen embryos—could have resulted in punitive liability under Alabama's civil wrongful death statute. Petitioners also assert that the Supreme Court of Alabama has deprived Petitioners (and other, non-represented parties) of their Fourteenth Amendment due process rights by failing to consider whether Respondents had adequate standing to bring suit. *See*

generally 28 U.S.C. § 1257(a) (granting Supreme Court jurisdiction to review a state court judgment that addresses a contention that a title, right, privilege or immunity is "set up or claimed under the Constitution").

Although litigation is ongoing, the judgment of the Supreme Court of Alabama is a final judgment for purposes 28 U.S.C. § 1257(a) and subject to this Court's review. *See, e.g.*, *Flynt v. Ohio*, 451 U.S. 619, 620 (1981); *see also, e.g.*, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479–86 (1975) (holding that a decision may be deemed final, even where the litigation is ongoing, where the question presented for Supreme Court review will require a decision regardless of the merits of the underlying action, and where "additional proceedings would not require the decision of other federal questions that might also require review by the Court"). As in *Brady v. Maryland*, the federal due process issues have been finally decided by the Supreme Court of Alabama and will require this Court's intervention regardless of the outcome of any ancillary state-court proceedings. 373 U.S. 83, 83–90 (1963); *see also, e.g.*, *Cox Broadcasting*, 420 U.S. at 480 (discussing *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945) (Court reviewing intermediate decision of state supreme court notwithstanding ongoing state process)). Critically, the constitutional questions presented here are "too important to be denied review" and are altogether "independent of the cause itself" such that "appellate consideration [need not] be deferred until the whole case is adjudicated." *Loc. No. 438 Constr. Laborers' Union v. Curry*, 371 U.S. 542, 549 (1963) (holding that, even where the ultimate action has not been conclusively resolved, the Supreme Court may consider intermediate state court decisions implicating important federal issues).

Furthermore, the questions for which Petitioners seek a writ of certiorari were both "pressed," and the second question presented "passed upon," by the Supreme Court of Alabama. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). At both the circuit and appellate levels, Petitioners argued that the interpretation of Alabama's civil wrongful death statute for which Respondents advocated, and that the Alabama Supreme Court ultimately adopted, was contrary to any logical, well-founded expectation about the administration of Alabama's statutory scheme and unsupported by both Alabama and nationwide precedent. And, at both the circuit and appellate levels, Petitioners raised the standing issue that serves as the basis for the second question presented in this petition. *See Mut. Life Ins. Co. v. McGrew*, 188 U.S. 291, 307 (1903) (the claim to be reviewed may be raised in any action on the record); *Hemphill v. New York*, 595 U.S. 140, 148 (2022) ("No particular form of words or phrases is essential for satisfying the presentation requirement, so long as the claim is brought to the attention of the state court with fair precision and in due time." (internal quotation marks omitted)). Despite being raised repeatedly in the Alabama proceedings, the Supreme Court of Alabama did not address the standing issue. *See generally McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434–35 (1940) (the Court will consider a claim if it was raised, or, alternatively, if it was squarely considered and resolved by the state court).

REASONS FOR GRANTING THE PETITION

The Supreme Court of Alabama's decision implicates two important questions of constitutional law. *First*, the Supreme Court of Alabama "shock[ed]" Petitioners and onlookers alike when it held that unimplanted, *in*

vitro embryos constitute "minor children" for the purposes of Alabama's civil wrongful death statute, thus subjecting providers of critical reproductive services to the possibility of unprecedented punitive damages for the virtually inevitable loss of some fertilized eggs or eventual destruction of unused embryos. Pet.App.106a (Sellers, J., dissenting). Not only is the Alabama Supreme Court's decision wrong, but it is so egregiously unwarranted in its creation of new, springing liability that it violates the fair notice requirements of the Due Process Clause of the Fourteenth Amendment. *Second*, the Supreme Court of Alabama ignored Petitioners' arguments and violated their Fourteenth Amendment due process rights by failing to guarantee that Respondents have a "personal stake in the outcome of" the case at bar. *Baker v. Carr*, 369 U.S. 186, 205 (1962). This Court should grant certiorari to resolve these significant questions of constitutional law, both of which implicate due process protections vital to the American judicial system, and one of which was entirely ignored by the Supreme Court of Alabama.

I. This Court Should Decide Whether A State Supreme Court's Unprecedented and Unwarranted Interpretation Of A Statute Can Violate Due Process and Fair Notice Rights Guaranteed By The Fourteenth Amendment.

A. This Constitutional Issue Is Exceptionally Important.

The Due Process Clause of the Fourteenth Amendment provides that no State shall deprive any person of life, liberty, or property, without due process of law. U.S. Const. amend. XIV, § 1. This requires that laws provide citizens fair notice of conduct that is prohibited. *See United States v. Williams*, 553 U.S. 285, 304 (2008);

Citizens United v. Schneiderman, 882 F.3d 374, 389 (2d Cir. 2018) ("[T]he Due Process Clause of the Fourteenth Amendment mandates that 'laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.'"); *Johnson v. United States*, 576 U.S. 591, 620 (2015) (discussing same); *Cotriss v. City of Roswell*, No. 19-12747, 2022 WL 2345729, at *5 (11th Cir. June 29, 2022) (discussing same). "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012). "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *see also, e.g.*, *Papachristou v. Jacksonville*, 405 U. S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids.'" (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (alteration in original)). It is essential that "regulated parties . . . know what is required of them so they may act accordingly." *Fox TV*, 567 U.S. at 240. Indeed, "the due process protection against vague regulations 'does not leave [regulated parties] . . . at the mercy of *noblesse oblige*." *Id.* at 241 (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)). With fundamental notions of fairness in mind, it is imperative that "[v]ague laws [not] trap the innocent" by failing to "provide fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

While particularly salient in matters of criminal liability, fair notice is also a foundational civil due process right. *See, e.g.*, *Johnson*, 576 U.S. at 595 ("The

prohibition of vagueness in criminal statutes is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process." (internal quotation marks omitted)). Indeed, the Court has recently balked at efforts to adopt a "less-than-fair-notice standard for civil cases": "This Court has already expressly held that a 'stringent vagueness test' should apply to at least some civil laws[,] [and] [t]his Court has made clear, too, that due process protections against vague laws are 'not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute.' . . . So the happenstance that a law is found in the civil or criminal part of the statute books cannot be dispositive." *Sessions v. Dimaya*, 584 U.S. 148, 183–84 (2018) (Gorsuch, J., concurring) (quoting *Giaccio v. Pennsylvania*, 382 U. S. 399, 402 (1966)). This is particularly true where, as here, a civil statute subjects violators to punitive damages. *Sessions*, 584 U.S. at 184 (Gorsuch, J., concurring) (noting that "today's civil laws regularly impose penalties far more severe than those found in many criminal statutes" and that "punitive civil sanctions [are] rapidly expanding" (internal quotation marks omitted)).

The Fourteenth Amendment's fair notice requirement is not ephemeral or superfluous. The principle of adequate warning "isn't about indulging a fantasy. It is about protecting an indispensable part of the rule of law—the promise that, whether or not individuals happen to read the law, they can suffer penalties only for violating standing rules announced in advance." *Wooden v. United States*, 595 U.S. 360, 390–391 (2022) (Gorsuch, J., concurring). As such, it is well established that "fair warning should be given to the world in a

language that the common world will understand." *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

B. This Important Issue Is Directly Implicated By This Case.

In holding that an unimplanted, *in vitro* embryo constitutes a "minor child" for purposes of Alabama's civil wrongful death statute and thereby imposing civil penalties on individuals and entities for the intentional or negligent destruction of such embryos, the Supreme Court of Alabama has violated bedrock fair-notice requirements that Fourteenth Amendment due process guarantees.

Prior to the Supreme Court of Alabama's decision, there was only one possible understanding of the civil wrongful death statute with respect to IVF— it did not apply to unimplanted, *in vitro* embryos. *First*, a common-sense reading of Alabama's civil wrongful death statute compels that interpretation, which is supported by a lineage of the Alabama Supreme Court's own precedent. For example, when interpreting the meaning of the term "minor child" in civil wrongful death actions, the Alabama Supreme Court has historically relied on Alabama's criminal Homicide Act and has "repeatedly . . . emphasized the need to establish congruence between the criminal law and [Alabama's] civil wrongful death statutes." *Mack v. Cormack*, 79 So. 3d 597, 602, 611 (Ala. 2011); *see also, e.g.*, *Stinnett v. Kennedy*, 232 So. 3d 202, 215 (Ala. 2016) ("borrowing the definition of 'person' from the criminal Homicide Act to inform as to who is protected under the civil Wrongful Death Act ma[kes] sense"). Critically, Alabama's criminal homicide offenses do *not* apply to unimplanted, *in vitro* embryos. The state's homicide statutes explicitly limit the definition of unborn "persons" to those "in utero." *See, e.g.*, *Mack*, 79 So. 3d at 600, 610–11. Petitioners have

moderated their conduct to comport with that common-sense legal framework since they began offering IVF services in Alabama. Unsurprisingly, for years, those services—and the attendant destruction of unused embryos that IVF necessitates—went unchallenged.

In undergoing their own IVF treatment, Respondents, too, have fashioned their own conduct around the understanding that Alabama's civil wrongful death statute would not apply to the destruction of unimplanted embryos. They themselves opted to inseminate more eggs than they were potentially planning to have implanted, and, further, contracted for Petitioners to destroy their unused embryos after a period of years. *See* Pet.App.217a. It is wholly inconsistent for Respondents to argue, then, as they have in the Alabama proceedings, that Alabama's civil wrongful death statute applies to the destruction of cryopreserved embryos—an outcome to which they had previously assented.

The Alabama Supreme Court's decision flips the longstanding norm against civil liability (on which Petitioners and many other Alabama citizens have relied) on its head. In its decision, the Alabama Supreme Court redefined and drastically expanded the definition of the term "person"; destroyed the congruence between Alabama's civil and criminal statutes that it previously insisted upon and that has long informed Petitioners' conduct; and, in doing so, usurped the legislature's role of resolving such significant statutory ambiguities.

It is plain that Petitioners had no "fair warning" or "fair notice" that the destruction of unimplanted embryos could subject them to civil liability under the wrongful death statute. *See Cotriss*, 2022 WL 2345729, at *16. As a result of the Alabama Supreme Court's

decision, Petitioners inherited responsibility of ensuring the wellbeing of thousands of unused embryos in their possession—under threat of punitive damages. This sort of unprecedented and consequential "policy matter[]" belongs with lawmakers, not "judges[] and juries for resolution on an ad hoc and subjective basis." *Grayned*, 408 U.S. at 109. If the people of Alabama wanted to effectively curtail IVF services in the state, they could have sought to do so with the clarity and foresight that the Constitution demands of their representatives in the legislature. Springing a drastic statutory about-face on the parties in this case, as the Supreme Court of Alabama has done, is a task far removed from that court's judicial role and is contrary to the fair notice principles that underpin the Fourteenth Amendment and our system of justice.

Second, Petitioners' commonsense understanding (that they would not be subject a claim for wrongful death for the destruction of pre-implantation embryos) is bolstered by the nationwide acceptance that pre-implantation embryos are *not*, and have never been, properly characterized as "persons" for purposes of criminal *or* civil liability. Not a single court in the United States has held to the contrary without clear legislative language specifying that extra-uterine fertilized embryos are statutorily defined "persons." *See, e.g.*, *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256 (Ariz. Ct. App. 2005); *Miller v. Am. Infertility Grp. of Ill.*, 897 N.E.2d 837 (Ill. Ct. App. 2008); *Penniman v. Univ. Hospitals Health Sys., Inc.*, 130 N.E.3d 333 (Ohio Ct. App. 2009); *Inst. for Women's Health P.L.L.C. v. Imad*, No. 04–05–00555–CV, 2006 WL 334013 (Tex. Ct. App. 2006); *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. Ct. App. 2016); *Davis v. Davis*, 842 S.W.2d 588, 594 (Tenn. 1992). *Compare, e.g.*, S.D. Codified Laws § 22-1-2 (defining "unborn child" as "an individual organism . . . from

fertilization to until live birth"), *with* Ga. Code Ann. § 1-2-1 (defining "person" as a human being "at any stage of development who is carried in the womb"). On this issue, Alabama stands conspicuously alone.

Third, that the Supreme Court of Alabama defied the reasonable expectations of Alabama citizens is evident by the decision's immediate aftermath. Just weeks after the Supreme Court handed down its ruling, Alabama lawmakers scrambled to pass a bill "to provide civil and criminal immunity for death or damage to an embryo to any individual or entity when providing or receiving services related to in vitro fertilization." Ala. Code §§ 6-5-810, 811. Although the bill applied retroactively, it carved out ongoing lawsuits. But in any event, the statutory immunity is tenuous: Respondents have already filed motions in the circuit court seeking to have the new statute declared unconstitutional.

In sum, the Alabama Supreme Court's unwarranted interpretation of the civil wrongful death statute—and subsequent implication of civil liability—makes it such that, pre-decision, Petitioners lacked any "fair notice [that their] conduct" was, or could have been, forbidden. *Schneiderman*, 882 F.3d at 389 (quoting *Fox TV*, 567 U.S. at 253). Members of the Supreme Court of Alabama acknowledged as much. In his dissenting opinion on Petitioners' application for rehearing, Justice Sellers wrote:

> One of the cardinal rules of jurisprudence is that judicial decisions should follow reason and logic so that no one is ever truly surprised by them. Indeed, an important role of the judicial branch is to ensure that the rules governing society create stability and certainty that comport with the English concept of 'the

> law of the land,' i.e., to reflect the common experience, tradition, and culture of citizens over the philosophical, creative, and speculative. . . . In this case, our decision was a surprise, if not a shock, to our citizens. . . . Many [] individuals had no reason to believe that a legal and routine medical procedure would be delayed, much less denied, as a result of this Court's opinion.

Pet.App.105a–106a (Sellers, J., dissenting).

Justice Cook, too, previously emphasized the anomalous nature of the Supreme Court's decision: "No court—anywhere in the country—has reached the conclusion the main opinion reaches," lamenting that "when we are the sole outlier, it should cause us to carefully reexamine our conclusions about expanding the reach of a statute passed in 1872 and our understanding of the common law." Pet.App.63a, 97a. (Cook, J., concurring in part and dissenting in part).

The ruling levied by the Supreme Court of Alabama represents more than a mere disagreement over statutory interpretation. It is an unprecedented and unwarranted departure from an accepted regulatory framework governing routine medical procedures on which Alabamians—including Petitioners and Respondents—have long relied. By bucking reasonable expectations about Alabama's longstanding statutory scheme, the Alabama Supreme Court makes a mockery of the fundamental notions of fairness that undergird the Due Process Clause of the Fourteenth Amendment—and Petitioners are left to pay the price.

C. This Case Is An Ideal Vehicle To Address This Important Constitutional Issue.

This case presents an ideal vehicle for considering whether the unprecedented decision of the Alabama Supreme Court, and the resulting imposition of civil punitive damages for the destruction of *in vitro* embryos, violates the fair notice requirements guaranteed to Petitioners by the Fourteenth Amendment.

As set forth above, the Alabama Supreme Court's decision came as "a surprise, if not a shock," to Petitioners, Alabamians, and onlookers nationwide. Pet.App.106a (Sellers, J., dissenting). As a result of that court's holding, Petitioners are now subject to claims for punitive damages for conduct attendant to a routine medical procedure of which thousands of Americans have availed themselves, including Respondents. The legal basis underpinning this due process issue was argued before both the circuit court and Supreme Court of Alabama. It was disregarded by the Supreme Court of Alabama when it issued an unprecedented decision that broke with every other court in the nation and eschewed widely accepted legal assumptions around which many Alabamians have ordered their lives.

And, equally as importantly, the Supreme Court of Alabama's decision immediately chilled access to IVF services in the state and will likely have similar influence elsewhere. As one member of the Alabama Supreme Court noted, "[n]o rational medical provider would continue to provide IVF services" with a risk of punitive damages looming. Pet.App.97a (Cook, J., concurring in part and dissenting in part).

A ruling in Petitioners' favor on this issue would return the case to the circuit court to proceed on the

merits consistent with that court's prior orders, including the dismissal of all but one of Respondents' prior claims.

II. This Court Should Decide Whether Due Process Demands An Initial Finding That A Litigant Has Standing To Bring Suit.

"The preclusive power of stare decisis is real, and . . . [it] raises serious due process issues." Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011, 1026 (2003). For that reason, it is critical that courts ensure that litigants have "a personal stake in the outcome" of a case so as to guarantee that the best arguments are presented to it *before* making a decision that would bind parties and non-parties alike. *Baker*, 369 U.S. at 205. Thus, a determination that litigating parties have standing is a critical due process protection.

The Alabama Supreme Court neglected that threshold responsibility and ignored Petitioners' arguments that Respondents lack standing to prosecute the case at bar. Indeed, to date, there has been no finding that Respondents have "the necessary zeal" to present the case on behalf of all of the Alabamians now bound by the Supreme Court of Alabama's holding. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). The result is a decision that forces a mandatory "new regime" on "individuals [who] never had an opportunity to submit briefs in th[e] case to explain their positions and the law supporting them," and "for which they had neither input, nor redress, nor a hearing." Pet.App.106a (Sellers, J., dissenting). That outcome is contrary to the foundational notice and hearing requirements that animate the Due Process Clause. The question of whether constitutional due process rights require that courts determine that a litigant has standing to bring

suit before addressing the merits of an action is presented here, is critical to state and federal litigants nationwide, and is ripe for resolution. It warrants review.

A. This Constitutional Issue Is Exceptionally Important.

1. Standing Is A Foundational Tenet Of Our Adversarial Legal System.

The "adversarial system of adjudication" is a hallmark of the American legal process. *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020). A litigant's stake in the issue to be determined—that is, their "standing"—ensures that parties to a litigation remain requisitely opposed so as to guarantee "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker*, 369 U.S. at 205. Indeed, standing is a "bedrock constitutional requirement that [the] Court has applied to all manner of important disputes." *United States v. Texas*, 599 U.S. 670, 675 (2023). The *litigant*, not the issues to be decided, is the focal point of a standing determination, given that standing is meant to ensure that the "dispute sought to be adjudicated will be presented in an adversary context." *Flast v. Cohen*, 392 U.S. 83, 101 (1968).

At its core, standing guarantees that the leading arguments in a dispute are presented to the court for consideration before the case is definitively resolved. This fundamental objective is well-established. For example, as the Court noted in *Gladstone, Realtors v. Bellwood*, "the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access . . . to those litigants best suited to assert a particular claim."

441 U.S. 91, 99–100 (1979). Only those litigants with an appropriate stake in the outcome of the litigation can be expected to proceed "with the necessary zeal and appropriate presentation" required to vindicate their rights, crystallize the record, and put forth the most compelling arguments. *Kowalski*, 543 U.S. at 129. Simply put, standing "assures the court that the issues before it will be concrete and sharply presented." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984).

2. Standing Ensures That The Application Of *Stare Decisis* Does Not Violate Non-Parties' Due Process Rights To Notice And A Hearing.

Marshaling the best arguments before a court is not pro forma; it is essential to due process. The Due Process Clause of the Fourteenth Amendment ensures that no State deprive any person of life, liberty, or property, without due process. U.S. Const., amend XIV, § 1. In any adjudication, it is axiomatic that the life, liberty, and/or property of a party is at stake. Due process protects a litigant's right to be heard on the merits of their claims *before* their life, liberty, or property be infringed upon. *See, e.g.*, *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *Richards v. Jefferson Cnty.*, 517 U.S. 793, 797–98, 797 n.4 (1996).

But the application of *stare decisis* makes it such that a future litigant *may* be deprived of their constitutional right to be heard on the merits of their claim *if* their controversy has already been considered and decided by the court. The application of binding precedent serves to preclude a party from re-litigating issues already decided, notwithstanding whether the party seeking relief was involved in the initial litigation.

The power of binding precedent, therefore, occupies a uniquely influential position in the American judicial process. As one court has noted, "[*s*]*tare decisis*, unlike the doctrines of *res judicata* and collateral estoppel, is not narrowly confined to parties and privies . . . . Rather, when its application is deemed appropriate, the doctrine is broad in impact, reaching strangers to the earlier litigation." *E.E.O.C. v. Trabucco*, 791 F.2d 1, 2 (1st Cir. 1986). "[S]tare decisis functions as a doctrine of preclusion, and its application to nonparty litigants poses the same due process problem as the application of issue preclusion to nonparty litigants." Barrett, *supra*, at 1060–61. Indeed, "[t]he preclusive power of stare decisis is real, and . . . [it] raises serious due process issues." *Id.* at 1026.

3. Due Process Demands That Courts Determine Whether Litigants Have Standing Before Considering A Case's Merits.

Because *stare decisis* binds non-parties to a decision of which they were not a part, and because due process demands that all individuals have their day in court, an initial determination that litigating parties have standing (and will thus set forth the best arguments before the court *before* non-parties are bound by a decision) is a critical due-process protection for non-parties and future litigants. *See, e.g.*, Emile J. Katz, *Due Process & The Standing Doctrine*, 47 Harv. J.L. & Pub. Pol'y 395, 400 (2024) ("[T]he standing doctrine ensures that the parties presently before the court are adequately representing potential future litigants before those future litigants are bound by the court's precedent.") A finding to the contrary—or, as in this case, no finding at all with regard to Respondents' standing—is manifestly contrary to the due process

guarantee that individuals not be bound by a judgment unless they have had their day in court, or unless it can be fairly said that they were adequately represented in a prior litigation.

In some contexts, this Court has already held that a finding of standing is an essential due process protection. For example, adequate representation is critical to the constitutionality of class actions, namely because class suits inherently bind (and thus preclude) similarly situated non-parties from re-litigating similar issues. And this Court has held that "a failure of due process" will be had where "it cannot be said that the [class action] procedure adopted *fairly insures the protection of the interests of absent parties who are to be bound by it*." *Hansberry,* 311 U.S. at 42 (emphasis added); *see also* Katz, *supra*, at 420–21 ("[T]he Court has permitted class actions because the process they afford absent class members adequately protects the interests of those members and, consequently, the class action mechanism does not violate the Due Process Clause.")

By that same token, given the binding nature of precedent, it must be true that due process demands that a court establish that the parties to a litigation have requisite standing so as to ensure that they will adequately and effectively represent any non-parties that will be bound by the court's ultimate holding. Simply put, the Fourteenth Amendment's Due Process Clause "forbids a court from binding a person to the effects of a court's judgment where that person has not previously had her 'day in court' or otherwise been 'adequately represented' in court." Katz, *supra*, at 421 (quoting *Taylor v. Sturgell*, 553 U.S. 880, 894–95 (2008)). When a court chooses not to consider or address whether the parties to a litigation are adequately adverse, it fails to protect the interests of

non-parties who will nonetheless be bound by the court's holding, breaching those parties' due process right to a hearing and trial.

The relationship between due process and standing is well founded. This Court has already acknowledged that standing and due process are inextricably intertwined. In *Singleton v. Wulff*, the Court found that two physicians had adequate standing to represent their patients in a litigation, noting, "The courts depend on effective advocacy, and therefore should prefer to construe legal rights *only when the most effective advocates of those rights are before them*. The holders of the rights may have a like preference, to the extent they will be bound by the court's decisions under the doctrine of stare decisis." 428 U.S. 106, 114 (1976) (emphasis added). The Court, "implicitly acknowledg[ing] that the purpose of the [standing] rule was to protect future litigants not presently before the Court," Katz, *supra*, at 439, went on to find that standing ought to be afforded to a third party only where "the relationship between the litigant and the third party [is] such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Wulff*, 428 U.S. at 114–15. It is paramount—indeed, due process demands—that courts ensure that the best litigants—and, therefore, the best arguments—are presented *ab initio*.

4. Current Jurisprudence Overlooks Standing As A Due Process Requirement.

Historically, the Court has grounded a standing requirement only in Article III of the Constitution, which limits the judicial power to certain "Cases" and "Controversies." *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an

essential and unchanging part of the case-or-controversy requirement of Article III."). But standing is also relevant and necessary to a constitutional due process analysis. For the reasons outlined above, the Due Process Clause—and the resultant application of *stare decisis*—necessitates that courts make a finding of standing before addressing the merits of a case.

As an initial matter, Article III as the Constitution's sole home for a standing requirement is not a foregone conclusion. At best, Article III's standing requirement is atextual. As one leading treatise notes, "[d]espite the clarity with which the Court articulates the elements of standing, the Constitution contains no Standing Clause." Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System 101 (7th ed. 2015). And it has been previously observed that it is not a "linguistically inevitable conclusion" that the Court root its standing jurisprudence in Article III, as the standing requirement "has been made part of American constitutional law through" Article III only "for want of a better vehicle." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 882 (1983).

The Due Process Clause of the Fourteenth Amendment, on the other hand, plainly "requires that a litigant receive notice of a proceeding and an opportunity to be heard in it before she is bound to any determinations resulting from it." Barrett, *supra*, at 1035 (citing *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971)). A finding that initial litigating parties have standing, then, certifies that due process protections of non-party litigants (who will nonetheless be bound by the court's holding) remain respected. Conversely, when a court fails to consider whether litigants have standing, as is the case here, it

necessarily tramples the due process rights of parties not present in the action. The Due Process Clause, in addition to Article III, requires that courts make a determination of standing before reaching the merits of an action. State courts are not exempt from the Fourteenth Amendments demands. Still, the Alabama Supreme Court did not make any such determination.

B. This Important Issue Is Directly Implicated By This Case.

Here, the Supreme Court of Alabama did not see fit to address Petitioners' argument that Respondents did not, and do not, have standing to bring suit. As Petitioners have argued, Respondents lack a proper legal stake in the outcome of this case, given that they benefited from Petitioners' IVF services, made no claim that they planned to implant their remaining embryo, and themselves chose to have any unused embryos destroyed after five years.

Nonetheless, and notwithstanding Respondents' suspect standing, the Supreme Court of Alabama issued a decision compelling "a new regime" on "individuals [who] never had an opportunity to submit briefs in th[e] case to explain their positions and the law supporting them," and "for which they had neither input, nor redress, nor a hearing." Pet.App.106a (Sellers, J., dissenting). And, in all likelihood, as Petitioners have repeatedly conveyed, Respondents are the wrong party to represent these non-party rights. Even so, millions of Alabamians now find themselves bound to the result of a judicial process in which they played no role and for which they can seek no redress. This is directly contrary to constitutional due process guarantees outlined above. *See, e.g.*, *Hansberry*, 311 U.S. at 42.

The Fourteenth Amendment prohibits the outcome here. Indeed, it is incumbent on the courts, including state courts, to ensure that litigants can serve as vigorous advocates of any non-parties that will be bound by the court's judgment. The Supreme Court of Alabama ignored this threshold obligation, in violation of the Fourteenth Amendment.

C. This Case Is An Ideal Vehicle To Address This Important Constitutional Issue.

This case presents an ideal vehicle for the Court to confirm that the Constitution's Due Process Clauses require state and federal courts to determine and address whether a litigant has standing before the court reaches the merits of a case.

As set forth above, Petitioners have repeatedly argued that Respondents do not have standing to prosecute this case. The Supreme Court of Alabama never considered Petitioners arguments on this critical issue. Instead, that court issued a far-reaching decision with "sweeping implications for individuals who were entirely unassociated with the parties in the case." Pet.App.106a (Sellers, J., dissenting). Given the nature of the due process concerns at the heart of this petition, the Court should grant this petition to resolve this important issue and address the Supreme Court of Alabama's error.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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August 1, 2024

APPENDIX

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APPENDIX A

Rel: February 16, 2024

Notice: This opinion is subject to formal revision before publication in the advance sheets of *Southern Reporter*. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0650), of any typographical or other errors, in order that corrections may be made before the opinion is printed in *Southern Reporter*.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

SC-2022-0515

JAMES LEPAGE AND EMILY LEPAGE, INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS OF TWO DECEASED LEPAGE EMBRYOS, EMBRYO A AND EMBRYO B; AND WILLIAM TRIPP FONDE AND CAROLINE FONDE, INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS OF TWO DECEASED FONDE EMBRYOS, EMBRYO C AND EMBRYO D

v.

THE CENTER FOR REPRODUCTIVE MEDICINE, P.C., AND MOBILE INFIRMARY ASSOCIATION D/B/A MOBILE INFIRMARY MEDICAL CENTER

Appeal from Mobile Circuit Court
(CV-21-901607)

SC-2022-0579

FELICIA BURDICK-AYSENNE AND SCOTT AYSENNE, IN THEIR INDIVIDUAL CAPACITIES AND AS PARENTS AND NEXT FRIENDS OF BABY AYSENNE, DECEASED EMBRYO/MINOR

v.

THE CENTER FOR REPRODUCTIVE MEDICINE, P.C., AND MOBILE INFIRMARY ASSOCIATION D/B/A MOBILE INFIRMARY MEDICAL CENTER

Appeal from Mobile Circuit Court
(CV-21-901640)

MITCHELL, Justice.[1]

This Court has long held that unborn children are "children" for purposes of Alabama's Wrongful Death of a Minor Act, § 6-5-391, Ala. Code 1975, a statute that allows parents of a deceased child to recover punitive damages for their child's death. The central question presented in these consolidated appeals, which involve the death of embryos kept in a cryogenic nursery, is whether the Act contains an unwritten exception to that rule for extrauterine children -- that is, unborn children who are located outside of a biological uterus at the time they are killed. Under existing black-letter law, the answer to that question is no: the Wrongful

[1] These consolidated appeals were originally assigned to another Justice on this Court; they were reassigned to Justice Mitchell on December 15, 2023.

Death of a Minor Act applies to all unborn children, regardless of their location.

Facts and Procedural History

The plaintiffs in these consolidated appeals are the parents of several embryonic children, each of whom was created through in vitro fertilization ("IVF") and -- until the incident giving rise to these cases -- had been kept alive in a cryogenic nursery while they awaited implantation. James LePage and Emily LePage are the parents of two embryos whom they call "Embryo A" and "Embryo B"; William Tripp Fonde and Caroline Fonde are the parents of two other embryos called "Embryo C" and "Embryo D"; and Felicia Burdick-Aysenne and Scott Aysenne are the parents of one embryo called "Baby Aysenne."

Between 2013 and 2016, each set of parents went to a fertility clinic operated by the Center for Reproductive Medicine, P.C. ("the Center"), to undergo IVF treatments. During those treatments, doctors were able to help the plaintiffs conceive children by joining the mother's eggs and the father's sperm "in vitro" -- that is, outside the mother's body. The Center artificially gestated each embryo to "a few days" of age and then placed the embryos in the Center's "cryogenic nursery," which is a facility designed to keep extrauterine embryos alive at a fixed stage of development by preserving them at an extremely low temperature. The parties agree that, if properly safeguarded, an embryo can remain alive in a cryogenic nursery "indefinitely" -- several decades, perhaps longer.

The plaintiffs' IVF treatments led to the creation of several embryos, some of which were implanted and resulted in the births of healthy babies. The plaintiffs contracted to have their remaining embryos kept in

the Center's cryogenic nursery, which was located within the same building as the local hospital, the Mobile Infirmary Medical Center ("the Hospital"). The Hospital is owned and operated by the Mobile Infirmary Association ("the Association").

The plaintiffs allege that the Center was obligated to keep the cryogenic nursery secured and monitored at all times. But, in December 2020, a patient at the Hospital managed to wander into the Center's fertility clinic through an unsecured doorway. The patient then entered the cryogenic nursery and removed several embryos. The subzero temperatures at which the embryos had been stored freeze-burned the patient's hand, causing the patient to drop the embryos on the floor, killing them.

The plaintiffs brought two lawsuits against the Center and the Association. The first suit was brought jointly by the LePages and the Fondes; the second was brought by the Aysennes. Each set of plaintiffs asserted claims under Alabama's Wrongful Death of a Minor Act, § 6-5-391. In the alternative, each set of plaintiffs asserted common-law claims of negligence (in the LePages and Fondes' case) or negligence and wantonness (in the Aysennes' case), for which they sought compensatory damages, including damages for mental anguish and emotional distress. The plaintiffs specified, however, that their common-law claims were pleaded "in the alternative, and only [apply] should the Courts of this State or the United States Supreme Court ultimately rule that [an extrauterine embryo] is not a minor child, but is instead property." In addition to those claims, the Aysennes brought breach-of-contract and bailment claims against the Center.

The Center and the Association filed joint motions in each case asking the trial court to dismiss the

plaintiffs' wrongful-death and negligence/wantonness claims against them in accordance with Rules 12(b)(1) and 12(b)(6), Ala. R. Civ. P. The trial court granted those motions. In each of its judgments, the trial court explained its view that "[t]he cryopreserved, in vitro embryos involved in this case do not fit within the definition of a 'person'" or "'child,'" and it therefore held that their loss could not give rise to a wrongful-death claim.

The trial court also concluded that the plaintiffs' negligence and wantonness claims could not proceed. Specifically, the court reasoned that, to the extent those claims sought recovery for the value of embryonic children, the claims were barred by Alabama's long-standing prohibition on the recovery of compensatory damages for loss of human life. And to the extent the claims sought emotional-distress damages, the trial court said that they were barred by the traditional limits to Alabama's "zone of danger test," which "limits recovery for emotional injury *only* to plaintiffs who sustained a physical injury ... or were placed in immediate risk of physical harm ...."

The trial court's judgments disposed entirely of the LePages' and the Fondes' claims, and left the Aysennes with only their breach-of-contract and bailment claims. The Aysennes asked the trial court to certify its judgment as final under Rule 54(b), Ala. R. Civ. P., which the trial court did. Both sets of plaintiffs appealed.

Standard of Review

We review a trial court's judgment granting a motion to dismiss de novo, without any presumption of correctness. *Hawkins v. Ivey,* 365 So. 3d 1058, 1060 (Ala. 2022).

Analysis

The parties to these cases have raised many difficult questions, including ones about the ethical status of extrauterine children, the application of the 14th Amendment to the United States Constitution to such children, and the public-policy implications of treating extrauterine children as human beings. But the Court today need not address these questions because, as explained below, the relevant statutory text is clear: the Wrongful Death of a Minor Act applies on its face to all unborn children, without limitation. That language resolves the only issue on appeal with respect to the plaintiffs' wrongful-death claims and renders moot their common-law negligence and wantonness claims.

A. Wrongful-Death Claims

Before analyzing the parties' disagreement about the scope of the Wrongful Death of a Minor Act, we begin by explaining some background points of agreement. All parties to these cases, like all members of this Court, agree that an unborn child is a genetically unique human being whose life begins at fertilization and ends at death. The parties further agree that an unborn child usually qualifies as a "human life," "human being," or "person," as those words are used in ordinary conversation and in the text of Alabama's wrongful-death statutes. That is true, as everyone acknowledges, throughout all stages of an unborn child's development, regardless of viability.

The question on which the parties disagree is whether there exists an unwritten exception to that rule for unborn children who are not physically located "in utero" -- that is, inside a biological uterus -- at the

time they are killed. The defendants argue that this Court should recognize such an exception because, they say, an unborn child ceases to qualify as a "child or "person" if that child is not contained within a biological womb.

The plaintiffs, for their part, argue that the proposed exception for extrauterine children would introduce discontinuity within Alabama law. They contend, for example, that the defendants' proposed exception would deprive parents of any civil remedy against someone who kills their unborn child in a "partial-birth" posture -- that is, after the child has left the uterus but before the child has been fully delivered from the birth canal -- despite this State's longstanding *criminal* prohibition on partial-birth abortion, *see* Ala. Code 1975, § 26-23-3.

The plaintiffs also argue that the defendants' proposed exception would raise serious constitutional questions. For instance, one latent implication of the defendants' position -- though not one that the defendants seem to have anticipated -- is that, under the defendants' test, even a full-term infant or toddler conceived through IVF and gestated to term in an in vitro environment would not qualify as a "child" or "person," because such a child would both be (1) "unborn" (having never been delivered from a biological womb) and (2) not "in utero."[2] And if such

[2] Until recently, there had been a longstanding ethical norm against artificially gestating human embryos past 14 days of development. Henry T. Greely, *The 14-Day Embryo Rule: A Modest Proposal,* 22 Hous. J. Health L. & Pol'y 147 (2022). But that norm is wavering, and there is currently nothing stopping "researchers from allowing *ex vivo* [that is, extrauterine] human embryos to develop for eight or nine weeks postfertilization .... Or to viability .... Or, for that matter, to 38 weeks postfertilization and full term."

children were not legal "children" or "persons," then their lives would be unprotected by Alabama law. The plaintiffs argue that this sort of unequal treatment would offend the Equal Protection Clause of the 14th Amendment to the United States Constitution, which prohibits states from withholding legal protection from people based on immutable features of their birth or ancestry. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.,* 600 U.S. 181, 208 (2023) ("'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" (citations omitted)).[3]

These are weighty concerns. But these cases do not require the Court to resolve them because, as explained below, neither the text of the Wrongful Death of a Minor Act nor this Court's precedents exclude extra-uterine children from the Act's coverage. Unborn children are "children" under the Act, without exception

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Id. at 154-55; *see also* Kirstin R.W. Matthews & Daniel Morali, *National Human Embryo and Embryoid Research Policies: A Survey of 22 Top Research-intensive Countries,* 15 Regenerative Med. 1905 (2020) ("While the USA was the first to propose the 14-day limit, the limit was never passed as a federal law."). There are, of course, practical limitations on developing extrauterine embryos to term, but those limitations are shrinking each year due to "technological advances." *See* Matthews & Morali, 15 Regenerative Med. at 1905.

[3] In his dissenting opinion, Justice Cook appears to concede that the life of a fully developed child who was conceived and gestated in vitro would not be protected under his and the defendants' reading of the Wrongful Death of a Minor Act. *See* ___ So. 3d at ____ n.55 (arguing that "the Legislature" would have to intervene to protect the lives of any children created with these "future technologies"). Justice Cook does not, however, discuss the constitutional implications of that position.

based on developmental stage, physical location, or any other ancillary characteristics.

1. The Text of the Wrongful Death of a Minor Act Applies to All Children, Without Exception

First enacted in 1872, the Wrongful Death of a Minor Act allows the parents of a deceased child to bring a claim seeking punitive damages "[w]hen the death of a minor child is caused by the wrongful act, omission, or negligence of any person," provided that they do so within six months of the child's passing. § 6-5-391(a). The Act does not define either "child" or "minor child," but this Court held in *Mack v. Carmack,* 79 So. 3d 597 (Ala. 2011), that an unborn child qualifies as a "minor child" under the Act, regardless of that child's viability or stage of development. *Id.* at 611. We reaffirmed that conclusion in *Hamilton v. Scott,* 97 So. 3d 728 (Ala. 2012), explaining that "Alabama's wrongful-death statute allows an action to be brought for the wrongful death of any unborn child." *Id.* at 735.

None of the parties before us contest the holdings in *Mack* and *Hamilton,*[4] and for good reason: the

[4] Justice Cook raises several novel arguments, none of which were briefed or mentioned by the parties, in support of his view that "the public meaning of 'minor child' as used in the Wrongful Death [of a Minor] Act did not include an unborn infant." ___ So. 3d at ____ (Cook, J., dissenting). If Justice Cook were correct on that point, then it would mean that *Mack* erred by interpreting the Act to protect unborn children. For the reasons given in this section of the opinion, we are not persuaded that the unborn were excluded from the original meaning of the term "child." But even if Justice Cook were correct on that point, the Court would still apply *Mack's* definition because, as Justice Cook himself acknowledges, no party has challenged the *Mack* line of cases. *See id.* at ___ (Cook, J., dissenting) (emphasizing that this Court does not overrule precedent unless asked to do so by the parties and

ordinary meaning of "child" includes children who have not yet been born. "This Court's most cited dictionary defines 'child' as 'an unborn or recently born person,'" *Ex parte Ankrom,* 152 So. 3d 397, 431 (Ala. 2013) (Shaw, J., concurring in part and concurring in the result) (citing *Merriam-Webster's Collegiate Dictionary* 214 (11th ed. 2003)), and all other mainstream dictionaries are in accord. *See, e.g.,* 3 The *Oxford English Dictionary* 113 (2d ed. 1989) (defining "child" as an "unborn or newly born human being; foetus, infant"); *Webster's Third New International Dictionary* 388 (2002) (defining "child" as "an unborn or recently born human being"). There is simply no "patent or latent ambiguity in the word 'child'; it is not a term of art and contains no inherent uncertainty." *Ankrom,* 152 So. 3d at 431 (Shaw, J., concurring in part and concurring in the result).

The parties have given us no reason to doubt that the same was true in 1872, when the Wrongful Death of a Minor Act first became law. *See* Act No. 62, Ala. Acts 1871-72 (codified at § 2899, Ala. Code 1876). Indeed, the leading dictionary of that time defined the word "child" as "the immediate progeny of parents" and indicated that this term encompassed children in the womb. Noah Webster et al., *An American Dictionary of the English Language* 198 (1864) ("[t]o be

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explaining that "the parties [here] have neither asserted that the holdings or reasoning in either *Mack* or *Stinnett [v. Kennedy,* 232 So. 3d 202 (Ala. 2016),] are wrong, nor have they asked us to overrule those decisions"). We are perplexed by Justice Cook's insistence that we have not given *Mack* due deference when the bulk of his dissent is animated by the view that *Mack* was wrongly decided and that, contrary to its holding, unborn children are not "children" under the Act after all.

with child [means] to be pregnant").[5] And Blackstone's *Commentaries,* the leading authority on the common law, expressly grouped the rights of unborn children with the "Rights of Persons," consistently described unborn children as "infant[s]" or "child[ren]," and spoke of such children as sharing in the same right to life that is "inherent by nature in every individual." 1 William Blackstone, *Commentaries on the Laws of England* 125-26.[6] Those expressions are in keeping

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[5] As Justice Cook points out, this entry goes on to explain that the term "child" is "applied to infants from their birth; but the time when they cease ordinarily to be so called, is not defined by custom." ___ So. 3d at ____ (Cook, J., dissenting). Justice Cook believes that this language indicates that infants prior to birth were not considered "children." We disagree. The language quoted by Justice Cook contrasts newborns with older children in order to make the point that there is no clear-cut time at which a young person transitions from childhood to adulthood; it does not indicate that infants were considered something other than children prior to their birth, as the definition elsewhere makes clear when it describes a pregnant woman as being "with child." Another definition on that same page further drives home the point that unborn children are "children" when it describes "childbearing" as the act of "bearing children" in the womb.

[6] It is true, as Justice Cook emphasizes, that the common law spared defendants from criminal-homicide liability for killing an unborn child unless the prosecution could prove that the child had been "born alive" before dying from its injuries. But the criminal law has always been "out of step with the treatment of prenatal life in other areas of law," in that it generally prioritizes lenity towards the accused over the otherwise applicable "'civil rights'" of unborn children. *Dobbs v. Jackson Women's Health Org.,* 597 U.S. 215, 247 (2022) (citation omitted). Accordingly, the born-alive safe harbor appears to have operated primarily as an evidentiary rule rather than as a substantive limitation on personhood. Joanne Pedone, *Filling the Void: Model Legislation for Fetal Homicide Crimes,* 43 Colum. J. L. & Soc. Probs. 77, 82 (2009) (explaining that the function of the born-alive rule was "to make sure the government established causation before

with the United States Supreme Court's recent observation that, even as far back as the 18th century, the unborn were widely recognized as living persons with rights and interests. *See Dobbs v. Jackson Women's Health Org.,* 597 U.S. 215, 246-48 (2022).

Courts interpreting statutes are required to give words their "'"natural, ordinary, commonly understood meaning,"'" unless there is some textual indication that an unusual or technical meaning applies. *Swindle v. Remington,* 291 So. 3d 439, 457 (Ala. 2019) (citations omitted). Here, the parties have not pointed us to any such indication, which reflects the overwhelming consensus in this State that an unborn child is just as much a "child" under the law as he or she is a "child" in everyday conversation.

Even if the word "child" were ambiguous, however, the Alabama Constitution would require courts to resolve the ambiguity in favor of protecting unborn life. Article I, § 36.06(b), of the Constitution of 2022 "acknowledges, declares, and affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate." That section, which is titled "Sanctity of Unborn Life," operates in this context as a constitutionally imposed canon of

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obtaining a homicide conviction," during an era in which "'the state of medical science'" was primitive and in which proving causation for prenatal injuries was difficult (quoting Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms,* 21 Val. U. L. Rev. 563, 586 (1987))). Like the so-called "quickening rule," the born-alive rule ensured that there was "'*evidence* of life,'" but did not provide a *definition* of life, and did not mean that unborn children were considered to be something other than living human beings. *Dobbs,* 597 U.S. at 246 (citation omitted); *see also* Forsythe, supra, at 586 & n.105.

construction, directing courts to construe ambiguous statutes in a way that "protect[s] ... the rights of the unborn child" equally with the rights of born children, whenever such construction is "lawful and appropriate." *Id.*[7] When it comes to the Wrongful Death of a Minor Act, that means coming down on the side of including, rather than excluding, children who have not yet been born.

The upshot here is that the phrase "minor child" means the same thing in the Wrongful Death of a Minor Act as it does in everyday parlance: "an unborn or recently born" individual member of the human species, from fertilization until the age of majority. *See Merriam-Webster's Collegiate Dictionary* 214 (11th ed. 2020) (defining "child"); *accord* Noah Webster et al., *An American Dictionary of the English Language* 198 (defining "child"). Nothing about the Act narrows that definition to unborn children who are physically "in

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[7] Justice Cook argues that § 36.06 should not inform our analysis because, he contends, that provision "cannot retroactively change the meaning of words passed in 1872." ___ So. 3d at ___ (Cook, J., dissenting). But as part of our Constitution, § 36.06 represents "the supreme law of the state," meaning that all statutes "must yield" to it, whether or not they were enacted prior to its adoption. *Alexander v. State ex rel. Carver,* 274 Ala. 441, 446, 150 So. 2d 204, 208 (1963). Further, the definition of "child" that we apply here is *in keeping* with the definition that was established by this Court's precedents at the time § 36.06 was adopted. *See Mack,* 79 So. 3d at 611 ("[W]e hold that the Wrongful Death Act permits an action for the death of a previable fetus."); *Hamilton,* 97 So. 3d at 735 ("As set forth in *Mack* and as applicable in this case, Alabama's wrongful-death statute allows an action to be brought for the wrongful death of any unborn child."). It is Justice Cook's opinion, not this Court's, that seeks to set aside that meaning in favor of the view that the term "child," as originally understood, did not encompass "an unborn infant." *See* ___ So. 3d at ___ (Cook, J., dissenting).

utero." Instead, the Act provides a cause of action for the death of any "minor child," without exception or limitation. As this Court observed in *Hamilton,* "Alabama's wrongful-death statute allows an action to be brought for the wrongful death of *any* unborn child." 97 So. 3d at 735 (emphasis added).

2. This Court's Precedents Do Not Compel Creation of an Unwritten Exception for Extrauterine Children

The defendants do not meaningfully engage with the text or history of the Wrongful Death of a Minor Act. Instead, they ask us to recognize an unwritten exception for extrauterine children in the wrongful-death context because, they say, our own precedents compel that outcome. Specifically, the defendants argue that: (1) this Court's precedents require complete congruity between "the definition of who is a person" under our criminal-homicide laws and "the definition of who is a person" under our civil wrongful-death laws; (2) extrauterine children are not within the class of persons protected by our criminal-homicide laws; and (3) as a result, extrauterine children cannot be protected by the Wrongful Death of a Minor Act. Appellees' brief in appeal no. SC-2022-0579 at 47; Appellees' brief in appeal no. SC-2022-0515 at 49.

The most immediate problem with the defendants' argument is that its major premise is unsound:[8] nothing in this Court's precedents requires one-to-one congruity between the classes of people protected by Alabama's criminal-homicide laws and our civil wrongful-death laws. The defendants' error stems from their

[8] The plaintiffs argue that both premises are faulty, but since we agree that the first is wrong, we have no need to reach the second.

misreading of this Court's opinions in *Mack* and *Stinnett v. Kennedy,* 232 So. 3d 202 (Ala. 2016). As mentioned earlier, *Mack* held, based on "numerous considerations," that previable unborn children qualify as "children" under the Wrongful Death of a Minor Act. 79 So. 3d at 611. One of those considerations involved the fact that Alabama's criminal-homicide laws -- as amended by the Brody Act, Act No. 2006-419, Ala. Acts 2006 -- expressly included (and continues to include) unborn children as "'person[s],'" "'regardless of viability.'" 79 So. 3d at 600 (quoting Ala. Code 1975, § 13A-6-1(a)(3)). The *Mack* Court noted that it would be "'incongruous' if 'a defendant could be responsible criminally for the homicide of a fetal child but would have no similar responsibility civilly.'" 79 So. 3d at 611 (citation omitted). *Stinnett* echoed that reasoning. *See* 232 So. 3d at 215.

The defendants interpret the "incongruity" language in *Mack* and *Stinnett* to mean that the definition of "child" in the Wrongful Death of a Minor Act must precisely mirror the definition of "person" in our criminal-homicide laws. But the main opinions in *Mack* and *Stinnett* did not say that. Those opinions simply observed that it would be perverse for Alabama law to hold a defendant criminally liable for killing an unborn child while immunizing the defendant from civil liability for the same offense. The reason that such a result would be anomalous is because criminal liability is, by its nature, more severe than civil liability -- so the set of conduct that can support a criminal prosecution is almost always narrower than the conduct that can support a civil suit.[9]

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[9] This reality also helps to illustrate why it is wrong to assume that the prospect of civil liability for the mishandling of embryos

The defendants flip that reasoning on its head. Instead of concluding that civil-homicide laws should sweep *at least* as broadly as criminal ones (as *Mack* and *Stinnett* reasoned), the defendants insist that the civil law can never sweep *more* broadly than the criminal law. That type of maneuver is not only illogical, it was rejected in *Stinnett* itself:

> "[Mack's] attempt to harmonize who is a 'person' protected from homicide under both the Homicide Act and Wrongful Death Act, however, was never intended to synchronize civil and criminal liability under those acts, or the defenses to such liability. Although we noted that it would be unfair for a tortfeasor to be subject to criminal punishment, but not civil liability, for fetal homicide, it simply does not follow that a person not subject to criminal punishment under the Homicide Act should not face tort liability under the Wrongful Death Act. This argument, followed to its logical conclusion, would prohibit wrongful-death actions arising from a tortfeasor's simple negligence, something we have never held to be criminally punishable but which often forms the basis of wrongful-death actions."

232 So. 3d at 215. As this passage from *Stinnett* makes clear, the definition of "person" in criminal-homicide law provides a floor for the definition of personhood in wrongful-death actions, not a ceiling. So even if it is true, as the defendants argue, that individuals cannot be convicted of criminal homicide for causing the death

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necessarily raises the spectre of criminal liability for the same conduct.

of extrauterine embryos (a question we have no occasion to reach), it would not follow that they must also be immune from civil liability for the same conduct.

3. The Defendants' Public-Policy Concerns Cannot Override Statutory Text

Finally, the defendants and their amicus devote large portions of their briefs to emphasizing undesirable public-policy outcomes that, they say, will arise if this Court does not create an exception to wrongful-death liability for extrauterine children. In particular, they assert that treating extrauterine children as "children" for purposes of wrongful-death liability will "substantially increase the cost of IVF in Alabama" and could make cryogenic preservation onerous. Medical Association of the State of Alabama amicus brief at 42; *see also* Appellees' brief in appeal no. SC-2022-0515 at 36 (arguing that "costs and storage issues would be prohibitive").

While we appreciate the defendants' concerns, these types of policy-focused arguments belong before the Legislature, not this Court. Judges are required to conform our rulings "to the expressions of the legislature, to the letter of the statute," and to the Constitution, "without indulging a speculation, either upon the impolicy, or the hardship, of the law." *Priestman v. United States,* 4 U.S. (4 Dall.) 28, 30 n.1 in the reporter's synopsis (1800) (Chase, J., writing for the federal circuit court).

Here, the text of the Wrongful Death of a Minor Act is sweeping and unqualified. It applies to all children, born and unborn, without limitation. It is not the role of this Court to craft a new limitation based on our own view of what is or is not wise public policy. That is especially true where, as here, the People of this State

have adopted a Constitutional amendment directly aimed at stopping courts from excluding "unborn life" from legal protection. Art. I, § 36.06, Ala. Const. 2022.[10]

B. Negligence and Wantonness Claims

The second question raised in these consolidated appeals is whether the trial court erred in dismissing the plaintiffs' common-law negligence and wantonness claims. As discussed above, both sets of plaintiffs made clear in their operative complaints that those claims were "alternative" theories pleaded only as a fallback in case this Court held that extrauterine children are not protected by the Wrongful Death of a Minor Act. Since we now hold that the Act does protect extra-uterine children, the plaintiffs' alternative negligence and wantonness claims are moot, and we affirm the trial court's dismissal of those claims on that basis.

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[10] The defendants also suggest that, if extrauterine children are accorded the same protections under the Wrongful Death of a Minor Act as unborn children in utero, then providers could be held liable for routine treatment of ectopic pregnancies -- that is, pregnancies in which an embryo has implanted in an organ other than the uterus, such as the fallopian tubes.

The defendants' concerns are misguided. As the parties acknowledge, ectopic pregnancies almost invariably involve a fatal medical condition: if left in place, the ectopic embryo will either die from malnourishment or else grow to the point where it kills the mother -- in turn causing the embryo's own death. The parties agree that there is currently no way to treat an ectopic implantation without simultaneously causing the death of the unborn child, no matter how desperately the surgeon and the parents wish to preserve the child's life. In light of that tragic reality, we do not see how any hypothetical plaintiffs who attempt to sue over the consensual removal of an ectopic pregnancy could establish the core elements of a wrongful-death claim, including breach of duty and causation.

C. Remaining Issues

During oral argument in these cases, the defendants suggested that the plaintiffs may be either contractually or equitably barred from pursuing wrongful-death claims. In particular, the defendants pointed out that all the plaintiffs signed contracts with the Center in which their embryonic children were, in many respects, treated as nonhuman property: the Fondes elected in their contract to automatically "destroy" any embryos that had remained frozen longer than five years; the LePages chose to donate similar embryos to medical researchers whose projects would "result in the destruction of the embryos"; and the Aysennes agreed to allow any "abnormal embryos" created through IVF to be experimented on for "research" purposes and then "discarded." The defendants contended at oral argument that these provisions are fundamentally incompatible with the plaintiffs' wrongful-death claims.

If the defendants are correct on that point, then they may be able to invoke waiver, estoppel, or similar affirmative defenses. But those defenses have not been briefed and were not considered by the trial court, so we will not attempt to resolve them here. We are "a court of review, not a court of first instance." *Henry v. White,* 222 Ala. 228, 228, 131 So. 899, 899 (1931). The trial court remains free to consider these and any other outstanding issues on remand.

Conclusion

We reverse the trial court's dismissal of the plaintiffs' wrongful-death claims in both appeal no. SC-2022-0515 and appeal no. SC-2022-0579. Because the plaintiffs' alternative negligence and wantonness claims are now moot, we affirm the trial court's dismissal of those claims on that basis.

SC-2022-0515 -- AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SC-2022-0579 -- AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Wise and Bryan, JJ., concur.

Parker, C.J., concurs specially, with opinion.

Shaw, J., concurs specially, with opinion, which Stewart, J., joins. Mendheim, J., concurs in the result, with opinion.

Sellers, J., concurs in the result in part and dissents in part, with opinion.

Cook, J., dissents, with opinion.

PARKER, Chief Justice (concurring specially).

A good judge follows the Constitution instead of policy, except when the Constitution itself commands the judge to follow a certain policy. In these cases, that means upholding the sanctity of unborn life, including unborn life that exists outside the womb. Our state Constitution contains the following declaration of public policy: "This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life." Art. I, § 36.06(a), Ala. Const. 2022 (adopted Nov. 6, 2018) (sometimes referred to as "the Sanctity of Unborn Life Amendment"). As noted in the main opinion, these cases involve unborn life -- a fact that no party in these cases disputes. Therefore, I take this opportunity to examine the meaning of the term "sanctity of unborn life" as used in § 36.06 and to explore the legal effect of the adoption of the Sanctity of Unborn Life Amendment as a constitutional statement of public policy.

I. Meaning of "Sanctity"

The Alabama Constitution does not expressly define the phrase "sanctity of unborn life." But because the parties have raised § 36.06 in their arguments, these cases call for us to interpret what this phrase means. The goal of constitutional interpretation is to discern the original public meaning, which is "'the meaning the people understood a provision to have at the time they enacted it.'" *Barnett v. Jones,* 338 So. 3d 757, 767 (Ala. 2021) (Mitchell, J., joined by Parker, C.J., concurring specially) (citation and emphasis omitted). Constitutional interpretation must start with the text, but it also must include the context of the time in which it was adopted. *Id.;* see also *Hagan v.*

Commissioner's Court of Limestone Cnty., 160 Ala. 544, 554, 49 So. 417, 420 (1909) (holding that the Alabama Constitution "must be understood and enforced according to the plain, common-sense meaning of its terms"); Antonin Scalia, A *Matter of Interpretation* 37 (new ed. 2018) ("In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation -- though not an interpretation that the language will not bear.").

Helpful sources in interpretation include contemporaneous dictionaries, but the analysis must also "draw from deeper wells" instead of relying "solely on dictionaries." *Gulf Shores City Bd. of Educ. v. Mackey,* [Ms. 1210353, Dec. 22, 2022] ___ So. 3d ____, ____ (Ala. 2022) (Parker, C.J., concurring in part and concurring in the result). Such "deeper wells" include (1) the history of the period, (2) similar provisions in predecessor constitutions, (3) the records of the constitutional convention, inasmuch as they shed light on what the public thought, (4) the common law, (5) cases, (6) legal treatises, (7) evidence of contemporaneous general public understanding, especially as found in other state constitutions and court decisions interpreting them, (8) contemporaneous lay-audience advocacy for (or against) its adoption, and (9) any other evidence of original public meaning, which could include corpus linguistics. *Gulf Shores,* ___ So. 3d at ____ (Parker, C.J., concurring in part and concurring in the result in part); *Young Ams. for Liberty at Univ. of Alabama at Huntsville v. St. John,* [Ms. 1210309, Nov. 18, 2022] ___ So. 3d ___, ___ (Ala. 2022) (Parker, C.J., concurring in part and concurring in the result); *Barnett,* 338 So. 3d at 766-67 (Mitchell, J., concurring specially).

Section 36.06 specifically recognizes the sanctity of *unborn* life. Nevertheless, the phrase "sanctity of unborn life" involves the same terms and concepts as the broader and more common phrase, "sanctity of life." Thus, the history and meaning of the phrase "sanctity of life" informs our understanding of "sanctity of unborn life" as that phrase is used in § 36.06.

At the time § 36.06 was adopted, "sanctity" was defined as: "1. holiness of life and character: GODLINESS; 2 a: the quality or state of being holy or sacred: INVIOLABILITY b *pl*: sacred objects, obligations, or rights." *Merriam-Webster's Collegiate Dictionary* 1100 (11th ed. 2003). Recent advocates of the sanctity of life have attempted to articulate the principle on purely secular philosophical grounds. See, e.g., John Keown, *The Law and Ethics of Medicine* 3 (2012); Neil M. Gorsuch, *The Future of Assisted Suicide and Euthanasia* 157-58 (2009) (arguing that "human life is fundamentally and inherently valuable" based on the "secular moral theory" that human life is a "basic good" that "ultimately comes not from abstract logical constructs (or religious beliefs)"). Such advocates have preferred to use the term "inviolability" rather than "sanctity" to avoid what one scholar calls "distracting theological connotations." Keown, *supra,* at 3. But even though "inviolability" is certainly a synonym of "sanctity" in that the meaning of the two words largely overlap, the two words cannot simply be substituted for each other because each word carries its own set of implications. When the People of Alabama adopted § 36.06, they did not use the term "inviolability," with its secular connotations, but rather they chose the term "sanctity," with all of its connotations.

This kind of acceptance is not foreign to our Constitution, which in its preamble "invok[es] the

favor and guidance of Almighty God," pmbl., Ala. Const. 2022, and which declares that "all men ... are endowed [with life] by their Creator," Art. I, § 1, Ala. Const. 2022.[11] The Alabama Constitution's recognition that human life is an endowment from God emphasizes a foundational principle of English common law, which has been expressly incorporated as part of the law of Alabama. § 1-3-1, Ala. Code 1975 ("The common law of England ... shall ... be the rule of decisions, and shall continue in force ...."). In his *Commentaries on the Laws of England,* Sir William Blackstone declared that "[l]ife is the immediate gift of God, a right inherent by nature in every individual."[12] 1 William Blackstone, *Commentaries on the Laws of England* *125. He later described human life as being "the immediate donation of the great creator." *Id.* at *129.

Only recently has the phrase "sanctity of life" been widely used as shorthand for the general principle that human life can never be intentionally taken without

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[11] Accord the philosophy of the United States of America as expressed in the Declaration of Independence -- "endowed by their Creator with certain unalienable Rights, that among these are Life ...." *The Declaration of Independence* para. 2 (U.S. 1776).

[12] Blackstone went on to state that life "begins in contemplation of law as soon as an infant is able to stir in the mother's womb." 1 William Blackstone, *Commentaries on the Laws of England* *125. Similarly, Alabama law has recognized that human life begins at conception. See *Ex parte Hicks,* 153 So. 3d 53, 72 (Ala. 2014); *Ex parte Ankrom,* 152 So. 3d 397 (Ala. 2013); *Hamilton v. Scott,* 97 So. 3d 728 (Ala. 2012); *Mack v. Carmack,* 79 So. 3d 597 (Ala. 2011); § 26-22-2(8), Ala. Code 1975 (defining an "unborn child" as "[a]n individual organism of the species Homo sapiens from fertilization until live birth"); § 26-23A-3(10), Ala. Code 1975 (defining an "unborn child" as "[t]he offspring of any human person from conception until birth").

adequate justification. The phrase was first used in the modern bioethical debate by Rev. John Sutherland Bonnell as the title to his 1951 article opposing euthanasia: *The Sanctity of Human Life.* 8 Theology Today 194-201. Glanville Williams later employed the phrase in his groundbreaking book, *The Sanctity of Life and the Criminal Law,* in 1957. The common usage of this phrase has continued into the 21st century, referring to the view that all human beings bear God's image from the moment of conception. See, e.g., *Manhattan Declaration: A Call of Christian Conscience* (Nov. 20, 2009) (at the time of this decision, this document could be located at: https://www.manhattandeclaration.org) (referring multiple times to the "sanctity of life" in response to abortion).[13]

The phrase appeared only twice in our precedents before 2018. In 1982, Justice Faulkner used it to describe the argument that so-called "wrongful birth" actions should not be cognizable at law because the "sanctity of life" precluded them. *Boone v. Mullendore,* 416 So. 2d 718, 724 (Ala. 1982) (Faulkner, J., concurring specially). More recently, however, it was used in a 2014 special concurrence referring to this Court's decisions in *Ex parte Ankrom,* 152 So. 3d 397 (Ala. 2013), *Hamilton v. Scott,* 97 So. 3d 728 (Ala. 2012), and *Mack v. Carmack,* 79 So. 3d 597 (Ala. 2011). *Ex parte Hicks,* 153 So. 3d 53, 72 (Ala. 2014) (Parker, J., concurring specially) ("This case presents an opportunity for

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[13] It is worth noting that the *Manhattan Declaration* was signed by "Orthodox, Catholic, and Evangelical Christians" who "joined together across historic lines of ecclesial differences" to speak together on certain issues, one of which was the sanctity of life. *Id.* Despite major theological disagreements, signers from all three branches of Christianity were able to agree on the sanctity of life.

this Court to continue a line of decisions affirming Alabama's recognition of the sanctity of life from the earliest stages of development. We have done so in three recent cases *[Ankrom, Hamilton,* and *Mack];* we do so again today." (footnote omitted)).

But the principle itself -- that human life is fundamentally distinct from other forms of life and cannot be taken intentionally without justification -- has deep roots that reach back to the creation of man "in the image of God." *Genesis* 1:27 (King James). One 17th-century commentator has explained the significance of man's creation in God's image as follows:

> "[T]he chief excellence and prerogative of created man is in the image of his Creator. For while God has impressed as it were a vestige of himself upon all the rest of the creatures ... so that from all the creatures you can gather the presence and efficiency of the Creator, or as the apostle [Paul] says, you can clearly see his eternal power and divinity, yet only man did he bless with his own image, that from it you may recognize not only what the Creator is, but also who he is, or what his qualities are.
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> "... God did this: (1) so that he might as it were contemplate and delight himself in man, as in a copy of himself, or a most highly polished mirror, for which reason his delights are said to be with the children of men. (2) So that he might, as much as can be done, propagate himself as it were in man. ... (3) So that he would have on earth one who would know, love, and worship him and all that is his, which could not be obtained in the least apart from the image of God .... (4) So that he

> might have one with whom he would live most blessed for eternity, with whom he would converse as with a friend .... Therefore, so that God could eternally dwell and abide with man, he willed him to be in some manner similar to him, to bear his image ....
>
> "....
>
> "Therefore, the image of God in man is nothing except a conformity of man whereby he in measure reflects the highest perfection of God."

3 Petrus Van Mastricht, *Theoretical-Practical Theology* 282-85 (Joel R. Beeke ed., Todd M. Rester trans., Reformation Heritage Books 2021) (1698-99).[14]

Van Mastricht's assessment of the significance of man's creation in the image of God accords with that of Thomas Aquinas centuries earlier. Following Augustine, Aquinas distinguished human life from other things God made, including nonhuman life, on the ground that man was made in God's image.

> "As Augustine observes, man surpasses other things, not in the fact that God Himself made man, as though He did not make other things;

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[14] Petrus Van Mastricht (1630-1706) was a Dutch Reformed theologian and professor at the University of Utrecht. He was a favorite of Jonathan Edwards, a leading minister in the First Great Awakening and later President of Princeton University. Edwards opined that, "for divinity in General, doctrine, Practice & Controversie; or as an [sic] universal system of divinity, [Van Mastrict's *Theoretical-Practical Theology]* is much better than ... any other Book in the world, excepting the Bible." Jonathan Edwards & Stanley T. Williams, *Six Letters of Jonathan Edwards to Joseph Bellamy,* 1 New Eng. Q. 226, 230 (footnotes omitted) (reprinting Edwards's letter to Bellamy dated January 15, 1747).

> since it is written, 'The work of Thy hands is the heaven,' and elsewhere, 'His hands laid down the dry land,' but in this, that man is made to God's image."

Thomas Aquinas, *Summa Theologica* First Part, Treatise on Man, Question 91, Art. 4 (Fathers of the English Dominican Province trans., Benziger Bros., Inc. 1947). Further, Aquinas explained that every man has the image of God in that he "possesses a natural aptitude for understanding and loving God," which imitates God chiefly in "that God understands and loves Himself." *Id.,* First Part, Question 93, Art. 4. Thus, man's creation in God's image directs man to his last end, which is to know and love God. *Id.,* Second Part, Question 1, Art. 8.

Man's creation in God's image is the basis of the general prohibition on the intentional taking of human life. See *Genesis* 9:6 (King James) ("Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man."). John Calvin, in expounding that text, explains:

> "For the greater confirmation of the above doctrine [of capital punishment for murder], God declares, that he is not thus solicitous respecting human life rashly, and for no purpose. Men are indeed unworthy of God's care, if respect be had only to themselves; but since they bear the image of God engraven on them, *He deems himself violated in their person.* Thus, although they have nothing of their own by which they obtain the favour of God, he looks upon his own gifts in them, and is thereby excited to love and to care for them. This doctrine, however, is to be carefully observed, that *no one can be injurious to his*

> *brother without wounding God himself.* Were this doctrine deeply fixed in our minds, we should be much more reluctant than we are to inflict injuries. Should any one object, that this divine image has been obliterated, the solution is easy; first, there yet exists some remnant of it, so that man is possessed of no small dignity; and secondly, the Celestial Creator himself, however corrupted man may be, still keeps in view the end of his original creation; and according to his example, we ought to consider for what end he created men, and what excellence he has bestowed upon them above the rest of living beings."

John Calvin, *Commentaries on the First Book of Moses Called Genesis* 295-96 (John King trans., Calvin Translation Society 1847) (1554) (emphasis added). Likewise, the *Geneva Bible,* which was the "most popular book in colonial homes,"[15] includes a footnote to *Genesis* 9:6 that provides: "Therefore to kill man is to deface God's image, and so injury is not only done to man, but also to God." *Genesis* 9:6 n.2 (Geneva Bible 1599).

Finally, the doctrine of the sanctity of life is rooted in the Sixth Commandment: "You shall not murder." *Exodus* 20:13 (NKJV 1982). See John Eidsmoe, *Those Ten Commandments: Why Won't They Just Go Away?* 31 Regent U. L. Rev. 11, 15 (2018) (arguing that the Sixth Commandment is the basis for "Respect for Life" in Western law); see also *Van Orden v. Perry,* 545 U.S. 677, 686-90 (2005) (discussing the impact of the Ten Commandments on America generally). Aquinas taught

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[15] Kenneth Graham, *Confrontation Stories: Raleigh on the Mayflower,* 3 Ohio St. J. Crim. L. 209, 213-14 (2005).

that "it is in no way lawful to slay the innocent" because "we ought to love the nature which God has made, and which is destroyed by slaying him." Aquinas, *supra,* Second Part of the Second Part, Treatise on Prudence and Justice, Question 64, Art. 6. Likewise, Calvin explained the reason for the Sixth Commandment this way: "Man is both the image of God and our flesh. Wherefore, if we would not violate the image of God, we must hold the person of man sacred." 2 John Calvin, *Institutes of the Christian Religion* 256 (Henry Beveridge trans., Hendrickson Publishers 2008) (1559). These and many similar writings, creeds, catechisms, and teachings have informed the American public's view of life as sacred.

In summary, the theologically based view of the sanctity of life adopted by the People of Alabama encompasses the following: (1) God made every person in His image; (2) each person therefore has a value that far exceeds the ability of human beings to calculate; and (3) human life cannot be wrongfully destroyed without incurring the wrath of a holy God, who views the destruction of His image as an affront to Himself. Section 36.06 recognizes that this is true of unborn human life no less than it is of all other human life -- that even before birth, all human beings bear the image of God, and their lives cannot be destroyed without effacing his glory.

II. Effect of Constitutional Policy

Having discussed the meaning of the phrase "sanctity of unborn life," I will briefly explore the legal effect of its inclusion in the Alabama Constitution as a statement of public policy. Again, I will start with the text. Section 36.06 provides, in relevant part:

> "(a) This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life.
>
> "(b) This state further acknowledges, declares, and affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate."

In 2018, the term "public policy" was a legal term that meant: "The collective rules, principles, or approaches to problems that affect the commonwealth or (esp.) promote the general good; specif., principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole society." *Black's Law Dictionary* 1426 (10th ed. 2014); see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 73 (Thomson/West 2012) (noting that ordinary legal meaning governs instead of common meaning when the law is the subject). Notice that the dictionary does not just say that "public policy" is something like "whatever is in the best interests of Alabama," which really is for the Legislature and not this Court to decide. Instead, it refers to the *collective rules, principles, or approaches to problems* or *principles and standards.* Because this term refers to fixed standards and not subjective opinions of whatever serves the public good, this Court can look to this § 36.06 in appropriate cases to aid it in its decisions.

When considering a question concerning "public policy," an Alabama judge is supposed to look to "the Constitution, the statutes, or definite principles of customary law which have been recognized and

developed by the course of judicial decisions," such as the common law, but not "some considerations of policy which might properly have weight with the Legislature if it had occasion to deal with the question." *Couch v. Hutchison,* 2 Ala. App. 444, 447, 57 So. 75, 76 (1911). Thus, Alabama precedents confirm that the Judiciary can look to the Constitution, statutes, and principles of customary law to determine what the public policy of this state is. It must not, however, usurp the role of the Legislature by attempting to guess what policy decision the Legislature might have made if it had considered other factors. That decision must be left for the Legislature itself.

Now that we know what "public policy" means, we must consider what effect it has on statutory interpretation. In one of its oldest decisions considering that question, this Court held: "It is not denied that where public policy or substantial justice obviously requires it, Courts should strongly incline to such liberal construction of the statute as will effect the object." *Jones v. Watkins,* 1 Stew. 81, 85 (Ala. 1827). However, in more modern times, this Court has repeatedly emphasized adherence to the plain language of the statute, and I agree with this approach. See generally Jay Mitchell, *Textualism in Alabama,* 74 Ala. L. Rev. 1089, 1100-10 (2023). Consequently, I believe that, ordinarily, this Court may consider public policy in statutory interpretation only if (1) there is substantial doubt about the meaning of the statute and (2) the precepts of public policy and jurisprudence to which we look are settled. *Ex parte Z.W.E.,* 335 So. 3d 650, 660 (Ala. 2021) (Parker, C.J., concurring in the result) (citing *Old Republic Ins. Co. v. Lanier,* 644 So. 2d 1258, 1260-62 (Ala. 1994); *Allgood v. State,* 20 Ala. App. 665, 667, 104 So. 847, 848 (1925); 82 C.J.S. *Statutes* § 472 (2009); 73 Am. Jur. 2d *Statutes* § 91

(2012)). Thus, I agree with the main opinion that, if the Wrongful Death of a Minor Act, § 6-5-391, Ala. Code 1975, were ambiguous, then the Sanctity of Unborn Life Amendment would resolve the matter in favor of the plaintiffs.

But a special problem arises when the People of Alabama enshrine a specific statement of public policy in their Constitution. Instead of gleaning bits and pieces of the state's public policy from the Constitution, statutes, common law, and precedents, the People of Alabama explicitly told the Legislature, the Executive, and the Judiciary what they are supposed to do. Ordinarily, we resort to public-policy considerations in statutory interpretation as a last resort, so that the Judiciary does not usurp the role of the Legislature. But in this case, the People explicitly told all three branches of government what they ought to do. See *The Federalist* No. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (noting that "the power of the people is superior to both" the judicial and legislative powers). Consequently, as Alexander Hamilton wrote in *The Federalist* No. 78, "where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former." *Id.* Thus, as a constitutional statement of public policy, § 36.06 circumscribes the Legislature's discretion to determine public policy with regard to unborn life. Accordingly, any legislative (or executive) act that contravenes the sanctity of unborn life is potentially subject to a constitutional challenge under the Alabama Constitution.

Putting this all together, § 36.06 does much more than simply declare a moral value that the People of Alabama like. Instead, this constitutional provision

tilts the scales of the law in favor of protecting unborn life. Although § 36.06 may not resolve every case involving unborn life, if reasonable minds could differ on whether a common-law rule, a statute, or even a constitutional provision protects life, § 36.06 instructs the Alabama government to construe the law in favor of protecting the unborn. Furthermore, to exclude the unborn from § 36.06's protection, the Legislature would have to do so very clearly and for a reason that is consistent with upholding the sanctity of life.

Justice Cook argues in his dissent that applying § 36.06 and the Wrongful Death of a Minor Act to frozen embryos will have disastrous consequences for the in vitro fertilization ("IVF") industry in Alabama. Although it is for the Legislature to decide how to address this issue, I note briefly that many other Westernized countries have adopted IVF practices or regulations that allow IVF to continue while drastically reducing the chances of embryos being killed, whether in the creation process, the implantation process, the freezing process, or by willful killing when they become inconvenient. For decades, IVF has been largely unregulated in the United States, with some commentators even comparing it to the Wild West. See, e.g., Alexander N. Hecht, *The Wild Wild West: Inadequate Regulation of Assisted Reproductive Technology,* 1 Hous. J. Health L. & Pol'y 227, 228 (2001) ("Unfortunately, this industry remains largely unregulated. The near-absence of federal and state law combined with ineffective and unheeded industry guidelines leads to a lawless free-for-all." (footnotes omitted)); see also Myrisha S. Lewis, *The American Democratic Deficit in Assisted Reproductive Technology Innovation,* 45 Am. J. L. & Med. 130, 144 & n.77 (2019) (noting that IVF in the United States is still unregulated and that commentators are still comparing it to the Wild West). In Alabama, the only

statutes that mention IVF address the issue of determining parentage of children conceived through IVF, but they do not govern the practice of IVF itself. See The Alabama Uniform Parentage Act, § 26-17-101 et seq., Ala. Code 1975. And the only administrative regulation of IVF in Alabama governs IVF clinics' use of radioactive materials, but not any other IVF practice. Ala. Admin. Code (State Bd. Of Health, Dep't of Pub. Health), r. 420-3-26-.02. If the Legislature agrees that it is time to regulate the IVF industry, then the good news is it need not reinvent the wheel. Other Westernized countries have given Alabama some examples to consider.

For instance, in Australia and New Zealand, prevailing ethical standards dictate that physicians usually make only one embryo at a time.[16] On the related issue of embryo transfers, which is the process of implanting the embryos into the uterus,[17] in

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[16] *Code of Practice for Assisted Reproductive Technology Units* § 3.3, p. 24, Fertility Society of Australia and New Zealand, Reproductive Technology Accreditation Committee (2021) (at the time of this decision, this document could be located at: https://www.fertilitysociety.com.au/wp-content/uploads/20211124-RTAC-ANZ-COP.pdf.).

[17] According to the contract that the LePages signed, the number of embryos transferred to the mother could range from 1-5. LePage Contract at 9. It appears that the objective of transferring multiple embryos is to increase the chances of pregnancy. *Id.* at 8. At least two issues arise from this practice. First, it results in the mother becoming pregnant with multiple babies 30% of the time, which can cause health problems for the mother and babies. See *id.* at 17. Second, less than half of embryo transfers result in live births, which raises the question whether transferring multiple embryos at once risks the deaths of these little people. See Jennifer Choe & Anthony L. Shanks, *In Vitro Fertilization,* NIH National Library of Medicine (last updated

Australia and New Zealand over 90% of embryo transfers occur only one at a time.[18] Likewise, European Union ("EU") countries set a legal limit on the number of embryos transferred in a single cycle.[19] In EU countries, 58% of embryo transfers involve just one embryo, and 38% involve two; thus, 96% of embryo transfers in EU countries involve two or fewer transfers at one time.[20] Such limitations on embryo creation and transfer necessarily reduce or eliminate the need for storing embryos for extended lengths of

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Sep. 4, 2023), (at the time of this decision, this document could be located at: https://www.ncbi.nlm.nih.gov/books/NBK562266.

[18] See Choe & Shanks, supra, at n.17; Christine Wyns, *Number of Frozen Treatment Cycles Continues to Rise Throughout the World,* European Society of Human Reproduction and Embryology (June 30, 2021) (at the time of this decision, this document could be located at: https://www.focusonreproduction.eu/article/ESHRE-News-ESHRE-2021-freeze-all) (reporting that "Australia/New Zealand leads the way" in the "number of single embryo transfers" in "more than 90% of cycles").

[19] *Regulation and Legislation in Assisted Reproduction,* European Society of Human Reproduction and Embryology (Jan. 2017) (at the time of this decision, this document could be located at: https://tinyurl.com/299cvcbf). Specifically, Austria, Belgium, and Malta have allowed only one transfer at a time; the United Kingdom, France, and Sweden have allowed no more than two; and Germany has allowed only three, although a maximum of two is recommended. *Id.;* Embryo Protection Act, Chapter 524, § 6, of the Laws of Malta; Susan Mayor, *UK Authority Sets Limits on Number of Embryos Transferred,* 328 BMJ 65, 65 (2004). Some of these laws may have changed over time, but they illustrate that other Westernized countries have, at some point, adopted these positions.

[20] *More Women Are Using Single Embryos During Fertility Treatment,* European Society of Human Reproduction and Embryology (June 27, 2023) (at the time of this decision, this document could be located at: https://www.eshre.eu/ESHRE2023/Media/2023-Press-releases/EIM).

time. Italy went one step further, banning cryopreservation of embryos except when a bona fide health risk or force majeure prevented the embryos from being transferred immediately after their creation.[21] All of these measures protect the lives of the unborn and still allow couples to become parents. Therefore, although certain changes to the IVF industry's current creation and handling of embryos in Alabama will result from this decision, to the extent that Justice Cook is predicting that IVF will now *end* in Alabama, that prediction does not seem to be well-founded.

These regulations adopted by other countries seem much more likely to comport with upholding the sanctity of life than the prevailing practice of creating and transferring at once many embryos that have little chance of survival and then throwing embryos away after a while. The American states, unfortunately, have not followed the example of other Westernized countries that have regulations that achieve both the protection of life and the promotion of parenthood. Ultimately, however, it is for the Legislature to decide how the IVF industry can help parents have children. The Legislature is free to do so in any way it decides, provided that it comports with the Alabama Constitution, including the Sanctity of Unborn Life Amendment.[22]

III. Conclusion

In application to these cases, the contentions of the defendants and their amicus are not sustainable in light of the Sanctity of Unborn Life Amendment. The People of Alabama have declared the public policy of

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[21] See Legge 19 Feb. 2004, no. 40 (art. 14, para. 3), in G.U. Feb. 24, 2004, no. 45 (It.).

[22] The Legislature should also take note of § 36.06 if it considers other ethical issues related to reproduction if they arise.

this State to be that unborn human life is sacred. We believe that each human being, from the moment of conception, is made in the image of God, created by Him to reflect His likeness. It is as if the People of Alabama took what was spoken of the prophet Jeremiah and applied it to every unborn person in this state: "Before I formed you in the womb I knew you, Before you were born I sanctified you." *Jeremiah* 1:5 (NKJV 1982). All three branches of government are subject to a constitutional mandate to treat each unborn human life with reverence. Carving out an exception for the people in this case, small as they were, would be unacceptable to the People of this State, who have required us to treat every human being in accordance with the fear of a holy God who made them in His image. For these reasons, and for the reasons stated in the main opinion, I concur.

SHAW, Justice (concurring specially).

I concur fully in the main opinion. I write specially to note the following.

I agree with the main opinion that the meaning of the word "child" for purposes of Alabama law is well settled and includes an unborn child. Thus, for purposes of the Wrongful Death of a Minor Act, § 6-5-391, Ala. Code 1975 ("the Wrongful Death Act"), the term "minor child" includes an unborn child with no distinction between in vitro or in utero.

In prior cases determining whether an unborn child is a "minor child" for purposes of the Wrongful Death Act, this Court has referenced the definition of a "person" found in § 13A-6-1(3), Ala. Code 1975, which in turn applies to certain portions of the criminal code. The main opinion thoroughly explains why this criminal-law definition does not limit the determination whether an in vitro embryo is a "minor child" for purposes of a civil-law action under the Wrongful Death Act.

I do not believe that any purported prior common-law rule requires a different result.

> "The common law of England, *so far as it is not inconsistent with the Constitution, laws and institutions of this state,* shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, except as from time to time it may be altered or repealed by the Legislature."

§ 1-3-1, Ala. Code 1975 (emphasis added). The language of this Code section is plain: the common law does not apply when it is inconsistent with the Constitution, laws, and institutions of this state. The

legislature may always alter the common law, but this Code section does not provide that the common law, if inconsistent with the above, remains in place unless altered by the legislature. As one Justice has explained:

> "This statute does not provide that 'the common law of England shall be the rule of decisions in Alabama unless changed by the legislature.' On the contrary, it provides that the common law of England shall be the rule of decisions in this State, so far as the common law is *not inconsistent with the constitution, the laws, and the institutions of Alabama.*"

Swartz v. United States Steel Corp., 293 Ala. 439, 446-47, 304 So. 2d 881, 887 (1974) (Faulkner, J., concurring specially).

In the context of civil law, the legislature, the constitution, and this Court's decisions have collectively repealed the common law's prohibition on wrongful-death actions, § 6-5-391; protected the rights of the unborn, Ala. Const. 2022, Art. I, § 36.06(b) ("[I]t is the public policy of this state to ensure the protection of the rights of the unborn child ...."); and eliminated the common law's prohibition on seeking a civil remedy for injuries done to the unborn, *Huskey v. Smith,* 289 Ala. 52, 265 So. 2d 596 (1972), and *Hamilton v. Scott,* 97 So. 3d 728 (Ala. 2012). If, after this, the common law does not allow wrongful-death actions for some unborn children when they are injured -- here, based on their physical location -- that rule must be consistent with the Constitution, laws, and institutions of this state. Whether such rule is in fact consistent, we can respectfully disagree. But if it is inconsistent, then it need not be first altered or repealed by the legislature.

It can scarcely be argued that science is not outdistancing the law in various areas, especially in the context of human reproduction. Creating and sustaining life outside a woman's womb is nothing less than the stuff of miracles. The overriding public policy of this state recognizes and supports the sanctity of unborn life and the rights of unborn children, including the right to life, and requires the protection of the rights of the unborn child "in all manners and measures lawful and appropriate." § 36.06(b). The people of Alabama, apparently recognizing that advancements in reproductive science necessarily come with concomitant responsibilities, have bound all three branches of our state government to this policy, and, in my view, the enactments of the Alabama Legislature are consistent with it.

Stewart, J., concurs.

MENDHEIM, Justice (concurring in the result).

Over the course of time, previous cases from this Court have applied the protection afforded to a "minor child" in subsection (a) of § 6-5-391, Ala. Code 1975, the Wrongful Death of a Minor Act, to human lives at earlier and earlier stages of development. In *Stanford v. St. Louis-San Francisco Railway Co.,* 214 Ala. 611, 108 So. 566 (1926), this Court, construing a predecessor to § 6-5-391(a),[23] held that a "parental injury before the birth is no basis for action in damages by the child or its personal representative." *Birmingham Baptist Hosp. v. Branton,* 218 Ala. 464, 467, 118 So. 741, 743 (1928) (citing *Stanford).* However, in *Huskey v. Smith,* 289 Ala. 52, 265 So. 2d 596 (1972), "[t]he Court concluded that the term 'minor child' in the predecessor to § 6-5-391(a) [Title 7, § 119, Ala. Code 1940 (Recomp. 1958),] included an unborn child who was viable at the time of a prenatal injury, who thereafter was born alive, but who later died. 289 Ala. at 55, 265 So. 2d at 596." *Mack v. Carmack,* 79 So. 3d 597, 601 (Ala. 2011). The Court pushed the boundary back again in *Wolfe v. Isbell,* 291 Ala. 327, 280 So. 2d 758 (1973), in which the Court "concluded that [a] father could maintain an action for the wrongful death of his unborn child even though the injuries that allegedly caused the death occurred before the fetus became viable." *Mack,* 79 So. 3d at 604. A year later, in *Eich v. Town of Gulf Shores,* 293 Ala. 95, 100, 300 So. 2d 354, 358 (1974), the Court held that "the parents of an eight and one-half month old stillborn fetus [were] entitled to maintain an action for the wrongful death of the child." The Court stepped back from those broader applications of protection in *Gentry v. Gilmore,* 613 So.

[23] Section 5695, Ala. Code 1923.

2d 1241 (Ala. 1993), and *Lollar v. Tankersley,* 613 So. 2d 1249 (Ala. 1993), concluding that "the Wrongful Death [of a Minor] Act did not permit recovery for the death of a fetus that occurs before the fetus attains viability." *Mack,* 79 So. 3d at 606. But, several years later in *Mack,* the Court returned to its understanding of the Wrongful Death of a Minor Act espoused in *Wolfe,* holding that "the Wrongful Death [of a Minor] Act permits an action for the death of a previable fetus." *Mack,* 79 So. 3d at 611. In *Hamilton v. Scott,* 97 So. 3d 728, 735 (Ala. 2012), the Court reaffirmed its conclusion from *Mack,* stating that "Alabama's wrongful-death statute allows an action to be brought for the wrongful death of any unborn child, even when the child dies before reaching viability."

The foregoing history of previous decisions concerning the Wrongful Death of a Minor Act, and the fact that the pertinent language in the Act has not been amended since its enactment in 1872, shows that this Court, rather than the Legislature, has taken the lead in shaping when the protection afforded by the Act may be invoked. See *Eich,* 293 Ala. at 100, 300 So. 2d at 358 (describing that decision as one in which the Court was "again extending out judicial prerogative as was done in *Huskey* and *Wolfe* ...."). Because of that, and because the terms "child" and "minor child" in § 6-5-391(a) are not further defined in the Wrongful Death of a Minor Act, I agree with the main opinion that the Act can be construed to include frozen embryos produced through in vitro fertilization ("IVF"). For those reasons, I concur in the result reached today that reverses the trial court's dismissal of the plaintiffs' wrongful-death claims.

However, I have misgivings about the reasoning and some of the comments contained in the main opinion.

The main opinion begins its analysis by observing that "[t]he parties to these cases have raised many difficult questions," but it insists throughout that applying the protection of § 6-5-391(a) to frozen embryos is not one of those difficulties because "existing black-letter law" dictates our answer to the central question. __ So. 3d at __. Indeed, the main opinion states that the text of § 6-5-391(a) is "clear" and that there is no ambiguity as to whether its protection applies to frozen embryos. __ So. 3d at __.

> "Too often, a court's conclusion that statutory language is 'plain' is a substitute for careful analysis. At best, such unexplained conclusions are based on a judge's gestalt sense of the best meaning of the words in question. At worst, the bare insistence that statutory language is 'plain' is cover (perhaps subconscious) for judicial policymaking."

Carranza v. United States, 267 P.3d 912, 916 (Utah 2011) (opinion of Lee, J., joined by one other Justice).

In my judgment, the main opinion's view that the legal conclusion is "clear" and "black-letter law" is problematic because when the Wrongful Death of a Minor Act was first enacted in 1872, and for 100 years thereafter, IVF was not even a scientific possibility. Likewise, although it may be true that "the phrase 'minor child' ... in everyday parlance" has long included an "unborn child," the main opinion fails to acknowledge that, at the time the Wrongful Death of a Minor Act was enacted -- and long thereafter -- the term "unborn child" was only understood to refer to a child within its mother's womb.[24] __ So. 3d at __.

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[24] See, e.g., *Wolfe,* 291 Ala. at 331, 280 So. 2d at 761 (observing that "the fetus or embryo is not a part of the mother, but rather

The main opinion's contention that "[t]he central question presented in these consolidated appeals ... is whether the [Wrongful Death of a Minor] Act contains an unwritten exception to th[e] rule" that the Act "allows parents of a deceased child to recover punitive damages for their child's death" is similarly simplistic. __ So. 3d at __. The defendants have *never* argued for an "exception" to the Wrongful Death of a Minor Act. The main opinion reaches that conclusion by implication -- simply assuming that the term "minor child" includes frozen embryos -- a wholesale adoption of the plaintiffs' argument. See Appellants' brief in appeal no. SC-2022-0515, p. 19 (contending that the "[d]efendants' arguments ... create an exception to existing Alabama law so that not all embryonic lives are treated equally under the law").

The main opinion then goes on in Part A.2. of its analysis to provide reasons why this Court's many

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has a separate existence *within the body of the mother"* (emphasis added)); *Clarke v. State,* 117 Ala. 1, 8, 23 So. 671, 674 (1898) ("'When a child, having been born alive, afterwards died by reason of any potion or bruises it received in the womb, it seems always to have been the better opinion that it was murder in such as administered or gave them.'" (quoting 3 *Russell on Crimes* 6 (6th ed.))). Cf. *Ex parte Ankrom,* 152 So. 3d 397, 416 (Ala. 2013) (observing, in the course of construing the term "child" in the chemical-endangerment statute, that "[c]learly, for an unborn child, the mother's womb is an essential part of its physical circumstances"). Indeed, even with regard to IVF, a mother's womb is obviously an indispensable part of pregnancy. See *Maher v. Vaughn, Silverberg & Assocs., LLP,* 95 F. Supp. 3d 999, 1002 n.1 (W.D. Tex. 2015) (describing IVF as "a multi-step medical procedure," and listing the final steps of that process to be "the grown embryos are transferred into the patient's uterus" and then "the patient takes supplemental hormones for the ensuing nine to eleven days, and if an embryo implants in the lining of the patient's uterus and grows, a pregnancy can result").

pronouncements about "congruence" between Alabama's wrongful-death statutes and its criminal-homicide statutes[25] do not dictate importing the definition of the term "person" in § 13A-6-1(a)(3), Ala. Code 1975, into § 6-5-391(a). The reasoning in that portion of the main opinion also strikes me as strained given the history behind our wrongful-death statutes.

As this Court has observed numerous times, there was no right of action for wrongful death at common law. See, e.g., *Ex parte Bio-Med. Applications of Alabama, Inc.,* 216 So. 3d 420, 422 (Ala. 2016) (""A wrongful death action is purely statutory; no such action existed at common law."" (quoting *Ex parte Hubbard Props., Inc.,* 205 So. 3d 1211, 1213 (Ala. 2016), quoting in turn *Waters v. Hipp,* 600 So. 2d 981, 982 (Ala. 1992))); *Giles v. Parker,* 230 Ala. 119, 121, 159 So. 826, 827 (1935) ("There is no civil liability, under the common law, as interpreted in this jurisdiction, against one who wrongfully or negligently causes the death of a human being; and hence no right of action exists under the common law therefor. The right of action is purely statutory."); *Kennedy v. Davis,* 171 Ala. 609, 611-12, 55 So. 104, 104 (1911) ("It has been decided and many times reaffirmed by this court that actions under [the wrongful-death statutes] are purely statutory. There was no such action or right of action at common law."). This was also true for the wrongful death of a minor child. See *White v. Ward,* 157 Ala. 345, 349, 47 So. 166, 167 (1908) ("There was no right of action at the common law for the death of the child. ...

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[25] See, e.g., *Mack,* 79 So. 3d at 611 (observing that "this Court repeatedly has emphasized the need for congruence between the criminal law and our civil wrongful-death statutes").

The right to recover damages for its death is therefore purely statutory.").

The reasons for the common-law prohibition appear to have been based on two legal concepts.

> "The effect to be given the death of a person connected with a tort rests almost entirely upon statutory foundations. The common-law limitations that eventually led to legislative reform were twofold. First was the rule that personal tort actions die with the person of either the plaintiff or the defendant. This limitation is expressed by the maxim, *actio personalis moritur cum persona,* which has roots deep in the early history of English law. The second limitation was that the death of a human being was not regarded as giving rise to any cause of action at common law on behalf of a living person who was injured by reason of the death. This latter is of more recent origin as a distinct proposition, although it doubtless rests in part on the same considerations that underlie the other and older maxim of *actio personalis moritur cum persona.*"

Wex S. Malone, *The Genesis of Wrongful Death,* 17 Stan. L. Rev. 1043, 1044 (1965) (footnotes omitted).[26] Our wrongful-death statutes sought to remedy that erroneous legal thinking. See, e.g., *Suell v. Derricott,*

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[26] See also Malone, 17 Stan. L. Rev. at 1055 (explaining that "[t]he probable origin of the rule denying a cause of action for wrongful death was the doctrine, since discarded, that when a cause of action disclosed the commission of a felony the civil action was merged into the criminal wrong"). *Restatement (Second) of Torts* § 925, cmt. a. (Am. Law Inst. 1979), also provides a nice summary of the genesis of wrongful-death statutes.

161 Ala. 259, 262, 49 So. 895, 897 (1909) ("Statutes like ours were clearly intended to correct what was deemed a defect of the common law, that the right of action based on a tort or injury to the person died with the person."); *King v. Henkie,* 80 Ala. 505, 509 (1886) ("The purpose of this, and like legislation, was clearly to correct a defect of the common law, by a rule of which it was well settled, that a right of action based on a tort or injury to the person, died with the person injured. Under the maxim, 'Actio personalis moritur cum persona,' the personal representative of a deceased person could maintain no action for loss or damage resulting from his death.").

The close connection between Alabama's wrongful-death statutes and its criminal-homicide statutes was reflected in the first wrongful-death statute, Act No. 62, Ala. Acts 1871-72, p. 83, which was titled "AN ACT To prevent homicides," and their shared purpose has been repeatedly noted in our cases. See, e.g., *Stinnett v. Kennedy,* 232 So. 3d 202, 215 (Ala. 2016) (noting "the shared purpose of the Wrongful Death Act and the Homicide Act to prevent homicide"); *Ex parte Bio-Med. Applications,* 216 So. 3d at 424 ("'[The wrongful-death] statute authorizes suit to be brought by the personal representative for a definite legislative purpose -- to prevent homicide.'" (quoting *Hatas v. Partin,* 278 Ala. 65, 68, 175 So. 2d 759, 761 (1965))); *Eich,* 293 Ala. at 100, 300 So. 2d at 358 ("[T]he pervading public purpose of our wrongful death statute ... is to prevent homicide through punishment of the culpable party and the determination of damages by reference to the quality of the tortious act. ..."); *Huskey,* 289 Ala. at 55, 265 So. 2d at 597 ("One of the purposes of our wrongful death statute is to prevent homicides.") Thus, it seems logical to me for there to be a correlation between the persons protected under Alabama's wrongful-death statutes

and the persons protected under Alabama's criminal-homicide statutes.

The main opinion is correct that the protection afforded in a civil law certainly can be broader than its corollary in criminal law, but nothing *requires* the civil law to be read more broadly, particularly given the absence of legislative action on this subject.[27]

Moreover, I find it interesting that the Human Life Protection Act, § 26-23H-1 et seq., Ala. Code 1975, which was enacted in 2019 -- well after the Brody Act, which amended § 13A-6-1 of our criminal-homicide statutes, (and also after the Sanctity of Unborn Life Amendment, i.e., Art. I, § 36.06, Ala. Const. 2022) -- defines an "unborn child" exactly the same way the Brody Act defines a "person": "A human being, specifically including an unborn child in utero at any

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[27] The main opinion asserts that Art. I, § 36.06(b) of the Alabama Constitution of 2022, in stating that "it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate," "operates in this context as a constitutionally imposed canon of construction, directing courts to construe ambiguous statutes in a way that 'protect[s] ... the rights of the unborn child' equally with the rights of born children, whenever such a construction is 'lawful and appropriate.'" __ So. 3d at __. The main opinion offers no authority for taking § 36.06 as a canon of legal construction, and I am not sure what an "appropriate" construction of the law means.

More generally, it is unclear to me why a constitutional amendment that was adopted in 2018 is somehow so central to deciding the specific meaning of a statute that has substantively remained unchanged since 1872. In any event, "'[t]o declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative.'" *Lindsay v. United States Sav. & Loan Ass'n,* 120 Ala. 156, 168, 24 So. 171, 174 (1898) (quoting Thomas Cooley, *Constitutional Limitations* 114).

stage of development, regardless of viability." § 26-23H-3(7), Ala. Code 1975. In its amicus curiae brief, the Alabama Medical Association states:

> "[D]uring the debate on the Alabama Senate floor regarding the Human Life Protection Act, Senator Clyde Chambliss, the Bill's sponsor in the Alabama Senate, confirmed that the *'in utero'* language in the Act was intentional, since it was *not* the intent of the Legislature through this Act to impact or prevent the destruction of fertilized *in vitro* eggs because in those circumstances, the woman is not pregnant. Likewise, Eric Johnston, president of the Alabama Pro-Life Coalition and one of the individuals who helped draft the Human Life Protection bill, stated in an interview with the Washington Post that the Bill would 'absolutely not' impact *in vitro* fertilization. Mr. Johnston gave this statement in response to the ACLU's misguided suggestion that the Act might affect *in vitro* fertilization."

Alabama Medical Association's brief, pp. 30-31 (footnotes omitted). I fully realize that such legislative history is not persuasive for purposes of statutory interpretation, but that history should give us pause regarding any kind of expansive interpretation of the Brody Act.

I also take issue with a hypothetical employed by the main opinion to support the decision. Despite asserting at the outset of its analysis that "the Court today need not address" questions such as "the application of the 14th Amendment to the United States Constitution to [IVF] children," __ So. 3d at __, the main opinion nonetheless proceeds to share -- and implicitly agree with -- a hypothetical posited by the plaintiffs that purports to implicate the Equal Protection Clause of

the 14th Amendment.[28] The main opinion asserts that "one latent implication" of the defendants' interpretation of § 6-5-391(a) is that

> "even a full-term infant or toddler conceived through IVF and gestated to term in an in vitro environment would not qualify as a 'child' or 'person,' because such a child would both be (1) 'unborn' (having never been delivered from a biological womb) and (2) not 'in utero.' And if such children were not legal 'children' or 'persons,' then their lives would be unprotected by Alabama law."

__ So. 3d at __ (footnote omitted).

First, in mentioning the foregoing hypothetical, the main opinion ignores the fact that it is not now -- or for the foreseeable future -- scientifically possible to develop a child in an artificial womb so that such a scenario could somehow unfold.[29] Second, the main

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[28] It is, perhaps, telling that the plaintiffs and the main opinion chose to insert a hypothetical federal equal-protection issue given that there is no express equal-protection clause in the Alabama Constitution, a fact this Court has noted on several occasions. See, e.g., *Mobile Infirmary Ass'n v. Tyler,* 981 So. 2d 1077, 1104 (Ala. 2007) (observing that "'this Court has acknowledged that the Alabama Constitution contains no equal-protection clause ....'" (quoting *Mobile Infirmary Med. Ctr. v. Hodgen,* 884 So. 2d 801, 813 (Ala. 2003), and citing *Ex parte Melof,* 735 So. 2d 1172 (Ala. 1999))).

[29] Perhaps in anticipation of that objection, the main opinion inserts a footnote that selectively quotes from a couple of journal articles to make it seem as if the time when artificial wombs for the earliest stages of human life are a reality is just around the corner. See __ So. 3d at __ n.2. That is simply untrue. See, e.g., Jen Christensen, *FDA Advisers Discuss Future of 'Artificial Womb' for Human Infants,* CNN, Sept. 19, 2023 (at the time of this decision, this article could be located at: https://www.cnn.com/2023/09/

opinion's choice to include that emotionally charged hypothetical undermines its earlier observation that "[a]ll parties to these cases, like all members of this Court, agree that an unborn child is a genetically unique human being whose life began at fertilization and ends at death."[30] __ So. 3d at __. No one -- not

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19/health/artificial-womb-human-trial-fda/index.html) (reporting that "[a] handful of scientists have been experimenting with animals and artificial wombs," but that "no such device has been tested in humans," and that, in any event, "[a]n artificial womb is not designed to replace a pregnant person; it could not be used from conception until birth. Rather, it could be used to help a small number of infants born before 28 weeks of pregnancy, which is considered extreme prematurity."); Stephen Wilkinson et al., *Artificial Wombs Could Someday be a Reality,* The Conversation, Dec. 1, 2023 (at the time of this decision, this article could be located at: https://theconversation.com/artificial-wombs-could-someday-be-a-reality-heres-how-they-may-change-our-notions-of-parenthood-217490) (observing that even an artificial womb for premature babies "may be many decades away" but that "artificial womb technologies could *eventually* lead to 'full ectogenesis' -- growing a foetus from conception to 'birth' wholly outside the human body" (emphasis added)).

[30] I note that although I certainly agree with the above-quoted statement from the main opinion, even that observation is not as simple as it appears because of the terms involved.

> "Notwithstanding various legislative pronouncements, from a medical and scientific perspective, fertilization is currently considered to be a chaotic and multi-step process, whereas 'conception' has variously been described as the time frame between fertilization and implantation in a woman's uterus, or the process of implantation. Precisely how long an in vitro growing cell mass is considered an embryo versus a pre-embryo, or whether the latter term is a legitimate distinction has long been the subject of debate among scientists as well as legal and ethical scholars."

Susan L. Crockin & Gary A. Debele, *Ethical Issues in Assisted Reproduction: A Primer for Family Law Attorneys,* 27 J. Am. Acad.

Matrim. Law. 289, 299 (2015). See also *McQueen v. Gadberry,* 507 S.W.3d 127, 134 n.4 (Mo. Ct. App. 2016) (observing that ""Pre-embryo" is a medically accurate term for a zygote or fertilized egg that has not been implanted in a uterus. It refers to the approximately 14-day period of development from fertilization to the time when the embryo implants in the uterine wall and the "primitive streak," the precursor to the nervous system, appears. An embryo proper develops only after implantation. The term "frozen embryos" is a term of art denoting cryogenically preserved pre-embryos.'" (quoting Elizabeth A. Trainor, Annotation, *Right of Husband, Wife, or Other Party to Custody of Frozen Embryo, Pre-embryo, or Pre-zygote in Event of Divorce, Death, or Other Circumstances*, 87 A.L.R. 5th 253, 260 (2001))). Rev. 515, 516 (2018) (observing that, "[u]nfortunately, American courts have not kept pace with the advancements happening in the field of ART [assisted reproductive technology]" and that, "[m]ost often, frozen embryo cases come to the courts during divorce suits between progenitors. Due to the personal nature of ART, however, progenitors are less likely to seek legal recourse when frozen embryos are negligently destroyed and the harm caused by the clinic is shielded from the public eye. While suits regarding negligent destruction of frozen embryos and suits when progenitors stop paying storage fees are less common, they are not without their legal and societal implications. When couples do turn to the judicial system, the courts are often ill-equipped to answer such legal questions in a manner that also considers the unique nature of ART and the accompanying emotions of the progenitors." (footnotes omitted)); Shirley Darby Howell, *The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation,* 14 DePaul J. Health Care L. 407, 407 (2013) (explaining that "[u]sing IVF to assist individuals and couples having trouble procreating would be seemingly positive, but the procedure has resulted in serious unintended consequences that continue to trouble theologians, physicians, and the courts. The ongoing legal debate focuses on two principal questions: (1) whether a frozen embryo should be regarded as a person, property, or something else and, (2) how to best resolve disputes between gamete donors concerning disposition of surplus frozen embryos."); Maggie Davis, *Indefinite Freeze?: The Obligations A Cryopreservation Bank Has to Abandoned Frozen Embryos in the Wake of the Maryland Stem Cell Research Act of 2006,* 15 J. Health Care L. & Pol'y 379, 396-97 (2012)

Mobile Infirmary Association, the Center for Reproductive Medicine, the amicus Alabama Medical Association, my dissenting colleagues, or anyone who disagrees with today's Court's decision -- is suggesting that such a child, if he or she could be produced, should not be protected by Alabama law.

Ultimately, as I stated at the outset, we must be guided by the language provided in the Wrongful Death of a Minor Act and the manner in which our cases have interpreted it. Under those guideposts, today's result is correct. However, the decision undoubtedly will come as a shock in some quarters of the State. I urge the Legislature to provide more leadership in this area of the law given the numerous policy issues and serious ethical concerns at stake,[31]

(asserting that "[c]ryopreservation is a scarce good, and is incredibly costly. For instance, one California cryopreservation bank charged clients $375 a year, prepaid, to store embryos. After many years, this can become incredibly burdensome on the progenitors. When the fees become too burdensome, there is a higher chance for couples to stop paying their fees, and eventually fall out of contact with the clinic. As embryos are abandoned, and storage fees are not paid, cryopreservation banks will likely need to raise the costs of the fees to other customers in order to compensate." (footnotes omitted)); Beth E. Roxland & Arthur Caplan, *Should Unclaimed Frozen Embryos Be Considered Abandoned Property and Donated to Stem Cell Research?,* 21 B.U. J. Sci. & Tech. L. 108, 109 (2015) ("'As science races ahead, it leaves in its trail mind-numbing ethical and legal questions.'" (quoting *Kass v. Kass,* 91 N.Y. 2d 554, 562, 696 N.E.2d 174, 178, 673 N.Y.S. 2d 350, 354 (1998) (citing John A. Robertson, *Children of Choice: Freedom and The New Reproductive Technologies* (1994))).

[31] See, e.g., Yehezkel Margalit, *From (Moral) Status (of the Frozen Embryo) to (Relational) Contract and Back Again to (Relational Moral) Status,* 20 Ind. Health L. Rev. 257, 257 (2023) ("The existing hundreds of thousands of unused frozen embryos, coupled with the skyrocketing rate of divorce, raise numerous moral, legal, social, and religious dilemmas. Among the most

and the fact that there is little regulation of the entire IVF industry.[32] Ultimately, it is the Legislature that possesses the constitutional authority and responsibility to be the final arbiter concerning whether a frozen embryo is protected by the laws of this State. Without such guidance, I fear that there could be unfortunate consequences stemming from today's decision that no one intends.

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daunting problems are the moral and legal status of the frozen embryo; what should its fate be in the event of conflicts between the progenitors?; and whether contractual regulation of frozen embryos is valid and enforceable."); Caroline A. Harman, *Defining the Third Way -- the Special-Respect Legal Status of Frozen Embryos,* 26 Geo. Mason L.

[32] See, e.g., Valerie A. Mock, *Getting the Cold Shoulder: Determining the Legal Status of Abandoned IVF Embryos and the Subsequent Unfair Obligations of IVF Clinics in North Carolina,* 52 Wake Forest L. Rev. 241, 257 (2017) (observing that "IVF centers are largely a self-regulated industry, meaning that for better or for worse, they receive little governmental oversight. There are no federal regulations for the disposition of abandoned embryos, and very few states have addressed it legislatively." (footnotes omitted)); Roxland & Caplan, 21 B.U. J. Sci. & Tech. L. at 115 (noting that "[n]o federal statutory law or regulation generally governs the classification of frozen embryos. In fact, only three states have enacted legislation concerning the disposition of frozen embryos more generally: Louisiana, Florida, and New Hampshire." (footnotes omitted)).

SELLERS, Justice (concurring in the result in part and dissenting in part).

These cases are not about when life begins, nuances of statutory construction, or the definition of "minor child" or "person." And, contrary to the main opinion, there is no black-letter law in Alabama, or any other state, to help us.[33] Regrettably, these cases use the specter of destroying human life to craft a narrative involving the protection of unborn children to cynically inflame worries about the sanctity of life under Alabama law.

In reality, these cases concern nothing more than an attempt to design a method of obtaining punitive damages under Alabama's Wrongful Death of a Minor Act, § 6-5-391, Ala. Code 1975, by concluding that frozen embryos, negligently destroyed, are entitled to the same protections as a fetus inside a mother's womb. Parsing the Brody Act, Act No. 2006-419, Ala. Acts 2006, codified as § 13A-6-1, Ala. Code 1975 (which is a part of Alabama's criminal-homicide statutes), and employing any sequence of linguistic gymnastics, cannot yield the conclusion that embryos developed through in vitro fertilization were intended by the legislature to be included in the definition of "person," *see* § 13A-6-1(a)(3), much less the definition of "minor child," *see* § 6-5-391(a). It is clear from the four corners of the Brody Act that the legislative intent was to protect unborn life, regardless of viability, from violence perpetrated against the mother. Previously, to impose criminal sanctions for the murder of an unborn child was impossible. *See* Act No. 77-607, § 2001(2), Ala. Acts 1977 (amended in 2006 by the Brody Act)

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[33] Otherwise, the duration of oral argument would not have approached two hours.

("'Person,' when referring to the victim of a criminal homicide, means a human being *who had been born and was alive at the time of the homicidal act.*" (emphasis added)). The Brody Act eliminated not only this born-alive requirement but also any viability threshold to create the bright-line rule that, if a woman is pregnant, an embryo in utero receives all the protections that a viable life would be afforded under the laws of Alabama. *See* § 13A-6-1(a)(3). Thus, and in light of Justice Houston's special writings in *Gentry v. Gilmore,* 613 So. 2d 1241, 1245 (Ala. 1993) (Houston, J., concurring in the result), and *Lollar v. Tankersley,* 613 So. 2d 1249, 1253 (Ala. 1993) (Houston, J., concurring in the result), which "emphasized the need for congruence between the criminal law and our civil wrongful-death statutes," *Mack v. Carmack,* 79 So. 3d 597, 611 (Ala. 2011), this Court held "that the Wrongful Death [of a Minor] Act permits an action for the death of a previable fetus." *Id.*

But interpreting the Brody Act as we are asked to do here is a judgment call. In short, we must determine whether to constrain ourselves to the clear intent of the Act or whether to inform our interpretation using extraneous means to reach a result clearly contrary to anything the Act ever intended. The majority's conclusion that an action may be maintained under the Wrongful Death of a Minor Act for the negligent destruction of an in vitro embryo -- an atextual conclusion purportedly reached by utilizing the Brody Act's definition of "person" to inform the Wrongful Death of a Minor Act's definition of "minor child" -- is clearly contrary to the intent of the legislature. To equate an embryo stored in a specialized freezer with a fetus inside of a mother is engaging in an exercise of result-oriented, intellectual sophistry, which I am unwilling to entertain.

Furthermore, I am puzzled by the majority and concurring opinions' references to Article I, § 36.06, of the Alabama Constitution of 2022. We have repeatedly stated that "'[a] court has a duty to avoid constitutional questions unless *essential* to the proper disposition of the case.'" *Lowe v. Fulford,* 442 So. 2d 29, 33 (Ala. 1983) (quoting trial court's order citing other cases). The majority believes the word "child" is unambiguous, yet it opines in *dicta,* without any citation to authority, that if the word "child" were ambiguous, § 36.06 acts "as a constitutionally imposed canon of construction, directing courts to construe ambiguous statutes in a way that 'protect[s] ... the rights of the unborn child' equally with the rights of born children." __ So. 3d at __. Respectfully, § 36.06 neither operates in such a fashion nor commands this Court to override legislative acts it believes "contraven[e] the sanctity of unborn life." __ So. 3d at __ (Parker, C.J., concurring specially). Section 36.06 states, in relevant part, "that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate." § 36.06(b). Because all policy determinations are vested in our legislature, this includes those determinations regarding the sanctity of unborn life. Therefore, § 36.06 merely reaffirms that "the judicial branch may not exercise the legislative or executive power." Art. III, § 42(c), Ala. Const. 2022. Accordingly, this Court has no authority to determine whether legislation concerning or relating to unborn life defies § 36.06; that authority lies only with the People of this State, acting through their elected representatives.

Any public-policy ramifications of any decision in these cases are outside the purview of this Court, and they are more appropriately reserved for the legislature. Should the legislature wish to include in vitro

embryos in the definition of "minor child," it may easily do so. Absent any specific legislative directive, however, we should not read more into a legislative act than the legislature did so itself. Thus, as to the majority opinion's conclusion regarding the Wrongful Death of a Minor Act, I respectfully dissent.

Insofar as the majority opinion affirms the trial court's dismissal of the plaintiffs' negligence and wantonness claims, I concur in the result. I must necessarily disagree with the majority opinion's mootness rationale on account of my dissent as to the majority opinion's analysis and conclusion regarding the Wrongful Death of a Minor Act.

COOK, Justice (dissenting).

I respectfully dissent. The *first question* that this Court is being asked to decide in these appeals is whether Alabama's Wrongful Death of a Minor Act ("the Wrongful Death Act"), *see* § 6-5-391, Ala. Code 1975, as passed by our Legislature, provides a civil cause of action for money damages for the loss of frozen embryos. This is a question of the meaning of the words in that Act, as it was originally passed and understood in 1872.

My sympathy with the plaintiffs and my deeply held personal views on the sanctity of life cannot change the meaning of words enacted by our elected Legislature in 1872. Even when the facts of a case concern profoundly difficult moral questions, our Court must stay within the bounds of our judicial role.

Limiting our role to interpreting the existing words in a statute and letting the Legislature decide changes is one of the basic teachings of the United States Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 215 (2022). In

that case, the United States Supreme Court overruled *Roe v. Wade,* 410 U.S. 113 (1973), and returned the hotly disputed issue of abortion to the citizens in each state, so that their elected representatives could pass laws addressing that issue. In concluding that the authority to regulate abortion "must be returned to the people and their elected representatives," the Supreme Court in *Dobbs* explained that "respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance." 597 U.S. at 292 and 302. The Supreme Court further explained that it "'has neither the authority nor the expertise to adjudicate those disputes'" and that "'courts do not substitute their social and economic beliefs for the judgment of legislative bodies.'" *Id.* at 289 (quoting *Ferguson v. Skrupa,* 372 U.S. 726, 729-30 (1963)).

Over the years, our Court has repeatedly said the same thing. Specifically, our Court has made clear that we are "not at liberty to rewrite statutes or to substitute [our] judgment for that of the Legislature." *Ex parte Carlton,* 867 So. 2d 332, 338 (Ala. 2003). Further, our Court has repeatedly made clear that "public-policy arguments should be directed to the legislature, not to this Court." *Ex parte Ankrom,* 152 So. 3d 397, 420 (Ala. 2013) (emphasis added).

Statutes Do Not Evolve. The
Legislature Amends Them.

On rare occasions, our Court's decisions have included language that departed from the rule that the Legislature -- and not this Court -- updates statutes. For example, in *Eich v. Town of Gulf Shores,* 293 Ala. 95, 99, 300 So. 2d 354, 357 (1974), this Court wrote that "it is often necessary to breathe life into existing laws less they become stale and shelfworn" "in order that

existing law may become useful law to promote the ends of justice." This is both dicta and fundamentally wrong.

It is not our role to expand the reach of a statute and "breathe life" into it by updating or amending it. It is also not our role to consider whether a law has become "stale" or "shelfworn."[34] This is the same error made by those commentators who advocate for a living constitution and argue that the words in our Constitution should evolve over time.[35]

Instead, it is the role of the Legislature to determine whether a law is outdated (for instance, because of new technology) and, thus, requires updating. If our Court does "breathe life" into a law by expanding its reach, we short-circuit the legislative process and violate the Alabama Constitution's separation-of-powers clause. That clause provides that, "[t]o the end that the government of the State of Alabama may be a government of laws and not of individuals, ... the judicial branch may not exercise the legislative or executive power." Ala. Const. 2022, Art. III, § 42(c).

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[34] *See Craft v. McCoy,* 312 So. 3d 32, 37 (Ala. 2020) (recognizing that """""when determining legislative intent from the language used in a statute, a court may explain the language, but it may not detract from or add to the statute""""") (citations omitted)); and *Ex parte Coleman,* 145 So. 3d 751, 758 (Ala. 2013) (recognizing that "'[t]he judiciary will not add that which the Legislature chose to omit'" (quoting *Ex parte Jackson,* 614 So. 2d 405, 407 (Ala. 1993))).

[35] *See generally* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 403-10 (Thomson/West 2012); Joe Carter, *Justice Scalia Explains Why the "Living Constitution" is a Threat to America,* Action Inst. (May 14, 2018) (at the time of this decision, this article could be located at: https://rlo.acton.org/archives/101616-justice-scalia-explains-why-the-living-constitution-is-a-threat-to-america.html).

Substituting our own meaning "turn[s] this Court into a legislative body, and doing that, of course, would be utterly inconsistent with the doctrine of separation of powers." *DeKalb Cnty. LP Gas Co. v. Suburban Gas, Inc.,* 729 So. 2d 270, 276 (Ala. 1998).

Separation of powers is part of our Constitution for a reason -- there are real advantages to the Legislature -- and not this Court -- making such decisions. *See* Jay Mitchell, *Textualism in Alabama,* 74 Ala. L. Rev. 1089, 1097 (2023) (explaining that "[t]here is a reason that the people elected *legislators* to formulate public policy, and there is every reason to think they are better at it and better situated to be accountable for their choices than judges are" (emphasis in original)). In fact, the drafters of the Alabama Constitution felt the separation-of-powers principle was so important that they made it an express clause in our Constitution, whereas the drafters of the Constitution of the United States did not.[36] The facts of these cases certainly illustrate why the Legislature is best suited to weigh competing interests and write comprehensive legislation, after full input from the public and thorough study.

Why I Dissent

I dissent because the main opinion violates this fundamental principle -- that is, that the legislative branch and not the judicial branch updates laws -- by expanding the meaning of the Wrongful Death Act beyond what it meant in 1872 without an amendment

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[36] *Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham,* 912 So. 2d 204, 212 (Ala. 2005) (explaining that "[t]he Constitution of Alabama expressly adopts the doctrine of separation of powers that is only implicit in the Constitution of the United States").

by the Legislature. I also dissent because I believe the main opinion overrules our recent Wrongful Death Act caselaw that requires "congruence" between the definition of "person" in Alabama's criminal-homicide statutes and the definition of "minor child" in the Wrongful Death Act. Both the original public meaning and this recent caselaw indicate the same result here -- that the Wrongful Death Act does not address frozen embryos.

Moreover, there are other significant reasons to be concerned about the main opinion's holding. No court -- anywhere in the country -- has reached the conclusion the main opinion reaches. And, the main opinion's holding almost certainly ends the creation of frozen embryos through in vitro fertilization ("IVF") in Alabama. The plaintiffs themselves explained in oral argument:

> "But today we're here advocating on behalf of plaintiffs *who are supporters of in vitro fertilization.* It worked for them. They have two beautiful children in each family because of in vitro fertilization. *The notion that they would do anything to hinder or impair the right or access to IVF therapy is flat wrong.* That's not why we're here."

Supreme Court of Alabama, *Supreme Court O/A Mobile Alabama,* YouTube 19:14 (Sep. 21, 2023) (at the time of this decision, this oral- argument session could be located at: https://www.youtube.com/watch?v=L08KGhNSDME) (emphasis added). It is not my role to judge whether ending this medical procedure is good or bad -- but it doubtless will have a huge impact on many Alabamians. And it underscores the need to have the Legislature -- not this Court -- address these issues through the legislative process.

In addition to the reasons stated above, I also dissent because the main opinion does not reach the *second question* presented in these appeals -- that is, whether the trial court prematurely dismissed the plaintiffs' negligence and wantonness claims at the pleading stage. Those claims present an alternative pathway to protect frozen embryos, a pathway without many of the problems presented by the Wrongful Death Act claims.

There is no dispute in these cases about when life begins. All parties agree on that issue. I specifically asked the defendants at oral argument: "[s]o, is it your position that ... these were lives?" And they responded: "It is, Justice Cook. I think that the ... embryo is a life, but the issue today is whether an embryo is a child protected under the [Wrongful Death Act]." Supreme Court of Alabama, *Supreme Court O/A Mobile Alabama,* YouTube 1:17:49 (Sep. 21, 2023).

The defendants nevertheless present a "catch-22" argument in support of the dismissal of those claims. On the one hand, they allege that the plaintiffs' wrongful-death claims were properly dismissed because their frozen embryos are not *"minor children"* under the Wrongful Death Act. On the other hand, they allege that the trial court properly dismissed the plaintiffs' negligence and wantonness claims because their frozen embryos each represent *"a life."* I am deeply troubled by this argument and the consequences that could result from adopting this position.

However, as explained below, there is no need for this Court to reach this "catch-22" argument at this time because it is simply too soon to dismiss those claims under Alabama's liberal pleading rules. It is for this reason that I would reverse the trial court's

dismissal of the plaintiffs' negligence and wantonness claims.

I. The Plaintiffs' Wrongful-Death Claims

A. The Wrongful Death Act -- A Purely Statutory Claim

This Court has previously observed that wrongful-death actions "are *purely statutory,"* meaning "[t]here was no such action or right of action at common law." *Kennedy v. Davis,* 171 Ala. 609, 611-12, 55 So. 104, 104 (1911) (emphasis added). The Alabama Legislature, therefore, has the responsibility of declaring who is covered by this private right of action.

The Legislature originally passed the Wrongful Death Act in 1872, and the Act was later codified in the Code of Alabama in 1876. *See* Ala. Code 1876, § 2899. The Act states, in relevant part, that "[w]hen the death of a *minor child* is caused by the wrongful act, omission, or negligence of any person, ... the father, or the mother, ... of the minor may commence an action." § 6-5-391(a) (emphasis added).

Unfortunately, the Wrongful Death Act does not define the term "minor child." Although the Act was last amended in 1995, *see* Ala. Acts 1995, Act No. 95-774, § 1, the phrase "[w]hen the death of a minor child is caused by the wrongful act ... of any person" has remained unchanged from the Act's initial inception in 1872, and no change has ever been made to it bearing on the meaning of the term "minor child."

B. We Should Use the Original Public Meaning of the Wrongful Death Act's Words

With no definition of "minor child" having been provided by the Legislature, this Court must decide how to interpret the meaning of that term as used in

the Wrongful Death Act. I believe in originalism, which means that we should apply the original meaning of the words as those words were used in the Act when it was passed in 1872. In other words, I apply the "original public meaning" of the words. As Justice Mitchell has observed, *"the meaning of a law is its original public meaning, not its modern meaning."* Mitchell, *supra,* at 1092 (some emphasis added; some emphasis in original); *see also Barnett v. Jones,* 338 So. 3d 757, 768 (Ala. 2021) (Mitchell, J., concurring specially); *Ex parte Pinkard,* 373 So. 3d 192, 207 (Ala. 2022) (Mitchell, J., concurring specially); *Gulf Shores City Bd. of Educ. v. Mackey,* [Ms. 1210353, Dec. 22, 2022] __ So. 3d __, __ (Ala. 2022) (Mitchell, J., concurring in part and concurring in the result).[37]

One of the leading scholars on this approach has undoubtedly been Justice Antonin Scalia. In *Reading Law: The Interpretation of Legal Texts* 33 (Thomson/West 2012), Justice Scalia and Bryan A. Garner explain that when a court is required to interpret the words in a statute, it should consider "how a reasonable reader, fully competent in the language, *would have understood the text at the time it was issued."* (Emphasis added).[38] *See also id.* at 78-92 (referring to this as the "fixed-meaning canon" and as

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[37] *See also* Mitchell, *supra,* at 1103 (explaining that "[w]hen judges say words should be given their 'ordinary' meaning, we do not mean that each word in a text always takes its literal meaning or its most statistically common meaning. We mean instead that words must be given the meaning that an ordinary reasonable person would ascribe to them after reading them in context.").

[38] As Justice Mitchell notes in *Textualism in Alabama, supra,* "[o]ur court, along with the U.S. Supreme Court and courts within the United States Court of Appeals for the Eleventh Circuit, has cited *Reading Law* numerous times." 74 Ala. L. Rev. at 1107.

the "original public meaning" of a statute); *New Prime Inc. v. Oliveira,* 586 U.S. ____, ____, 139 S. Ct. 532, 539 (2019) (noting that "'[i]t's a "fundamental canon of statutory construction" that words generally should be "interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute."' *Wisconsin Central Ltd. v. United States,* 585 U.S. ____, ____, 138 S. Ct. 2067, 2074, 201 L. Ed. 2d 490 (quoting *Perrin v. United States,* 444 U.S. 37, 42, 100 S. Ct. 311, 62 L. Ed. 2d 199 (1979)).").[39]

Because *"[w]ords change meaning over time, and often in unpredictable ways,"* Justice Scalia and Garner explain that it is important to give words in statutes the meaning they had when they were adopted to avoid changing what the law is. Scalia & Garner, *supra,* at 78 (emphasis added). "By anchoring the meaning of a text to the objective indication of its words at a fixed point in time, ... a judges' abilities to 'update' laws as they go along" is constrained. Mitchell, *supra,* at 1096.

Again, because this Court is in the judicial branch, its role is limited, and applying the "original public meaning" of the words in a statute helps this Court to stay within its constitutional role, which is a fundamental part of democracy. *See* Scalia & Garner, *supra,* at 82-83 (recognizing that "[o]riginalism is the *only* approach to text that is compatible with democracy. When government-adopted texts are given a new meaning, the law is changed; and changing written

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[39] Consistent with applying original public meaning, this Court has explained that "'[t]he court knows nothing of the intention of an act, except from the words in which it is expressed, applied to the facts existing at the time, the meaning of the law being the law itself.'" *Maxwell v. State,* 89 Ala. 150, 161, 7 So. 824, 827 (1890) (citation omitted).

law, like adopting written law in the first place, is the function of the first two branches of government -- elected legislators and ... elected executive officials and their delegates."). After all, if judges could freely invest old statutory terms with new meanings, this Court would risk amending legislation outside the "single, finely wrought and exhaustively considered, procedure" the Constitution commands. *Immigration and Naturalization Serv. v. Chadha,* 462 U.S. 919, 951 (1953).

1. The Original Public Meaning of "Minor Child" Can Be Found in the Common Law -- "The authorities ... are unanimous."

The common law answers the question whether the term "minor child" as used in the Wrongful Death Act was broad enough in 1872 to reach a frozen embryo today. In Alabama, it is a well-settled principle of law that the common law governs unless expressly changed by the statutes passed by our Legislature. Our Court has repeatedly held that "'[a]ll statutes are construed in reference to the principles of the common law; and *it is not to be presumed that there is an intention to modify, or to abrogate it, further than may be expressed,* or than the case may absolutely require.'" *State v. Grant,* [Ms. 1210198, Sept. 9, 2022] ____ So. 3d ____, ____ (Ala. 2022) (quoting *Beale v. Posey,* 72 Ala. 323, 330 (1882)) (emphasis added); *see also Ex parte Christopher,* 145 So. 3d 60, 65 (Ala. 2013) (observing that "'statutes [in derogation or modification of the common law] *are presumed not to alter the common law in any way not expressly declared'*" (quoting *Arnold v. State,* 353 So. 2d 524, 526 (Ala. 1977) (emphasis added)).[40]

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[40] *See also Holmes v. Sanders,* 729 So. 2d 314, 316 (Ala. 1999) ("'[T]he common law is the base upon which all of the laws of this

The Alabama Code also expressly mandates that the common law remains in effect absent actual changes by the Legislature. *See* § 1-3-1, Ala. Code 1975 ("The common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this state, shall, together with such institutions and laws, be the rule of decisions, and *shall continue in force, except as from time to time it may be altered or repealed by the Legislature."* (emphasis added)).

Similarly, Justice Mitchell has previously recognized that "*[a] statute that uses a common-law term, without defining it, adopts its common-law meaning."* Mitchell, *supra,* at 1130 (emphasis added). Other authorities agree that we must "presume the legislature retained the common-law meaning." 3A Norman J. Singer and J.D. Shambie Singer, *Statutes and Statutory Construction* § 69:9 (7th ed. 2010) (quoted approvingly by Mitchell, *supra,* at 1130).

So, what did the common law indicate in 1872? There is no doubt that the common law did not consider an unborn infant to be a child capable of being killed for the purpose of civil liability or criminal-homicide liability. In fact, *for 100 years after the passage of the Wrongful Death Act,* our caselaw did not

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State have been constructed, and when our courts are called upon to construe a statute, ... they must read the statute in light of the common law.'") (citation omitted); *Ivey v. Wiggins,* 276 Ala. 106, 108, 159 So. 2d 618, 619 (1964) (recognizing that "[l]egislative enactments in modification of the common law should be clear and such as to prevent reasonable doubt as to the legislative intent and of the limits of such change"). Further *"statutes being in derogation of the common law, must be strictly construed,* and cannot be extended in their operation and effect by doubtful implication." *Mobile Battle House, Inc. v. Wolf,* 271 Ala. 632, 639, 126 So. 2d 486, 493 (1961) (emphasis added).

allow a claim for the death of an unborn infant, confirming that the common law in 1872 did not recognize that an unborn infant (much less a frozen embryo) was a "minor child" who could be killed.

For example, in 1926, this Court, for the first time, addressed the issue whether the Wrongful Death Act permitted claims for the death of an unborn fetus who died from prenatal injuries. Citing cases from other jurisdictions, this Court in *Stanford v. St. Louis-San Francisco Railway Co.,* 214 Ala. 611, 612, 108 So. 566, 566 (1926), held that the Wrongful Death Act did not permit recovery for injuries during pregnancy that resulted in the death of the fetus.

In support of that holding, our Court wrote:

> "'The doctrine of the civil law and the ecclesiastical and admiralty courts ... *that an unborn child may be regarded as in esse ... is a mere legal fiction, which,* so far as we have been able to discover, *has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth.* If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it. We are of opinion that the action will not lie.'"

214 Ala. at 612, 108 So. at 567 (quoting *Allaire v. St. Luke's Hosp.,* 184 Ill. 359, 368, 56 N.E. 638, 640 (1900)) (emphasis added). We emphasized: *"The authorities, however, are unanimous* in holding that a prenatal injury affords no basis for an action in damages, in

favor either of the child or its personal representative." 214 Ala. at 612, 108 So. at 566 (emphasis added).

For many years afterwards, this Court maintained this position. *See, e.g., Birmingham Baptist Hosp. v. Branton,* 218 Ala. 464, 467, 118 So. 741, 743 (1928) (recognizing that "[t]his court has established a general line of demarcation between the civil rights of the mother and child to be born. It is concurrent with separate existence of the mother and child by the birth; and parental injury before the birth is no basis for action in damages by the child or its personal representative."); *Snow v. Allen,* 227 Ala. 615, 619, 151 So. 468, 471 (1933) (recognizing that "[s]o long as the child is within the mother's womb, it is a part of the mother, and for any injury to it, while yet unborn, damages would be recoverable by the mother in a proper case").

Thus, the common law in Alabama before 1872, and for 100 years afterward, was clear: "'The doctrine of the civil law ... that an unborn child may be regarded as in esse ... is a *mere legal fiction,* which ... *has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth.*'" *Stanford,* 214 Ala. at 612, 108 So. at 566 (citation omitted; emphasis added).[41]

2. The Main Opinion's Responses to the Common-Law are Mistaken

The main opinion provides four responses to the position that the common law did not consider an

[41] Again, we must follow the original public meaning of the statute, even if we might believe that the meaning is ill-informed, unwise, or outdated. If a meaning of a statute is, in fact, ill-informed, unwise, or outdated, the Legislature -- not this Court -- must amend or update that statute.

unborn infant to be a minor child capable of being killed for the purpose of civil liability or criminal-homicide liability: (1) that the common-law homicide rule was merely an "evidentiary rule," (2) that a dictionary from the 1800s includes a definition of "child" that did not provide an "exception" for unborn infants, (3) that William Blackstone (among other things) "grouped" the "rights" of unborn children with the "Rights of Persons," and (4) that the defendants' argument seeks an "exception" to the definition of "minor child" for frozen embryos. Each of these arguments is mistaken. I will address them one at a time.

First, the main opinion notes that "[i]t is true, as Justice Cook emphasizes, that the common law spared defendants from criminal-homicide liability for killing an unborn child unless the prosecution could prove that the child had been 'born alive' before dying from its injuries." ____ So. 3d at ____ n.6. Nevertheless, the main opinion goes on to assert that the common-law "born-alive" rule was "an evidentiary rule rather than ... a substantive limitation on personhood." *Id.* [42]

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[42] The main opinion also asserts that we can ignore the common-law criminal-law rule that it admits existed, because the criminal law has always been "'out of step with the treatment of prenatal life in other areas of law.'" ____ So. 3d at ____ n.6 (quoting *Dobbs,* 597 U.S. at 247). It does not cite any Alabama law for this assertion.

Regardless, this assertion is directly contrary to our Court's repeated holdings that there should be "congruence" between the Wrongful Death Act and Alabama's criminal-homicide statutes (as discussed more fully below). *See Mack,* 79 So. 3d at 611. Even if it were not, this argument is nevertheless irrelevant given that the common-law rule in the civil-law context in Alabama was the same rule as the criminal-law rule. *See, e.g., Stanford,* 214 Ala. at 612, 108 So. at 566.

The main opinion cites no Alabama authority in support of its "evidentiary rule" argument. The only authority cited is a law-review article from 2009, which in turn relies on a second law-review article from 1987.[43] *See id.* (citing Joanne Pedone, *Filling the Void: Model Legislation for Fetal Homicide Crimes,* 43 Colum. J. L. & Soc. Probs. 77, 82 (2009), citing in turn Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms,* 21 Val. U. L. Rev. 563, 586 (1987)).

Regardless, the main opinion is mistaken. Our caselaw makes clear that this common law was a substantive rule of law -- both in the criminal context and in the civil context. *Stanford,* 214 Ala. at 612, 108 So. at 567 (concluding that a wrongful-death action for an unborn child *"'will not lie'"* (citation omitted;

Further, *Dobbs* did not say that the criminal law could be ignored in determining the meaning of the common law. Instead, the main opinion's quote from *Dobbs* merely concerned a debate over the "basis" for a different common-law rule (the quickening rule) -- an issue that the *Dobbs* Court did not even decide. 597 U.S. at 247.

[43] Although the main opinion cites to *Dobbs* in an apparent effort to support these two law-review articles, *Dobbs* did not hold, or even suggest, that this common-law rule was merely an evidentiary rule and not a substantive rule of law. Instead, as noted above, the page in *Dobbs* cited by the main opinion contains a discussion of a debate over the possible "basis" for the "quickening rule." *Dobbs,* 597 U.S. at 247. Moreover, *Dobbs* concluded that even the debate over the "basis" of the "quickening rule" was "of little importance." *Id.* In the present appeals, the "basis" for the common-law rule that an unborn infant could not be killed is not at issue. Even if we were to assume that the "basis" for this common-law rule was unwise, it was still the rule in effect at the time the Wrongful Death Act was passed and therefore is part of the original public meaning of that Act unless the Legislature amends it.

emphasis added)); *Clarke v. State,* 117 Ala. 1, 8, 23 So. 671, 674 (1898) (recognizing that "'*[a]n infant in its mother's womb, not being* in rerum natura, *is not considered as a person who can be killed within the description of murder* ....'" (quoting 3 *Russell on Crimes* (6th ed.)) (emphasis added)). The main opinion does not cite or distinguish either of these Alabama cases. Nor would it matter if it was an "evidentiary rule" because even an evidentiary rule would still indicate the original public meaning of the statute (that is, what a "reasonable reader" at the time of passage understood the law to be). The main opinion also cites no caselaw holding that an "evidentiary rule" (even if one applied here) should be ignored in determining the original public meaning. Further, even if the common law were a mere evidentiary rule (and it was not), it would be an *irrebuttable* evidentiary rule as clearly shown by the cases and language cited above.

Second, the main opinion argues that the "leading dictionary of that time defined the word 'child' as 'the immediate progeny of parents' and indicated that this term encompassed children in the womb." ____ So. 3d at ____ (citing Noah Webster et al., *An American Dictionary of the English Language* 198 (1864) (quoting the first listed definition). However, this Court cannot ascertain the meaning of disputed terms merely by "plugging a string of words into a dictionary and running with the first results that come up." Mitchell, *supra,* at 1091. Instead, "words are given meaning by their context." Scalia & Garner, *supra,* at 56.

Here, the context indicates that the main opinion is mistaken. The cited dictionary does not "indicate[] that this term encompassed children in the womb." Instead, it indicates the opposite. The *same first definition* of

"child" also states: "The term is applied to infants *from their birth;* but the time when they cease ordinarily to be so called, is not defined by custom." Webster, *supra,* at 198. (emphasis added).[44] "From their birth" means after they were born.

Further, the language quoted in the text of the main opinion is general in nature ("immediate progeny of parents") and thus fails to answer the question

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[44] The main opinion argues in a footnote that the language in the first definition of "child" merely "contrasts newborns with older children in order to make the point that there is no clear-cut time at which a young person transitions from childhood to adulthood." ____ So. 3d at ____ n.5. But this is not the plain meaning of the language in the definition of "child": "[t]he term is applied to infants from their birth." Webster, *supra,* at 198. And, our Court is not in a position to speculate about what the subjective intent of the author of an 1864 dictionary might have been -- that is, whether this plain language was included merely "in order to make the point." *See* Scalia & Garner, *supra,* at 30 ("Subjective intent is beside the point. ... Objective *meaning* is what we are after ....").

In that same footnote (and in a parenthetical in the text of the main opinion), the main opinion also quotes the last line of the definition in this dictionary (line 41 -- under the seventh definition). ____ So. 3d at ____ n.5. However, this quotation is simply an illustration. Webster, *supra,* at 198 *("To be with child,* to be pregnant"). Again, this illustration does not contradict the common law or Alabama law of the time. In fact, to the extent that this illustration could mean anything in these appeals, it would tend to show that a frozen embryo *outside of a mother* would not have been part of the public meaning of "minor child" in 1872 because there would be no mother who was *"pregnant."*

Finally, the main opinion argues that the definition of a different word -- "childbearing" -- "drives home the point" when it "describes 'childbearing' as the act of 'bearing children' in the womb." *Id.* However, the definition is far less clear. Instead it states that "childbearing" is "[t]he act of producing or bringing forth children; parturition."

whether a frozen embryo is a "minor child" as that term was understood in 1872. This general definition also does not contradict the common law in any way. As explained above, the common law (and Alabama law) is definite, and it does indicate that, in 1872, the public meaning of "minor child" as used in the Wrongful Death Act did not include an unborn infant (or a frozen embryo).

In the same vein, the main opinion cites Blackstone's *Commentaries* and argues (1) that it "expressly grouped the rights of unborn children" with the "'Rights of Persons,'" (2) "consistently described unborn children as 'infant[s]' or 'child[ren],'" and (3) spoke of "such children as sharing in the same right to life that is 'inherent by nature in every individual.'" ____ So. 3d at ____ (quoting 1 William Blackstone's *Commentaries on the Laws of England* *125-26). The main opinion's characterization of these principles in Blackstone's *Commentaries* is mistaken.

First, none of this contradicts the Alabama caselaw cited above. In fact, the snippets quoted by the main opinion do not state, one way or the other, whether an unborn infant could be killed under the common law (whether for civil or criminal purposes). Second, how a list of rights were "grouped" seems insignificant at best, and the main opinion provides no explanation for why this is even relevant, much less important. Third, although the main opinion's assertion that children share the "same right to life" is certainly true, it does not help explain why a frozen embryo is a "minor child" as that term was understood in 1872 when the Act was adopted.

Finally, the main opinion incorrectly characterizes the defendants' argument as seeking an exception to

the definition of "minor child." The very beginning of the main opinion argues:

> "This Court has long held that unborn children are 'children' for purposes of Alabama's Wrongful Death of a Minor Act .... The central question presented ... is *whether the Act contains an unwritten exception* to that rule *for extrauterine children* -- that is, *unborn children who are located outside of a biological uterus* at the time they are killed."

____ So. 3d at ____ (emphasis added).

In making this assertion, the main opinion assumes the answer to the relevant question -- i.e., whether a "frozen embryo" is a "minor child" as that term was understood in 1872 in the Wrongful Death Act -- by immediately labeling frozen embryos as "extrauterine children" and deeming them "unborn children." In other words, the main opinion assumes that a frozen embryo is a "child" without further context or analysis and does so in the second sentence of the opinion.

The main opinion then asks an irrelevant question -- "whether the Act contains an unwritten *exception"* for "extrauterine children." ____ So. 3d at ____ (emphasis added). No party has suggested or requested an "exception" to anything in these appeals. Assuming the answer to the question and then framing this debate as whether an "exception" exists is semantics. It does not provide an answer to the relevant question and does nothing to respond to the common-law rule.

In short, the common-law rule as stated by our Court in *Stanford* is the original public meaning of the term "minor child" as it was understood in 1872 in the Wrongful Death Act. *Stanford,* 214 Ala. at 612, 108 So. at 567 (1926) (concluding "'that an unborn child may

be regarded as in esse ... is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth'" (citation omitted)). And, our Court has made clear that "'statutes [in derogation or modification of the common law] are presumed not to alter the common law in any way not expressly declared.'" *Ex parte Christopher,* 145 So. 3d at 65 (citation omitted). Thus, any update to the Wrongful Death Act must be done by the Legislature and not this Court.

C. Prior Caselaw Interpreting and Applying the Wrongful Death Act Based on Congruence with Alabama's Criminal-Homicide Statutes and Action by the Legislature

What about this Court's more recent caselaw interpreting the Wrongful Death Act? Although the members of this Court believe in originalism and textualism, we should not ignore our prior caselaw unless we are willing to overrule it. After the cases cited above, the next time we tackled these issues was in 1972 when we decided *Huskey v. Smith,* 289 Ala. 52, 265 So. 2d 596 (1972). In *Huskey,* for the first time, 100 years after the passage of the Wrongful Death Act, we allowed an action for unborn infant who was viable at the time of a prenatal injury and thereafter was born alive, but who later died, thus partially overruling *Stanford.*

Why did we partially overrule *Stanford* in *Huskey?* One key reason was our Court's recognition that the purpose and reach of the Wrongful Death Act was tied to the State's criminal-homicide statutes:

> "By the criminal law, it is a great crime to kill the child after it is able to stir in the mother's womb, by an injury inflicted upon the person of the mother, and it may be murder if the child is *born alive* and dies of prenatal injuries. *Clarke v. State,* 117 Ala. 1, 23 So. 671 (1897). *One of the purposes of our wrongful death statute is to prevent homicides. Bell v. Riley Bus Lines,* [257 Ala. 120, 57 So. 2d 612 (1952)]. If we continued to follow *Stanford,* which followed then existing precedent, *a defendant could be responsible criminally for the homicide of a fetal child but would have no similar responsibility civilly. This is incongruous."*

Huskey, 289 Ala. at 55, 265 So. 2d at 597-98 (second and third emphasis added).

Then, in 1993, our Court made clear that it would not expand recovery under the Wrongful Death Act beyond that which was expressly provided in the Act absent a clear direction from the Legislature. First, in *Lollar v. Tankersley,* 613 So. 2d 1249, 1252-53 (Ala. 1993), we explained that, "[w]ithout a clearer expression of legislative intent," we would decline to hold that the Wrongful Death Act "creates a cause of action for the wrongful death of a fetus that has never attained viability" and noted that "it appears that no court in the United States has, without a clear legislative directive, recognized a cause of action for the wrongful death of a fetus that has never attained a state of development exceeding that attained in this case." Then, in *Gentry v. Gilmore,* 613 So. 2d 1241, 1244 (Ala. 1993), we repeated this sentiment and explained:

> *"We follow the reasoning of a majority of jurisdictions and hold that our statute*

> *provides no cause of action for the wrongful death of a nonviable fetus.* In so holding, we point out that, with the exception of Georgia, the Gentrys' position [that a wrongful-death action exists for the death of a nonviable fetus] apparently *is not the law in any American jurisdiction where there is no clear legislative direction to include a nonviable fetus within the class of those covered by the wrongful death acts. See Miccolis v. AMICA Mutual Insurance Co.,* 587 A.2d 67, 71 (R.I. 1991); Gary A. Meadows, Comment, *Wrongful Death and the Lost Society of the Unborn,* 13 J. Legal Med. 99, 107 (1992); and Sheldon R. Shapiro, Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Child,* 84 A.L.R.3d 411, 453-54, § 5[a] (1978 & Supp. 1992)."

(Emphasis added.)

Using language similar to *Huskey,* Justice Houston wrote specially in both cases and argued for an approach that he believed would be "consistent with the criminal law." Noting the definition of "person" in Alabama's criminal-homicide statutes at that time, Justice Houston wrote: "There should not be different standards in wrongful death and homicide statutes, given that the avowed public purpose of the wrongful death statute is to prevent homicide and to punish the culpable party and not to compensate for the loss." *Gentry,* 613 So. 2d at 1245 (Houston, J., concurring in the result); *Lollar,* 613 So. 2d at 1253 (Houston, J., concurring in the result).

1. The Brody Act and This Court's Reiteration of Congruence Between Alabama's Criminal-Homicide Statutes and the Wrongful Death Act

In 2006, nearly 13 years after Justice Houston's observations in *Lollar* and *Gentry,* the Alabama Legislature enacted the "Brody Act," Act No. 2006-419, Ala. Acts 2006, codified as § 13A-6-1, Ala. Code 1975. The Brody Act amended the definition of "person" in Alabama's criminal-homicide statutes to expand who could be deemed a victim of a criminal homicide to include an "unborn child in utero." *See* § 13A-6-1(a)(3), Ala. Code 1975.

Before that amendment, the definition of "person" in Alabama's criminal-homicide statutes was:

> "[A] human being *who had been born and was alive* at the time of the homicidal act."

See Act No. 607, § 2001(2), Ala. Acts 1977, formerly codified as § 13A-6-1(2) (emphasis added). After the passage of the Brody Act, however, the definition of "person" in the criminal-homicide statutes became:

> "[A] human being, *including an unborn child in utero at any stage of development,* regardless of viability."

§ 13A-6-1(a)(3) (emphasis added).

Following the passage of the Brody Act, our Court decided *Mack v. Carmack,* 79 So. 3d 597 (Ala. 2011), in which we held that a plaintiff could bring a claim under the Wrongful Death Act for the death of a previable in utero fetus. Our holding in *Mack* rested, in large part, on the Legislature's adoption of the Brody Act. Specifically, we noted that the Brody Act "constitute[d] clear legislative intent to protect even

nonviable fetuses from homicidal acts." 79 So. 3d at 610. We also explained that the public purpose of our wrongful-death statutes, including the Wrongful Death Act, is to prevent homicide and that *"this Court repeatedly has emphasized the need for congruence between the criminal law and our civil wrongful-death statutes."* 79 So. 3d at 611 (emphasis added).

Thus, we held, after considering "the legislature's amendment of Alabama's homicide statute to include protection for 'an unborn child in utero at any stage of development, regardless of viability,' § 13A-6 1(a)(3)," that the Wrongful Death Act should likewise permit an action for the death of the plaintiff's previable, in utero fetus given that the purpose of the Act is to prevent the death of a child. *Id.* In so holding, we quoted with approval Justice Houston's special concurrences from *Gentry* and *Lollar* regarding the need for congruence between Alabama's wrongful-death statutes and its criminal-homicide statutes given that the purpose of those statutes is to prevent homicide and "'to punish the culpable party and not to compensate for the loss.'" *Id.* at 610 (quoting *Gentry,* 613 So. 2d at 1245 (Houston, J., concurring in the result); and *Lollar,* 613 So. 2d at 1253 (Houston, J., concurring in the result)).

Five years after this Court's decision in *Mack,* our Court reached an identical result in *Stinnett v. Kennedy,* 232 So. 3d 202 (Ala. 2016). In that case, we explained that *"borrowing the definition of 'person' from the criminal Homicide Act to inform [us] as to who is protected under the civil Wrongful Death Act made sense."* 232 So. 3d at 215 (emphasis added).

In the present appeals, the parties have neither asserted that our holdings or reasoning in either *Mack* or *Stinnett* are wrong, nor have they asked us to

overrule those decisions. *See Clay Kilgore Constr., Inc. v. Buchalter/Grant, L.L.C.,* 949 So. 2d 893, 898 (Ala. 2006) (noting absence of a specific request to overrule existing authority and stating that, "[e]ven if we would be amenable to such a request, we are not inclined to abandon precedent without a specific invitation to do so").[45] I therefore see no reason to abandon this precedent in deciding the question at issue in the present appeals.

2. The Main Opinion is Overruling *Mack* and *Stinnett*

The main opinion alleges that this Court's decisions in *Mack* and *Stinnett* do not "mean that the definition of 'child' in the Wrongful Death of a Minor Act must precisely mirror the definition of 'person' in our criminal-homicide laws." ____ So. 3d at ____. Specifically, the main opinion alleges that, because criminal liability is "more severe than civil liability," the "set of conduct that can support a criminal prosecution is almost always narrower than the conduct that can support a civil suit." ____ So. 3d at ____. According to the main opinion, an argument to the contrary is "not only illogical, it was rejected in *Stinnett* itself." ____ So. 3d at ____. Based on the foregoing, the main opinion concludes that the definition of "person" in Alabama's criminal-homicide law provides a "floor" for the definition of personhood in wrongful-death actions, not a "ceiling." ____ So. 3d at ____.

Contrary to the main opinion's assertion, our Court in *Stinnett* expressly stated that it was *"borrowing the*

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[45] *See also Alabama Dep't of Revenue v. Greenetrack, Inc.,* 369 So. 3d 640 (Ala. 2022) (declining to overrule precedent when the parties did not expressly ask this Court to do so).

definition of 'person' from the criminal Homicide Act to inform [us] as to who is protected under the civil Wrongful Death Act." 232 So. 3d at 215 (emphasis added). By using the phrase "borrowing the definition," it is difficult to imagine how much clearer our Court could have been that the definitions of the terms "person" and "minor child" were to be interpreted the same. Thus, the main opinion is simply incorrect when it states that *Stinnett* "did not say that." ____ So. 3d at ____.

Additionally, in reaching the above conclusion, the main opinion mistakes statutory *definitions* for *liability standards*. It is certainly true that criminal law includes additional defenses (and sometimes includes additional elements) and thus contains a "narrower" standard of liability than civil law, but it is also true that definitions of terms can be the same in the criminal-homicide statutes and the civil wrongful-death statutes.

Stinnett illustrates this. In that case, the plaintiff sued a physician for the wrongful death of her unborn fetus pursuant to the Wrongful Death Act. The defendant, emphasizing the congruence discussion in *Mack,* argued that an exception to liability for medical personnel in the criminal-homicide statutes also prevented malpractice liability under the Wrongful Death Act. *See Stinnett,* 232 So. 3d at 214-15 (citing § 13A-6-1(b), Ala. Code 1975, which provides a defense to homicide for a physician providing medical care for a "[m]istake, or unintentional error").

Not surprisingly, our Court disagreed. Relying on *Mack,* we explained that the *liability standard* differed between the criminal-homicide statutes and the civil Wrongful Death Act. Therefore, this Court held, the defendant could be liable for medical malpractice

even if she were a physician and committed an "unintentional error." We wrote:

> "[Mack's] attempt to harmonize who is a 'person' protected from homicide under both the Homicide Act and Wrongful Death Act, however, *was never intended to synchronize civil and criminal liability* under those acts, or the defenses to such liability."

232 So. 3d at 215 (emphasis added); ____ So. 3d at ____ (quoting the same language). Thus, contrary to the main opinion's position, our Court in *Stinnett* made clear that our holding on *liability standards* had no impact on our decision to "borrow[]" the *definition* of "person" (that is, the victim) in Alabama's criminal-homicide statutes to determine who a "minor child" was under the Wrongful Death Act.

Moreover, the main opinion's reasoning that the definition of "person" in Alabama's criminal-homicide statutes provides a "floor" for the definition of "child" in wrongful-death actions, not a "ceiling," is also illogical given the changes brought about by the Brody Act.[46] The Legislature made an intentional decision to extend the criminal-homicide statutes beyond the common law when it passed the Brody Act. In sharp contrast, the Legislature has never extended the relevant portion of the Wrongful Death Act, despite the passage of 150 years. Yet, the main opinion now decides that the definition in this unamended civil

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[46] When construing a criminal statute in a civil action, the Rule of Lenity should be applied because it would be "inconceivable" to give "the language defining the violation ... one meaning (a narrow one) for the penal sanctions and a different meaning (a more expansive one) for the private compensatory action." Scalia & Garner, *supra,* at 297.

statute goes *further* than the definition in the criminal-homicide statutes that the Legislature did extend.

In sum, the main opinion overrules *Mack* and *Stinnett*[47] *sub silentio* by decoupling the definitions in the criminal-homicide statutes and the Wrongful Death Act, by removing the reasoning of those decisions, and by overlooking our other caselaw requiring congruence between the definition of "person" in Alabama's criminal-homicide statutes and the definition of "minor child" in the Wrongful Death Act.[48]

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[47] The year after this Court decided *Mack, supra,* it was once again called upon to address the reach of the Wrongful Death Act in *Hamilton v. Scott,* 97 So. 3d 728 (Ala. 2021). The main opinion quotes *Hamilton* for the proposition that a wrongful-death-act claim can be brought for "'any unborn child.'" ____ So. 3d at ____ (quoting *Hamilton,* 97 So. 3d at 735). This quote is correct, but it does not answer the relevant question in these cases -- that is, whether a frozen embryo is a "minor child" as that term was used in 1872 in the Wrongful Death Act. Further, *Hamilton* did not change the holding in *Mack* and instead expressly stated that "*Mack* is now controlling precedent .... Therefore, we will apply *Mack* in deciding this appeal." *Hamilton,* 97 So. 3d at 735. Moreover, to the extent that there is any confusion about whether the homicide statutes' definition of "person" has been "borrow[ed]" (and thus is both a "floor" and a "ceiling" for the scope of the term "minor child" in the Wrongful Death Act), *Stinnett* governs because it was decided after *Hamilton.*

[48] The main opinion argues that the "bulk of [my] dissent is animated by the view that *Mack* was wrongfully decided and that, contrary to its holding, unborn children are not 'children' under the Act after all." ____ So. 3d at ____ n.4. This is inaccurate. The opinions in these cases are settled law, and I have not questioned them or their reasoning. Moreover, as explained above, *Mack* arose after the Legislature made an express change to the criminal-homicide statutes that broadened the definition of "person" beyond the common law for the first time. So that there is no doubt, the law in Alabama is clear (since the Legislature amended the criminal-homicide statutes) that killing an "unborn

3. The Plaintiffs' Arguments Regarding the Brody Act are Mistaken

Because I would follow our prior precedent that there must be "congruence" between the definition of "person" in Alabama's criminal-homicide statutes and the definition of "minor child" in the Wrongful Death Act, I must consider whether a frozen embryo is within the definition of "person" in the criminal-homicide statutes, as amended by the Brody Act -- a question that is hotly debated in the briefs. Because the main opinion holds that the definition in the criminal-homicide statutes is merely a "floor," it does not engage on this question.

As noted above, after the passage of the Brody Act, the definition of "person" in the criminal-homicide statutes became: *"[A] human being, including an unborn child in utero at any stage of development, regardless of viability."* § 13A-6-1(a)(3) (emphasis added). The primary argument between the parties is over the phrase "including an unborn child in utero." On the one hand, the defendants argue strongly that the phrase "including an unborn child in utero" indicates that the Legislature, by adding this phrase to the definition, implied that "human being" would not otherwise include an unborn child in utero (and therefore would not include a frozen embryo, which was not added). On the other hand, the plaintiffs argue

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child in utero" is both a homicide and actionable under the Wrongful Death Act -- and I agree with this law.

Here, we are called upon to decide a question that this Court has not decided before -- whether a frozen embryo is a "minor child" under the Wrongful Death Act. There are two possible approaches to this: (1) follow the holding of *Mack* and *Stinnett* (that is, use the homicide definition of "person" adopted by the Legislature in the criminal-homicide

just as strongly that this phrase is not intended to be a limiting phrase but, instead, merely provides one example of a "human being," thus implying that "human being" is broad enough to include a frozen embryo.

First, this Court has recognized that both the preamble and the title of an act may be used to resolve any ambiguities in the text. *See Newton v. City of Tuscaloosa,* 251 Ala. 209, 218, 36 So. 2d 487, 494 (1948) (recognizing that "both the preamble and the title of an act may be looked to in order to remove ambiguities and uncertainty in the enacting clause"); *City of Bessemer v. McClain,* 957 So. 2d 1061, 1075 (Ala. 2006) (noting that our Court "can also look at the title or preamble of the act"); Scalia & Garner, *supra,* at 33 (recognizing that the textual purpose of an act is "vital" to its context).

The Brody Act provides that it "shall be known as the 'Brody Act,' in memory of the unborn son of Brandy Parker, whose death occurred when she was eight and one-half months pregnant." Act No. 2006-419, § 4. Likewise, the title to the Brody Act provides that it is "[a]n act, [t]o amend [Alabama's homicide code], ... to define person to include an unborn child ... [and] to name the bill 'Brody Act' in memory of the unborn son of Brandy Parker, whose death occurred when she was eight and one-half months pregnant."

Based on the contents of the Brody Act and its title, it seems quite clear to me that the death of Brody Parker -- an unborn, in utero child -- spurred the Legislature to change the definition of a "person" in the criminal-homicide statutes from the common-law meaning to a meaning that now allows a defendant to be charged with murder when he or she causes the death of a "human being" "in utero." In other words, the

textual purpose was to expand the definition of "person" to cover victims like Brody Parker who died in utero. Our caselaw makes clear that we must presume that the terms of a statute mean what they were designed to effect, and we are not allowed to enlarge them by construction. *See Holmes v. Sanders,* 729 So. 3d 314, 316 (Ala. 1999) (explaining that this Court presumes "'that the legislature did not intend to make any alteration in the law beyond what it declares either expressly or by unmistakable implication'" (quoting *Beasley v. MacDonald Eng'g Co.,* 287 Ala. 189, 197, 249 So. 2d 844, 851 (1971))).[49]

Second, the plaintiffs' proposed statutory construction of the criminal-homicide statutes is contrary to the common law of homicide and is not supported by the history of Alabama's criminal-homicide statutes. In 1852, the Alabama Legislature passed the first criminal-homicide statute, which made clear that only a "human being" could be the victim of a murder. That statute read, in relevant part, that "every homicide perpetrated ... to effect *the death of any human being*" constituted murder. § 3080, Ala. Code 1852 (emphasis added). Although every Code section addressing criminal homicide enacted between 1852 and 1977 used the term "human being" to describe the victim of murder and manslaughter, the Legislature never defined the term.

After the passage of the first homicide statute, this Court held that killing an unborn infant in utero did not constitute a murder, citing a common-law treatise.

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[49] *See also Cook v. Meyer Bros.,* 73 Ala. 580, 583 (1883) (noting the "presumption ... that the language ... of the statute import[s] the alteration or change it was designed to effect, and [its] operation will not be enlarged by construction ....").

For example, in *Clarke v. State,* 117 Ala. at 8, 23 So. at 674, this Court wrote that "'*[a]n infant in its mother's womb, not being* in rerum natura, *is not considered as a person who can be killed, within the description of murder* ....'" (Quoting 3 *Russell on Crimes* (6th ed.) (emphasis added).)[50]

Then, in 1977, the Legislature repealed the previous criminal-homicide statutes and replaced them with the new criminal-homicide statutes. In doing so, the Legislature *expressly adopted the common-law rule* and defined the term "person" as "a human being who had been born and was alive at the time of the homicidal act." Former § 13A-6-1(2). That definition remained unchanged until the adoption of the Brody Act, at which point the Legislature, as explained above, went beyond the common-law rule to expressly declare that a victim of a homicide or assault (that is, a "human being") included an "unborn child in utero."

In short, the common law was clear that an unborn infant was "'not considered as a person who can be killed.'" *Clarke,* 117 Ala. at 8, 23 So. at 674 (citation omitted). The statutory law did not change this until the passage of the Brody Act. Thus, the common-law definition remains, except to the extent that it has been expressly changed by the Brody Act to add an "unborn child in utero" to the definition of "person" in Alabama's criminal-homicide statutes. To conclude

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[50] The authority cited in *Clarke* was a leading criminal-law treatise originally written about the common law by an English Justice named William Oldnall Russell. Although this Court cited the sixth edition (published in 1896), the earlier editions contained the same quote, dating back to at least 1826. *See, e.g.,* William Oldnall Russell, *A Treatise on Crimes and Indictable Misdemeanors* at 424 (2d ed. 1826). In other words, this Court in *Clarke* correctly stated and followed the content of the common law.

otherwise would be inconsistent with our caselaw cited above holding that "'[a]ll statutes are construed in reference to the principles of the common law; and it is not to be presumed that there is an intention to modify, or to abrogate it, further than may be expressed, or than the case may absolutely require.'" *Grant,* ____ So. 3d at ____ (citing and quoting *Beale v. Posey,* 72 Ala. at 330).[51]

For all of these reasons, it seems clear to me that a frozen embryo does not fit within the statutory definition of "person" as that term is used in Alabama's criminal-homicide statutes and thus cannot be a "minor child" under the Wrongful Death Act.

D. Article I, § 36.06, of the Alabama Constitution of 2022 Has No Impact on the Terms in the Wrongful Death Act from 1872

The main opinion also argues that, even if the word "child" in the Wrongful Death Act were ambiguous, Article I, § 36.06, of the Alabama Constitution of 2022 "operates in this context as a constitutionally imposed

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[51] I note briefly that, were we to adopt the plaintiffs' proposed construction of the definition of "person" in the criminal-homicide statutes, we risk criminalizing the IVF process. Under the Rule of Lenity, "'*criminal statutes are to be strictly construed in favor of* those persons sought to be subjected to their operation, i.e., *defendants.*'" *Ex parte Bertram,* 884 So. 2d 889, 891 (Ala. 2003) (quoting *Clements v. State,* 370 So. 2d 723, 725 (Ala. 1979), overruled on other grounds by *Beck v. State,* 396 So. 2d 645 (Ala. 1980)). Thus, if there were any reasonable doubts as to the statutory construction of the criminal-homicide statutes, this Court would apply the Rule of Lenity and strictly construe the definition of "person" in favor of those persons sought to be subjected to their operation -- for instance, in a future case, perhaps fertility-clinic workers. This is yet another reason why the plaintiffs' interpretation of the criminal-homicide statutes is mistaken.

canon of construction," which "require[s] courts to resolve the ambiguity in favor of protecting unborn life." ____ So. 3d at ____. That section "acknowledges, declares, and affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate." § 36.06(b) (emphasis added). The Chief Justice also devotes his special concurrence to this argument.

The first problem with this argument is that there is nothing in the text of § 36.06 about resolving ambiguities in statutes (assuming there was one here), and the main opinion cites no authority supporting such a rule of construction. Even if we were to assume such a rule of construction, there is nothing in § 36.06 that tells us *how* to best protect frozen embryos. Specifically, § 36.06 does not indicate (1) whether we should protect frozen embryos by updating the words in the Wrongful Death Act or (2) whether we should protect frozen embryos via the ordinary common-law route (that is, by allowing the claims of negligence and wantonness to move forward in these actions). Why is one option more constitutionally mandated than another -- especially when one option requires us to discount the original public meaning of the terms in the Wrongful Death Act as it was passed by the Legislature in 1872?

The second problem with this position is timing. The Wrongful Death Act was passed in 1872, whereas § 36.06 was passed in 2018. Section 36.06 cannot retroactively change the meaning of words passed in 1872. The Legislature in 1872 had no idea about a constitutional amendment that would be passed 150 years later. If the Legislature wanted to change the

words in the statute, they should have changed the words in the statute.[52]

Although I agree with much of what Chief Justice Parker so eloquently states in his special concurrence regarding the "sanctity of unborn life," ____ So. 3d at ____ (Parker, C.J., concurring specially), I do not agree with his discussion of the "Effect of Constitutional Policy." ____ So. 3d at ____ (Parker, C.J., concurring specially). In particular, I believe he is mistaken when he asserts that the People of Alabama "explicitly" told "all three branches of government what they ought to do" in § 36.06. ____ So. 3d at ____ (Parker, C.J., concurring specially). The question for these appeals is whether Alabama law provides a private cause of action, for money damages, for the loss of a frozen embryo. There is no language in this constitutional amendment mentioning private causes of action, or money damages, or frozen embryos, or IVF. *Compare Dobbs,* 597 U.S. at 237 (noting that a right to abortion "is not mentioned anywhere in the Constitution").

The third difficulty with this argument is that it does not rebut any of my conclusions discussed above, including those premised on the common law, the criminal-homicide statutes, and our prior caselaw. It is

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[52] It is of course true, as the main opinion notes, that the Constitution is the "'supreme law of the state'" and that all statues "'must yield'" to it. ____ So. 3d at ____ n.7. However, the main opinion fails to explain why the original public meaning of the term "minor child" in the Wrongful Death Act violates -- that is, does not "yield" to -- § 36.06. Although the main opinion contends that the definition of "child" that it applies here is "in keeping with the definition that was established by this Court's precedents at the time § 36.06 was adopted," *id.* (emphasis omitted), I fail to see how that could be true given that, as explained in detail above, the main opinion is overruling *Mack* and *Stinnett*.

for all of these reasons that I find this argument unpersuasive.

E. The Suggestion that the Common Law Has Been "Collectively Repealed" Is Mistaken

Justice Shaw argues that it is "well settled" that the meaning of the term "minor child" "includes an unborn child with *no distinction between in vitro or in utero.*" ____ So. 3d at ____ (Shaw, J., concurring specially) (emphasis added). Other than simply referring to the main opinion, Justice Shaw cites no legal authority that this lack of any distinction is "well settled." Regardless, he is mistaken for all the reasons explained above.

As to his assertion that "the legislature, the constitution, and this Court's decisions have collectively repealed the common law's prohibition on ... seeking a civil remedy for injuries done to the unborn," ____ So. 3d at ____ (Shaw, J., concurring specially), Justice Shaw provides no analysis on this point either and, instead, simply provides a string citation to (1) the Wrongful Death Act itself, (2) § 36.06(b) (analyzed in full earlier), and (3) two cases that support my position (as explained earlier). *Id.* at ____. Regardless, it is well settled that the Legislature -- not this Court -- "repeal[s]" statutes.

Further, the question in these appeals is not whether there is a common-law *"prohibition* on seeking a civil remedy for injuries done to the unborn" (as Justice Shaw frames the issue). ____ So. 3d at ____ (Shaw, J., concurring specially) (emphasis added). Instead, the question is whether the common law can help this Court determine if a frozen embryo is within the *meaning of the term "minor child"* in the Wrongful Death Act.

Justice Shaw appears to contend that the common law has a narrower role in providing meaning for words used in Alabama statutes than I have explained above. Relying on a special concurrence to a 1974 plurality opinion from this Court and § 1-3-1, Ala. Code 1975, he contends that Alabama statutory law "'*does not provide*'" that the "'"common law of England *shall be the rule of decisions* in Alabama *unless changed by the legislature.*'"" ____ So. 3d at ____ (Shaw, J., concurring specially) (quoting *Swartz v. United States Steel Corp.,* 293 Ala. 439, 446, 304 So. 2d 881, 887 (1974) (Faulkner, J., concurring specially)) (emphasis added). He argues "'*[o]n the contrary,*'" Alabama law merely provides that the common law applies so long as it is "'*[n]ot inconsistent* with the constitution, the laws, and the institutions of Alabama.'" *Id.* (some emphasis omitted); *id.* at ____ ("But if it is inconsistent, then it need not be first altered or repealed by the legislature.").

I fail to see a distinction between these standards and what our Court has repeatedly (and very recently) broadly stated: "'All statutes are construed in reference to the principles of the common law,'" *Grant,* ____ So. 3d at ____, and "'statutes [in derogation or modification of the common law] are *presumed not to alter the common law in any way not expressly declared,*'" *Ex parte Christopher,* 145 So. 3d at 65 (citation omitted; emphasis added); *see also* 3A Norman J. Singer and J.D. Shambie Singer, *Statutes and Statutory Construction* § 69:9 (explaining that we "presume the legislature retained the common-law meaning").

Justice Shaw does not cite or distinguish any of this authority. More fundamentally, Justice Shaw does not explain how using the common-law understanding of the meaning of the term "child" to determine whether

a frozen embryo is a "minor child" under the Wrongful Death Act is "inconsistent" with "'the constitution, the laws, and the institutions of Alabama.'" ____ So. 3d at ____ (Shaw, J., concurring specially) (emphasis and citation omitted). As explained thoroughly above, any changes that have been made in this area of the law have been made incrementally by the Legislature over time and have only gone so far as to encompass unborn, *in utero* children, as reflected in the holding and language discussed above in *Stinnett,* 232 So. 3d at 215 (which postdates the two cases cited by Justice Shaw).[53]

Thus, unless and until the Legislature updates Alabama law in such a way that demonstrates that a "frozen embryo" is a "minor child," this Court remains bound by the original public meaning of that term as it was understood in 1872 when the Legislature passed the Wrongful Death Act.

F. Not a Single State Agrees with the Main Opinion

Not a single state has held that a wrongful-death action (or a criminal-homicide action) can be brought for the destruction of a frozen embryo. In fact, a number of jurisdictions have rejected such causes of action. *See, e.g., Penniman v. University Hosps. Health Sys., Inc.,* 130 N.E.3d 333, 339 (Ohio Ct. App. 2019) (holding that patients could not bring wrongful-death

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[53] Like the main opinion, Justice Shaw argues that the definition of "person" in the criminal-homicide statutes "does not limit the determination whether an in vitro embryo is a 'minor child' for purposes of a civil-law action under the Wrongful Death Act." ____ So. 3d at ____ (Shaw, J., concurring specially). But, he cites no legal authority other than referring to the main opinion, and therefore he is mistaken for all the reasons explained above.

action against hospital based on destruction of frozen embryos because the embryos had no statutory rights); *Jeter v. Mayo Clinic Arizona,* 211 Ariz. 386, 400, 121 P.3d 1256, 1270 (Ct. App. 2005) (holding that cryopreserved, three-day-old, eight-cell pre-embryo was not a "person" for purposes of recovery under wrongful-death statute); and *Davis v. Davis,* 842 S.W.2d 588, 594 (Tenn. 1992) (holding that under Tennessee law pre-embryos could not be considered "persons").

It is certainly true that this Court is not bound by the results in other states; however, when we are the sole outlier, it should cause us to carefully reexamine our conclusions about expanding the reach of a statute passed in 1872 and our understanding of the common law.

G. The Consequences of This Decision and Why That is Relevant

The main opinion's holding will mean that the creation of frozen embryos will end in Alabama. No rational medical provider would continue to provide services for creating and maintaining frozen embryos knowing that they must continue to maintain such frozen embryos forever or risk the penalty of a Wrongful Death Act claim for punitive damages.[54]

There is no doubt that there are many Alabama citizens praying to be parents who will no longer have

[54] The main opinion notes, but does not reach, the defendants' possible defenses based upon contracts between the IVF provider and the plaintiffs. Like the main opinion, I do not reach the possible defenses. However, no medical provider would depend upon the contract argument to continue creating and maintaining frozen embryos in the future, given this significant legal uncertainty and the potential to incur a significant punitive damage penalty.

that opportunity. And, there is no doubt that there will be fewer babies born. On the other hand, there are powerful moral and policy arguments supporting the notion that ending the creation, use, and destruction of frozen embryos is a good thing and that IVF technology has the potential for grave misuse.

I am empathetic to both sides of this debate; however, it is not my role to take a position one way or another on this issue. Even so, ending the creation of frozen embryos will undoubtedly cause significant consequences that will affect the future lives of thousands of Alabama citizens for years to come and the babies who will not be born. The solemn significance of these consequences (as well as the need for comprehensive regulation) further illustrates why this question is an issue that should be addressed by the elected representatives of the people of Alabama in the Legislature, not this Court. I thus urge the Legislature to promptly consider these issues to provide certainty to these Alabama parents-tobe and to the medical professionals who are attempting to provide services to them.[55]

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[55] As to the consequences of a contrary ruling, the main opinion discusses, but does not rely upon, a "parade of horribles" that the plaintiffs claim might result from a ruling that the term "minor child" in the Wrongful Death Act does not include frozen embryos. The plaintiffs are mistaken. These cases have no connection to partial-birth abortions, and Alabama's law on partial-birth abortions would not be impacted by a ruling in favor of the defendants in these civil wrongful-death cases. *See* § 26-23-3, Ala. Code 1975. There are also no facts in the record to support any such argument, and there is no doubt the Wrongful Death Act could reach a partial-birth abortion situation as appropriate.

As to the plaintiffs' second argument (regarding a possible future case involving a yet to be invented artificial womb), the answer to this futuristic hypothetical is simple. These cases are

The Chief Justice's special concurrence does not dispute that this will lead to fewer newborn babies. However, Chief Justice Parker insists that the IVF process may still survive in Alabama in some other form (for instance, he suggests: "one embryo at a time") because certain other countries have more regulations on their IVF processes. ____ So. 3d at ____ (Parker, C.J., concurring specially); *id.* at ___ (stating that he fails to see that "IVF will now end"). In fact, he spends several

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about the facts today and are based upon a statute that has not changed in its relevant terms since 1872. Should the facts change, the Legislature can address future technologies and can do so far better than this Court.

The main opinion alleges that I have conceded that the Wrongful Death Act would not cover such a hypothetical. It is mistaken. I have made no such concession. We decide cases on the facts that are before us -- not hypotheticals. The main opinion also alleges that I have failed to discuss the "constitutional implications" of this hypothetical. ____ So. 3d at ____ n.3. Again, the reason is simple -- it is a hypothetical and we do not reach arguments or facts that are not before us, certainly not hypotheticals about technology that does not even exist. This Court would be in a position to address the alleged "constitutional implications" only if the following circumstances existed: (1) such an artificial womb existed, (2) it was actually used someday in the future, (3) a developing unborn infant was killed in an artificial womb, (4) the Wrongful Death Act had not been modified by the Legislature, (5) and we concluded that this created an Equal Protection Clause conflict. No such circumstances exist in the present appeals; I therefore see no need to address these hypothetical scenarios. *See, generally, Ex parte Ankrom,* 152 So. 3d 397, 431 (Ala. 2013) (Shaw, J., concurring in part and concurring in the result) ("Some of the arguments made ... are premised on hypothetical situations, different from the facts before us, in which the Code section might be either unconstitutional as applied or seemingly unwise in its application. It goes without saying that we cannot strike down the application of the Code section ... merely because the Code section might be unconstitutionally applied in some other context." (footnotes omitted)).

pages describing the regulations that currently exist in other countries and suggests that the Alabama Legislature may wish to consider those regulations. The Alabama Medical Association strongly disagrees with the suggestion that IVF in some other, reduced, form is practical, safe, or medically sound and has filed two amicus briefs exhaustively explaining these issues.

It is not the place or time to decide whether the position of the Chief Justice or the position of the Alabama Medical Association is correct, moral, or ethical. It is not the place because these are questions for the Legislature and not this Court. And, even if this Court were the correct forum, it would not be the time because these appeals are at the motionto-dismiss stage and there is no factual record at this point. Therefore, no party has had the opportunity to investigate and respond to the assertions by the Chief Justice or the Alabama Medical Association.

However, as to the Chief Justice's suggestion that the Legislature consider these issues immediately (including his suggestion that they consider comprehensive regulation), I strongly agree.

II. The Plaintiffs' Negligence and Wantonness Claims

Finally, the main opinion does not reach the plaintiffs' negligence and wantonness claims because they are pleaded in the alternative and, instead, holds that those claims are now "moot." ____ So. 3d at ____. Because I would affirm the dismissal of the plaintiffs' wrongful-death claims, I must reach this issue. For the reasons stated below, I would reverse the trial court's dismissal of those claims.

The defendants are making a "catch-22" argument. *Cline v. Ashland, Inc.,* 970 So. 2d 755, 772 n.6 (Ala.

2007) (Harwood, J., dissenting) ("'Catch-22: a frustrating situation in which one is trapped by contradictory regulations or conditions.' *Random House Webster's Unabridged Dictionary* (2d ed. 2001)."). On the one hand, the defendants claim that the frozen embryos are not a "minor child." On the other hand, they claim that because the frozen embryos were "lives," no common-law claim (such as claims of negligence or wantonness) is available because no "damages" are recoverable.

I am concerned that such a rule might allow the destruction of life with no consequence, even for someone who commits an intentionally wrongful act. As explained by the plaintiffs, IVF is used by many parents-to-be in dire circumstances (for instance, because of reproductive issues caused by cancer, age, or infertility). Their frozen embryos are undeniably precious. Thus, this argument has the potential to be both unjust and to incentivize bad conduct. *See Huskey,* 289 Ala. at 54, 265 So. 2d at 597 (noting that not allowing a recovery "would give protection to an alleged tort-feasor").

However, I need not reach the question of exactly how our Court should handle this situation because it is too early in these cases. We are only at the pleading stage. The plaintiffs argue, under this Court's prior decision in *Raley v. Citibanc of Alabama/Andalusia,* 474 So. 2d 640, 642 (Ala. 1985), that the trial court's dismissal of their common-law tort claims in response to a Rule 12(b)(6), Ala. R. Civ. P., motion was improper. Under *Raley,* they argue, once a pleader has set out a cause of action, the failure of the complaint to allege requisite elements of relief (that is, damages) is not usually a ground for a motion to dismiss for failure to state cause of action but, rather, must be challenged by

a motion to strike, by objection to evidence, or by requested charges. Accordingly, they contend that the trial court's dismissal of those claims is due to be reversed.

"Alabama is a 'notice pleading' state." *Surrency v. Harbison,* 489 So. 2d 1097, 1104 (Ala. 1986) (citing *Simpson v. Jones,* 460 So. 2d 1282 (Ala.1984)). Rule 8(a), Ala. R. Civ. P., provides:

> "(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded."

"The primary purpose of notice pleading is to provide defendants adequate notice of the claims against them." *Cathedral of Faith Baptist Church, Inc. v. Moulton,* 373 So. 3d 816, 819 (Ala. 2022) (citing *Adkison v. Thompson,* 650 So. 2d 859 (Ala. 1994)). "'[P]leadings are to be liberally construed in favor of the pleader.'" *Id.* (quoting *Adkison,* 650 So. 2d at 862). As relevant here,

> "'the dismissal of a complaint is not proper if the pleading contains "even a generalized statement of facts which will support a claim for relief under [Rule 8, Ala. R. Civ. P.]" *(Dunson v. Friedlander Realty,* 369 So. 2d 792, 796 (Ala. 1979)), because "[t]he purpose of the Alabama Rules of Civil Procedure is to effect justice upon the merits of the claim and to renounce the technicality of procedure."

> *Crawford v. Crawford,* 349 So. 2d 65, 66 (Ala. Civ. App. 1977).'"

Id. (quoting *Simpson,* 460 So. 2d at 1285).

In their amended complaints, the plaintiffs alleged that the defendants' negligent and wanton conduct in failing to secure their respective facilities "led to and/or caused the destruction of the plaintiffs' embryo[s]." As a result of that allegedly negligent and wanton conduct, the plaintiffs "demand[ed] judgment for compensatory damages, *including but not limited to,* [the] value of embryonic human beings ... and for the severe mental anguish ...." (meaning that they are seeking any valid compensatory damages). (Emphasis added).

The defendants do not attempt to address this Court's prior decision in *Raley, supra.* They also do not ask that we: (1) revisit the pleading standard under Alabama law or (2) reconsider our decision in *Raley.* They also do not point to any caselaw in which we have affirmed a trial court's dismissal at the pleading stage based upon an argument that damages had not been properly pleaded. Based on *Raley, supra,* I would reverse the trial court's dismissal of the plaintiffs' negligence and wantonness claims.

APPENDIX B

Rel: May 3, 2024

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

SC-2022-0515

JAMES LEPAGE AND EMILY LEPAGE, INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS OF TWO DECEASED LEPAGE EMBRYOS, EMBRYO A AND EMBRYO B; AND WILLIAM TRIPP FONDE AND CAROLINE FONDE, INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS OF TWO DECEASED FONDE EMBRYOS, EMBRYO C AND EMBRYO D

v.

THE CENTER FOR REPRODUCTIVE MEDICINE, P.C., AND MOBILE INFIRMARY ASSOCIATION D/B/A MOBILE INFIRMARY MEDICAL CENTER

Appeal from Mobile Circuit Court
(CV-21-901607)

SC-2022-0579

FELICIA BURDICK-AYSENNE AND SCOTT AYSENNE, IN THEIR INDIVIDUAL CAPACITIES AND AS PARENTS AND NEXT FRIENDS OF BABY AYSENNE, DECEASED EMBRYO/MINOR

v.

THE CENTER FOR REPRODUCTIVE MEDICINE, P.C., AND MOBILE INFIRMARY ASSOCIATION D/B/A MOBILE INFIRMARY MEDICAL CENTER

Appeal from Mobile Circuit Court
(CV-21-901640)

On Applications for Rehearing

MITCHELL, Justice.

SC-2022-0515 -- APPLICATION OVERRULED. NO OPINION.

SC-2022-0579 -- APPLICATION OVERRULED. NO OPINION.

Parker, C.J., and Shaw, Wise, Bryan, Mendheim, and Stewart, JJ., concur.

Sellers, J., dissents, with opinion.

Cook, J., dissents.

SELLERS, Justice (dissenting).

One of the cardinal rules of jurisprudence is that judicial decisions should follow reason and logic so that no one is ever truly surprised by them. Indeed, an

important role of the judicial branch is to ensure that the rules governing society create stability and certainty that comport with the English concept of "the law of the land," i.e., to reflect the common experience, tradition, and culture of citizens over the philosophical, creative, and speculative.

As a court, we labor in anonymity, far away from the tensions experienced by other branches of government. This case has removed us from any notion of ivory-tower isolation and has subjected us to the scrutiny of world opinion, thrusting us into a public discussion that was as unwarranted as it was unanticipated.

While many of our opinions have unintended consequences, oftentimes such consequences nevertheless are foreseeable because our decisions impact others who, although they were not parties to the case, were generally aware of the potential repercussions of a reasonable decision. In this case, our decision was a surprise, if not a shock, to our citizens. The majority opinion on original submission had significant and sweeping implications for individuals who were entirely unassociated with the parties in the case. Many of those individuals had no reason to believe that a legal and routine medical procedure would be delayed, much less denied, as a result of this Court's opinion.

Because those individuals never had an opportunity to submit briefs in this case to explain their positions and the law supporting them, they now have a new regime that has been forced upon them for which they had neither input, nor redress, nor a hearing. The majority opinion on original submission also addressed issues and arguments that were never raised in the parties' initial briefs and never argued by the parties.

It is for these reasons that I would have granted the request to conduct oral argument on the applications for rehearing, including providing the various amici curiae an opportunity to voice their concerns, to explain the legal bases of their positions, and to highlight the various loose ends left dangling by this Court's opinion.

In light of the foregoing, and consistent with my special writing on original submission, I respectfully dissent from the denial of the applications for rehearing, especially the denial of oral argument on rehearing.

APPENDIX C

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No.: CV-2021-901607.00

LEPAGE JAMES, LEPAGE EMILY, FONDE WILLIAM TRIPP, FONDE CAROLINE *et al*,

Plaintiffs,

v.

MOBILE INFIRMARY ASSOCIATION DBA MIMC, CENTER FOR REPRODUCTIVE MEDICINE PC,

Defendants.

ORDER

This matter comes before the Court on the Defendants' 12(b)(1) and 12(b)(6) Motion to Dismiss the Plaintiffs' First Amended Complaint. (Doc. 65)[1] The Plaintiffs filed a Response to the Motion to Dismiss (Doc. 75), and the Defendants filed a Reply in further support of dismissal. (Doc. 95) The Court

[1] The original Complaint was filed by the Plaintiffs in a representative capacity "as parents and next friends." (Doc. 2) The First Amended Complaint asserts the same claims and identical two causes of action as those in the original Complaint but was filed by the parents in both a representative and individual capacity. (Doc. 47) The Defendants' Motion to Dismiss the original Complaint (Doc. 17) was thereafter adopted and reasserted with only minor modifications as a Motion to Dismiss the First Amended Complaint. (Doc. 65)

conducted a hearing and heard oral arguments from all parties on January 31, 2022.

To be clear, this Court is not tasked with the responsibility "to determine when life begins," as has been suggested by some. This court's function is to follow and interpret existing Alabama law which has been created by the legislature and to follow law which has been previously interpreted by the appellate courts of this state.

Claims asserted by the Plaintiffs

The operative First Amended Complaint asserts two causes of action against both Defendants: (1) "First Cause of Action-Wrongful Death-Negligence," asserting a claim pursuant to Ala. Code § 6-5-391 ("Wrongful Death of a Minor") based on alleged negligent "departure[s] from the accepted standard of care" (Doc. 47, ¶ 44) by the defendant health care providers, which the Plaintiffs claim led to the wrongful death of four of Plaintiffs' cryopreserved, *in vitro* embryos; and (2) "Second Cause of Action- Negligence," an alternatively-pleaded claim asserting that "should Alabama wrongful death laws not apply," the Plaintiffs are entitled to compensatory damages specified as "the value of the embryonic human beings that were wrongfully destroyed" and "for the severe mental anguish and emotional distress [the parents] have been caused to suffer and will suffer in the future." *Id.*[2]

[2] While oral argument in this case has thus far been consolidated with that in the similar case filed by Felicia and Scott Aysenne (CV21-901640), the pleadings and claims asserted in the two cases are not identical. There is no property or contract claim asserted here, and nowhere in the LePage/Fonde Complaint is there any assertion that, even alternatively, these cryopreserved

Standard of Review

In considering a challenge pursuant to Rule 12(b)(1) and (6), this Court accepts as true the allegations in the complaint and decides whether, "when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [the pleader] to relief." *Nance v. Matthews,* 622 So. 2d 297, 299 (Ala. 1993); *see also, Munza v. Ivey,* 2021 WL 1046484 (Ala. March 19, 2021). Although this Court is required to accept the Plaintiffs' factual allegations as true at this stage, and has done so in reaching its holding, it is not required to accept as true for the purposes of a Motion to Dismiss any conclusory allegations or deductions of fact or legal conclusions set out in the Complaint. *Ex parte Gilland,* 274 So. 3d 976, 985, n. 3 (Ala. 2018); *see also, Ex parte Marshall,* 323 So. 3d 1188, 1207 n. 3 (Ala. 2020). Dismissal is proper when it appears that the plaintiffs can prove no set of facts in support of the claims as plead that would entitle them to relief, or if this Court determines that it lacks jurisdiction. *Nance,* 622 So. 2d at 299; *Ex parte Mobile Infirmary Assoc.,* 2021 WL 4129400 (Ala. September 10, 2021).

Facts as set out in Plaintiffs' Complaint

The LePages and the Fondes assert they underwent *in vitro* fertilization performed by The Center for Reproductive Medicine, P.C. ("CRM"), followed by cryopreservation of a number of embryos. (Doc. 47, ¶¶ 23-24, 30-31) The operative Complaint asserts that these cryopreserved embryos were stored at sub-zero temperatures by CRM in a room within Mobile Infirmary's hospital in exchange for the Plaintiffs' agreement to

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embryos should or could be treated as property under Alabama law.

pay a storage fee to CRM. *(Id.* at ¶¶ 14, 22, 24, 25, 29, 31, 32, 35)

According to the Complaint, the LePages originally had eight embryos cryopreserved in February of 2017, three of which were transferred to Mrs. LePage's uterus on three separate occasions. *(Id.* at ¶¶ 23-29) Of the three transfers of a cryopreserved embryo to Mrs. LePage's uterus, two resulted in the birth of children (in 2017 and 2020 respectively). *(Id.)* The LePages had five remaining cryopreserved embryos being stored at the time of the incident made the basis of this suit, at which time they assert that two of those pre-embryos were destroyed. *(Id.* at ¶ 41) The Fondes originally had seven embryos following IVF in June of 2014, one of which was directly transferred to Mrs. Fonde's uterus at that time and resulted in the birth of a child in February of 2015. *(Id.* at ¶¶ 31) The other six pre-embryos were cryopreserved, and in September of 2018, another was transferred to Mrs. Fonde's uterus resulting in the birth of a second child in May of 2019. *(Id.* at ¶¶ 31-34) The Fondes had five remaining cryopreserved pre-embryos at the time of the incident made the basis of this suit, at which time they assert two were destroyed. *(Id.* at ¶ 41)

The Plaintiffs claim that some but not all[3] of these cryopreserved embryos were "killed" as a result of an incident on December 20, 2020 when, they assert, a hospital patient "gained unauthorized access to CRM's embryology laboratory and [negligently] destroyed numerous embryos, including the Plaintiffs' embryonic

[3] It is not in dispute that three of the LePages' stored cryopreserved pre-embryos and three of the Fondes' stored cryopreserved pre-embryos remain available for potential implantation, or potential abandonment, in the future. *(Id.)*

children A, B, C, and D." *(Id.* at pp. 1-2 and ¶¶ 36-41) Neither couple specifically asserts in the Complaint that they presently have or ever had an intent to pursue future implantation or future pregnancies. Rather, their Response to the Motion to Dismiss clarifies that their claims are based on the loss of these four individual embryos, regardless of whether the couples ever planned to pursue future implantation of any of the cryopreserved embryos. (Doc. 75, p. 16)

Count One — Wrongful Death/Negligence

The Defendants move to dismiss the Plaintiffs' first count for wrongful death under Ala. Code § 6-5-391, arguing that Alabama law does not recognize or support a finding that an extrauterine, *in vitro,* cryopreserved embryo, not yet implanted or developing *in utero,* is a "minor child" as that term is used Ala. Code § 6-5-391. For the reasons explained below, this Court agrees.

The Alabama Supreme Court has twice examined and answered the question of how to define the term "minor child" in an action for wrongful death. In both cases, the Court held that the term "minor child" found in Ala. Code § 6-5-391(a) is to be defined consistently and in harmony with the established legislative definition of a "person," which is an unborn child *"in utero,"* as utilized by the Legislature in the Brody Act at Ala. Code. § 13A-6-1(a)(3). *See Mack v. Cammack,* 79 So. 3d 597 (Ala. 2011); *Stinnett v. Kennedy,* 232 So. 3d 202 (Ala. 2016). The Court has instructed that, while civil and criminal liability may not perfectly mirror each other, due to the Legislature's decision to create exceptions to liability, the criminal and civil Acts share the same purpose of preventing homicide. As such, the Court has held that it "made sense" to "harmonize" the definitions of "person" and "minor child" in determining who is protected under the two Acts. *See*

Mack, 79 So. 3d 597 at 610 (Ala. 2011) ("Our legislature has now expressly amended Alabama's homicide statutes to include as a victim of homicide an unborn child in utero at any stage of development, regardless of viability.' § 13A-6-1(a)(3), Ala. Code 1975.... [T]his Court repeatedly has emphasized the need for congruence between the criminal law and our civil wrongful-death statutes."); *Stinnett,* 232 So. 3d at 215 (Ala. 2016) ("[I]n light of the shared purpose of the Wrongful Death Act and the Homicide Act to prevent homicide, the [Brody] amendment was an important pronouncement of public policy concerning who is a 'person' protected from homicide. Thus, borrowing the definition of 'person' from the criminal Homicide Act to inform as to who is protected under the civil Wrongful Death Act made sense.")

Stated another way, even if the Legislature creates exceptions to liability in one statute or the other, depending on the conduct involved, *who* is protected under the criminal homicide and wrongful death statutes must remain harmonious and consistent. Further, this Court is obligated to follow the Alabama Supreme Court's repeated instruction that, given the shared purpose of the criminal homicide and wrongful death statutes, "[t]here should not be different standards in wrongful death and homicide statutes, given that the avowed public purpose of the wrongful death statute is to prevent homicide. . . ." *Stinnett,* 232 So. 3d at 212, *quoting Gentry,* 613 So. 2d at 1245 (Houston, J. concurring in the result) and *Lollar,* 613 So. 2d at 1253 (Houston, J. concurring in the result). The Plaintiffs' position, if accepted, would create such conflict, incongruency, and "different standards" between the two statutes, a legal construct which has been repeatedly rejected by our Supreme Court. Specifically, the Plaintiffs' position seeks to push civil liability beyond

the clear bounds set by the criminal statute *(in utero)* to a place where neither the Alabama Legislature nor any Alabama Court has extended protection *(in vitro).* And while the Defendants have cited numerous opinions from other states which are consistent with this Court's present ruling, the Plaintiffs have cited no *case,* in Alabama or otherwise, which extends wrongful death civil liability to the frozen, extrauterine embryos.

Given the Alabama Supreme Court's specific pronouncement that it seeks to "harmonize" the definitions under these two Acts, and in order to promote the stated goal of congruency between "who is protected from homicide under both the Homicide Act and the Wrongful Death Act," this Court is bound to apply the same definition in this case as was used in both *Mack* and *Stinnett, supra.* The cryopreserved, *in vitro* embryos involved in this case do not fit within the definition of a "person" under the Brody Act ("[A]n unborn child *in utero* at any stage of development regardless of viability"), or the *"in utero"* definition of "minor child" which the Alabama Supreme Court has twice applied in actions under Ala. Code § 6-5-391(a). To hold otherwise would contradict the holdings of the Alabama Supreme Court and violate the principles of deference to legislative intent and separation of powers cited by Justice Parker in his concurrence in *Stinnett:* "This Court is not at liberty to rewrite statues or to substitute its judgment for that of the Legislature." *Stinnett,* 232 So. 3d at 223. Put simply, the Plaintiffs' proposed change in the definition of who is protected under these two Acts must come from the Legislature. This is especially true here, since the Alabama Supreme Court has stated that the Alabama Legislature expressed "clear legislative intent" *(Mack,* 795 So. 3d at 610) and made "an important pronouncement of public policy" *(Stinnett,* 232 So. 3d at 215) when the

Legislature defined person as "an unborn child in utero." This Court cannot override this intent and public policy.

The Plaintiffs argue it is inappropriate to distinguish between *in vitro* embryos and *in utero* embryos. However, this distinction already exists in Alabama law. The application of the Brody Act's *"in utero"* definition to the present case is not only consistent with the prior cases, discussed above, but the recent case of *Ex parte Z.* WE., 2021 WL 1190748 (March 26, 2021) — a case in which Justice Parker's concurrence reiterates that courts should "interpret a statute harmoniously with statutes that address related subjects." See, *id.* at *9. Justice Parker then catalogues numerous examples of Alabama statutes in which the term "child" has been defined as an unborn child *in utero,* or within the womb of a pregnant woman. *See, Id.* at *9 ("When faced with an unclear statute, we try to interpret the statute harmoniously with statutes that address related subjects....The homicide statutes define 'person' as 'including an unborn child in utero at any stage of development.'" § 13A-6-1(a)(3). Ala. Code 1975). Of note, the *Z.W.E.* opinion came after Justice Parker's concurrence in *Stinnett,* upon which the Plaintiffs heavily rely in their briefing and argument to this Court.

The Plaintiffs also heavily rely on a 2018 Constitutional Amendment which seeks to protect "the rights of the unborn child in all manners and means lawful and appropriate." However, after this amendment, the Alabama Legislature enacted the Alabama Human Life Protection Act, presumably in furtherance of the 2018 Constitutional Amendment's statement of public policy. Yet, the Legislature again used the same phrase as in the Brody Act, *"in utero,"* to define

"person" in the Human Life Protection Act. § 26-23H-3(7). Similarly, the death-penalty statutes prohibit the execution of a woman who is "with child." § 15-18-86. The statute governing health-care advance directives prevents a pregnant woman's wish to decline medical treatment from being carried out until the child is born. § 22-8A-4(h) ("Advance Directive for Health Care," § 3) (emphasis added).[4]

In summary, a strong belief in the sanctity of life has not prevented the Alabama Supreme Court from recognizing and upholding our Legislature's clear pattern of using the term *"in utero"* when defining the term unborn or minor child, including in the context of a wrongful death case. Further, in light of this Court's role within Alabama's constitutional construct, and giving appropriate deference to the separation of powers within the same, this Court is not permitted to reject such clear, consistent and repeated expressions of legislative intent.

Count Two — Negligence

The Plaintiffs assert in Count Two that, in the alternative, they are entitled to damages for mental anguish and "the value of the embryonic human beings that were wrongfully destroyed." (Doc. 47, ¶ 47) However, their claim for compensatory damages for

[4] Here, these embryos are not in a position to "develop" and be "born" until someone takes the affirmative steps of: (1) unfreezing the embryos and, assuming they survive this process; (2) implanting them into someone's womb. Given the fact that embryos can be voluntarily abandoned for destruction and/or implanted into any woman's womb also raises significant questions of standing, which may be a primary reason why Alabama Courts, the Alabama Legislature, and courts around the country have refused to define these embryos as "persons" for the purposes of criminal and civil liability.

the value of an alleged loss of life is not one permitted under Alabama law. It is well-established in this state that the only damages a civil jury may assess for the "wrongful" taking of a life are punitive damages. *Central Ala. Electric Co-op v Tapley,* 546 So. 2d 371 (Ala. 1989). *See also, Killough v. Jahandarfard,* 578 So. 2d 1041, 1044-1045 (Ala. 1991). The Plaintiffs' assertion that this Court can and should side-step these well-established principles has no legal precedent in this state. In fact, during oral argument, counsel for the Plaintiffs acknowledged that in some other states, the law compensates "the surviving spouse and next of kin for the pecuniary losses due to the decedent's death. Well, we don't get compensatory damages for death in Alabama."

Likewise, the Plaintiffs' claim for mental anguish damages in Count Two is unsustainable under Alabama law. The face of the Complaint demonstrates that no Plaintiff was present, injured, or at risk of physical harm as a result of the alleged negligence. *Hamilton v. Scott,* 97 So. 3d 728 (Ala. 2012). In *Hamilton,* the Alabama Supreme Court upheld the dismissal of a claim for emotional distress caused by alleged negligent and wanton acts asserted to have wrongfully caused the death of an *in utero* unborn child. Specifically, the Alabama Supreme Court held there was *no* exception to the zone of danger test carved out for the loss of an unborn child. *Id.* at 737. The Court also affirmed that the zone of danger test limits recovery for emotional injury *only* to plaintiffs who sustained a physical injury as a result of the alleged negligence or wantonness, or were placed in immediate risk of physical harm by that negligence or wantonness. *Id.* at 737 ("Because [the Plaintiff] conceded that she was 'not entitled to zone of danger damages' and her argument suggesting that *Taylor*

created an exception to the zone-of-danger test is misplaced, and because she presented no evidence showing that she suffered a physical injury as a result of the defendants' actions, we conclude that the trial court properly entered a summary judgment insofar as it concerns Hamilton's claim for damages for emotional distress.") *See also,* Ala. Pattern Jury Instr. Civ. 11.11 (3d ed.), *Mental Anguish —Zone of Danger.* The cases involving alleged mishandling of dead bodies, upon which the Plaintiffs rely in urging this Court to create an exception to the zone of danger test, are both distinguishable and predate *Hamilton,* which controls here.

It is therefore ORDERED and DECREED that Defendants' Motion to Dismiss both counts of Plaintiffs' Complaint is hereby GRANTED.

DONE this 13th day of April, 2022.

/s/ JILL PARRISH PHILLIPS
CIRCUIT JUDGE

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

May 16, 2024

SC-2022-0579

Felicia Burdick-Aysenne and Scott Aysenne, in their individual capacities and as parents and next friend of Baby Aysenne, deceased embryo/minor v. The Center for Reproductive Medicine, P.C., and Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center (Appeal from Mobile Circuit Court: CV-21-901640).

SC-2022-0515

James LePage and Emily LePage, individually and as parents and next friends of two deceased LePage embryos, Embryo A and Embryo B; and William Tripp Fonde and Caroline Fonde, individually and as parents and next friends of two deceased Fonde embryos, Embryo C and Embryo D v. The Center for Reproductive Medicine, P.C., and Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center (Appeal from Mobile Circuit Court: CV-21-901607).

ORDER

The "Appellees' Joint Motion to Stay Certificate of Judgment" filed by The Center for Reproductive Medicine, P.C., and Mobile Infirmary Association on

May 7, 2024, having been submitted to and considered by this Court,

IT IS ORDERED that the Motion is DENIED.

Witness my hand and seal this 16th day of May, 2024.

/s/ Megan B. Rhodebeck
Clerk of Court,
Supreme Court of Alabama

APPENDIX E

IN THE SUPREME COURT OF ALABAMA
[SEAL]

May 3, 2024

SC-2022-0579

Felicia Burdick-Aysenne and Scott Aysenne, in their individual capacities and as parents and next friend of Baby Aysenne, deceased embryo/minor v. The Center for Reproductive Medicine, P.C., and Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center (Appeal from Mobile Circuit Court: CV-21-901640).

CERTIFICATE OF JUDGMENT

WHEREAS, the ruling on the application for rehearing filed in this case and indicated below was entered in this cause on May 3, 2024:

APPLICATION OVERRULED. NO OPINION. Mitchell, J. -- Parker, C.J., and Shaw, Wise, Bryan, Mendheim, and Stewart, JJ., concur. Sellers, J., dissents, with opinion. Cook, J., dissents.

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on February 16, 2024:

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED. Mitchell, J. -- Wise and Bryan, JJ., concur. Parker, C.J., concurs specially, with opinion. Shaw, J., concurs specially, with opinion,

which Stewart, J., joins. Mendheim, J., concurs in the result with opinion. Sellers, J., concurs in the result in part and dissents in part, with opinion. Cook, J., dissents, with opinion.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Megan B. Rhodebeck, certify that this is the record of the judgment of the Court, witness my hand and seal.

/s/ Megan B. Rhodebeck
Clerk, Supreme Court of Alabama

APPENDIX F

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No.: CV-2021-901640.00

BURDICK-AYSENNE FELICIA, AYSENNE SCOTT, BABY AYSENNE, A DECEASED EMBRYO/MINOR FELICIA BURD,

Plaintiffs,

v.

THE CENTER FOR REPRODUCTIVE MEDICINE, P.C., MOBILE INFIRMARY ASSOCIATION DBA MIMC,

Defendants.

ORDER

Motion To Amend filed by Felicia Burdick-Aysenne, et al., is hereby GRANTED.

The Court's order (Doc. 103) of April 13, 2022, granting Defendants' Motion to Dismiss is hereby VACATED. The Court will enter the amendment(s) by separate order.

DONE this 28th day of April, 2022.

/s/ JILL PARRISH PHILLIPS
CIRCUIT JUDGE

APPENDIX G

IN THE SUPREME COURT OF ALABAMA

No. SC-2022-0579

FELICIA BURDICK-AYSENNE AND SCOTT AYSENNE, IN THEIR INDIVIDUAL CAPACITIES AND AS PARENTS AND NEXT FRIEND OF BABY AYSENNE, DECEASED EMBRYO/MINOR

Appellants,

v.

THE CENTER FOR REPRODUCTIVE MEDICINE, P.C.; AND MOBILE INFIRMARY ASSOCIATION D/B/A MOBILE INFIRMARY MEDICAL CENTER

Appellees.

APPEAL FROM THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA
CASE NO. 02-CV-2021-901640

AMENDED BRIEF OF APPELLANTS

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs/Appellants respectfully request oral argument as this is a matter of first impression in this State. The circuit court's order held that Alabama law provides no tort remedies for the wrongful death and destruction of human, *in vitro* embryos. Plaintiffs are asking that this Court reverse this order, and confirm that Alabama law protects all human life, in all of its forms and stages of development. Given the importance of the issues presented in this appeal, Plaintiffs believe oral argument would materially assist the Court.

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STATEMENT OF JURISDICTION

This Court has jurisdiction under Sections 12-2-7(1) and 12-22-2 of the *Alabama Code*, Rule 4(a)(1) of the *Alabama Rules of Appellate Procedure*, and Rule 54(b) of the *Alabama Rules of Civil Procedure*. This appeal requests a *de novo* review of the April 28, 2022 Order of the Mobile Circuit Court (The Honorable Jill

Parrish Phillips, Circuit Judge) (Doc. 114, C-417) granting Defendants' Motions to Dismiss.

The circuit court's order dismissed all of the Plaintiffs' tort claims against both Defendants, and further dismissed all pending claims against one of the Defendants. Additionally, the circuit court made an express determination that there is no just reason for delay and expressly directed entry of final judgment in these proceedings. The order therefore constitutes a final, appealable order under Rule 54(b) of the *Alabama Rules of Civil Procedure*.

The Plaintiffs timely filed their Notice of Appeal on May 13, 2022. (Doc. 117, C-428).

TABLE OF AUTHORITIES

Cases Page(s)

Publications and Websites

STATEMENT OF THE CASE

This case arises from the Defendants' failure to secure against unauthorized access to the cryogenic laboratory housing human embryos. As a result of Defendants' failures in this regard, numerous embryos, including the Plaintiffs' last remaining embryo, were killed.

Plaintiffs Felicia Burdick-Aysenne and Scott Aysenne (at times collectively referred to as the "Aysennes") paid Defendant The Center for Reproductive Medicine, P.C. ("CRM") to safeguard the Plaintiffs' human, *in vitro* embryo in CRM's cryogenic storage unit. On a Sunday evening in December 2020, CRM left the door to its facility, as well as the door to its cryogenic storage area, unlocked, unsecured, and unmonitored. At the same time, Defendant Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center ("MIMC") failed to properly monitor and secure its facilities. As a result, an unauthorized person was allowed to escape from MIMC's hospital, enter CRM's facility, access CRM's cryogenic storage area, remove the Plaintiffs' embryo from the storage unit, and illegally and impermissibly destroy it.

On September 16, 2021, Plaintiffs filed suit against both Defendants in Mobile County Circuit Court. (Doc. 2, C-12). On October 20, 2021, Defendants jointly filed a Motion to Dismiss, asking the circuit court to dismiss the action, "in its entirety." (Doc. 24, C-29). On November 4, 2021, the Defendants each moved separately to stay discovery pending resolution of their Motion to Dismiss. (Doc. 56, C-148). The Defendants refused to answer any discovery citing the pendency of that motion.

Plaintiff's subsequently filed a First Amended Complaint (the operative complaint for purposes of this appeal) on November 7, 2021. (Doc. 61, C-157). The First Amended Complaint is fifteen (15) pages long, includes eighty-six (86) paragraphs of allegations, and sets forth, in great detail, the various shortcomings that lead to the present catastrophe. (Doc. 61, ¶¶ 59 – 65, C-166-167). The First Amended Complaint seeks recovery under four (4) claims: wrongful death,

negligence, wantonness, and breach of contract. (Doc. 61, C157).

On November 22, 2021, Defendants jointly filed a Motion to Dismiss Certain Claims in Plaintiffs' First Amended Complaint. (Doc. 71, C-256). In light of the Complaint's amendments, the Defendants no longer sought to dismiss the action in its entirety. Instead, the Motion only sought dismissal of the wrongful death claim. (Doc. 71, C-256, 265). As to the other claims, the Defendants' Motion merely asked for a ruling that Plaintiffs could not recover mental anguish damages under their negligence claim. (Doc. 71, C-256, 269). The Motion did not seek any remedies regarding the wantonness or breach of contract claims. (Doc. 71, C-256).

On December 30, 2021, Plaintiffs filed an Opposition to Defendants' Motion to Dismiss. (Doc. 77, C-316). Because the present claim arises from the exact same facts and circumstances as those in the *James LePage v. Mobile Infirmary Association* (02-CV-2021-901607, Circuit Court of Mobile; Ala. Sup. Ct. Docket No. SC-2022-0515), the Plaintiffs adopted the pleadings filed and arguments made by the plaintiffs in this related litigation *in toto*. (Doc. 77, C-316).[1] Since the Amended Complaints in the two actions were not identical, and since the Defendants in this case had not asked for dismissal of the entire complaint, the Plaintiffs did file a comprehensive opposition of their own in addition to relying on the arguments made by the *LePage* plaintiffs. (Doc. 77, C-316).

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[1] The Aysennes again adopt and incorporate by reference the arguments made by the *LePage* Plaintiffs, a point discussed further in the Argument Section, below.

On January 25, 2022, Defendants filed their collective Reply in Support of Motion to Dismiss. (Doc. 88, C-343). In response to Plaintiffs pointing out that a motion to dismiss was not the proper vehicle to seek to strike the claim for mental anguish damages on the negligence claim, Defendants filed a separate Motion to Strike Plaintiffs' Claim for Impermissible Damages also on January 25, 2022. (Doc. 91, C-366). Plaintiffs filed an Opposition to Defendants' Motion to Strike on January 26, 2022 (Doc. 93, C-371), and Defendants filed a Reply in Support of Motion to Strike on January 28, 2022. (Doc. 95, C-375).

On January 31, 2022, the circuit court held a joint hearing on all of the pending motions in both this and the *LePage* case, which was recorded. (R1-99, 47). At the circuit court's request, Plaintiffs submitted a proposed order on February 4, 2022 (Doc. 97, C-382); with Defendants submitting their proposed order on February 11, 2022. (Doc. 99, C-384).

On April 13, 2022, the circuit court entered its order on the motions to dismiss – adopting nearly verbatim the Defendants' proposed order. (Doc. 103, C-197). The order dismissed not only the wrongful death claim, but also dismissed the negligence and wantonness claims, relief that the Defendants had not requested in their Motions to Dismiss. (Doc. 103, C397, 406).

The circuit court's order found that the Plaintiffs' embryo was not a "person" or a "minor child" under Alabama law, and thus the embryo was not protected by Alabama's Wrongful Death Act. (Doc. 103, C-400-404). At the same time; however, the circuit court also dismissed the negligence and wantonness claims because the Plaintiffs' embryo was a human life, and thus "the only damages a civil jury may assess for the 'wrongful' taking of a life are punitive damages." (Doc.

103, C-404). As a result, all of the tort claims were dismissed against all parties, MIMC no longer had any claims pending against it, and the only remaining claim was against CRM for breach of contract. (Doc. 103, C-397).[2]

On April 15, 2022, Plaintiffs filed a Motion to Amend Orders pursuant to *Alabama Rules of Civil Procedure* 59(e) and 54(b) to clarify that the circuit court's April 13, 2022 Order was a final judgment for which an appeal may lie. (Doc. 110, C-412). On April 28, 2022, the circuit court granted this Motion, and entered a new Order that included an express determination that there was no just reason for delay and that final judgment be entered as to all claims asserted against MIMC and that the wrongful death, negligence, and wantonness claims were dismissed in their entirety against CRM. (Doc. 112, C-416, Doc. 114, C417, 426).

On May 13, 2022, Plaintiffs timely filed their Notice of Appeal (Doc. 117, C-435); Docketing Statement (Doc. 118, C-437); and Transcript Purchase Order (Doc. 119, C-441).

STATEMENT OF THE ISSUES

I. Given the right to a remedy afforded by Alabama Constitution of 1901, Article I, Section 13, did the circuit court err by dismissing all of the tort claims from the Plaintiffs' Complaint and First Amended Complaint, leaving Plaintiffs and their embryonic children with no remedies for their child's wrongful death?

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[2] The circuit court's order also held that mental anguish damages were not recoverable under the Plaintiffs' negligence claim; however, this part of the order is moot given the dismissal of the negligence claim.

II. Did the circuit court err in ruling that human, *in vitro* embryos are not living, human beings subject to Alabama's Wrongful Death Act while also ruling that the only remedy for an *in vitro* embryo's wrongful death is for punitive damages under Alabama's Wrongful Death Act?

III. Did the circuit court err in making Findings of Fact when no discovery had been permitted and Plaintiffs were prevented from introducing evidence in opposition to Defendants' Motions to Dismiss?

IV. Given Alabama law that life begins at conception, combined with Alabama's unique wrongful-death remedy, did the circuit court err in relying upon appellate opinions from states other than Alabama premised upon analogous factual scenarios but altogether different views on when life begins and the applicable wrongful-death remedies?

STATEMENT OF THE FACTS

This case is one of an ever-growing number involving the loss or destruction of *in vitro* embryos through tortious conduct.[3] Because this is an appeal from a

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[3] *See, e.g., In re: Pacific Fertility Center Litigation*, Case No. 18-CV-01586-JSC (N.D.CA.) (California jury entered a $15 million verdict in favor of three women and a couple who filed suit against a fertility clinic and a cryogenic tank manufacturer when the tank malfunctioned, destroying embryos, eggs, and sperm); *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256 (Ariz. 2005) (Couple filed suit against reproductive clinic for losing the couple's embryos); *Frisina v. Women and Infants Hospital of Rhode Island*, CIV. A. 95-4037 (Superior Ct. R.I.) (Three consolidated cases arising from a fertility clinic losing the plaintiffs' embryos); Gerard Letterie, M.D., Dov Fox, J.D., and D. Phil, *Lawsuit frequency and claims basis over lost, damaged, and destroyed frozen embryos over a 10-year period*, Fertility & Sterility, Vol. 1, Issue 2, P. 78-82 (Sept. 2020) (Finding that 133 lawsuits had been

motion to dismiss, the facts are those set forth in Plaintiffs' First Amended Complaint. (Doc. 61). The Plaintiffs respectfully request that the Court disregard any assertions of purported additional "facts" filed by the Defendants/Appellees as well as any purported conclusions of facts in the circuit court's Order. For ease of reference, the facts from the Plaintiffs' First Amended Complaint are set forth below:

THE PARTIES

1. Plaintiff FELICIA BURDICK-AYSENNE ("Felicia") is an adult person who is the mother, next friend, and legal guardian of an embryo referred to herein as Baby Aysenne, deceased. Plaintiff Felicia brings suit in her individual capacity and as the parent and next friend of Baby Aysenne.

2. Plaintiff SCOTT AYSENNE ("Scott") is an adult person who is the father, next friend, and legal guardian of the embryo referred to herein as Baby

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filed in the 10 year period from January 1, 2009 to April 22, 2019, over lost, discarded or damaged IVF embryos). Additionally, in 2018 alone, there were two massive tank failures that lead to the death of over 7,500 frozen eggs and embryos, one in Cleveland, Ohio, and another in San Francisco, California. *See, generally,* https://www.nbcnews.com/news/us-news/15m-awarded-five-people-who-lost-eggs-embryos-fertility-clinic-n1270439 (last accessed October 17, 2022); *and* https://www.cnn.com/2020/02/05/us/ohio-fertility-clinic-lost-eggs-embryos-lawsuits/index.html (last accessed October 17, 2022). In 2019, a clinic "mix-up" lead to embryos being "switched" with two families giving birth, and partially raising, the other's biological child. https://www.nytimes.com/2021/11/09/us/fertility-clinic-embryo-mixup.html (last accessed October 17, 2022).

The Center is also a defendant in the Circuit Court of Mobile County, Alabama for an unrelated, separate incident wherein it lost a family's embryos. *Tonya Taylor, et al. v. The Center for Reproductive Medicine, P.C.*, CV-2021-902171.

Aysenne. Plaintiff Scott brings suit in his individual capacity and as the parent and next friend of Baby Aysenne.

3. Plaintiff BABY AYSENNE was the embryo formed by the fertilization of Felicia's egg with Scott's sperm via in vitro fertilization. Baby Aysenne was killed and/or destroyed because of the tortious conduct of the Defendants as more specifically detailed herein. Suit is brought on Baby Aysenne's behalf by and through her parents, Felicia and Scott.

4. Defendant THE CENTER FOR REPRODUCTIVE MEDICINE, P.C., ("CRM" and/or the "Center") is an Alabama entity doing business by agent or otherwise in this County and State. The Center owns and operates a fertility clinic with related functions such as human embryo cryopreservation located at or near Defendant Mobile Infirmary's hospital.

5. Defendant MOBILE INFIRMARY ASSOCIATION d/b/a MOBILE INFIRMARY MEDICAL CENTER (the "Mobile Infirmary") is an Alabama entity doing business by agent or otherwise in this County and State. Mobile Infirmary owns and operates a hospital known as the Mobile Infirmary.

. . .

FACTUAL ALLEGATIONS

I. Alabama law protects all human life, including embryos.

9. Human life is a continuum from fertilization of an egg with sperm until death.

10. A human embryo is a stage in the continuum of life.

11. A human being is the same living organism at every developmental life stage, from an embryo to a fetus, to an infant, toddler, teenager, and into adulthood. The degree of maturation is the only difference.

12. Each embryonic human being is a unique human life that is special and intrinsically valuable from conception.

13. Wrongfully causing and/or allowing the death of an embryonic human being is no different than causing the death of a human being at any other stage of life. Embryonic human beings are human beings.

14. The public policy of the State of Alabama is to protect life, born and unborn, including embryonic human beings.

15. Embryonic human beings are entitled to the protection of Alabama's laws regardless of their race, gender, size, or the environment that sustains their life.

II. General overview of human reproduction.

16. Every human being has a unique beginning: the moment of conception or fertilization. As soon as the twenty-three chromosomes carried by the sperm encounter the twenty three chromosomes carried by the egg, the whole information necessary and sufficient to create a new being is gathered.

17. A human sperm and a human egg each have only one pair of the 23 human chromosomes, which is half of the required number. Sperm and egg cannot singly develop further into human beings. Individual sperm and egg produce only gamete proteins and enzymes. They do not direct their own growth and

development. They are parts of a human, but they are not individuals in and of themselves.

18. This changes upon fertilization, as at that point, two separate parts of two human beings combine and transform into something very different from what they were before. The sperm and egg actually change into a single, new human being. During the process of fertilization, the sperm and egg cease to exist as such, and a new human being is created.

19. Immediately upon fertilization, a single-celled zygote is formed. A zygote is an entirely new human being, with his or her own unique DNA with 46 chromosomes (23 pairs of two chromosomes – in contrast to the egg and sperm, which each only have one pair of the 23 chromosomes).

20. The zygote is an extremely important aspect of human life. From this single cell will grow the entire person. This so-called "first cell" knows more and is more specialized than any cell which later develops in the human organism.

21. This single-cell human being immediately produces specifically human proteins and enzymes. The zygote further genetically directs his/her own human growth and development.

22. The zygote stage is immediately followed by cleavage, through which the zygote develops into an embryo. This does not mean that the zygote becomes another kind of thing. It simply grows and develops. The embryo is merely a bigger and more complex version of the same human being than the zygote is. This is no different than how an adult is bigger and more complex than a toddler.

23. Thus, once one specific sperm has fertilized one specific egg it becomes a zygote, which is a new human being that is the immediate process of fertilization.

III. Embryos conceived from in vitro fertilization are exactly the same as those conceived in vivo.

24. Assisted reproductive technology ("ART") covers all of the various methods used to treat infertility.

25. At issue in this case are two types of ART. The first is in vitro fertilization ("IVF"), which is a fertilization method that conceives a child by combining the egg and sperm outside of the womb – i.e. "in vitro." The second is cryopreservation, which is simply preserving the conceived embryos in cold temperatures to sustain their lives.

26. There is no difference between an embryo conceived via IVF and one conceived in vivo (i.e. inside the body). Location of the two embryos would be the only distinguishing aspect. Both are the beginning of a new human life, separate and apart from the egg and sperm from which they came.

27. Following IVF conception, the embryo is either transferred to a woman's uterus or preserved by cryopreservation.

28. There is no difference between embryos preserved by cryopreservation and embryos that are subsequently transferred to a woman's uterus. Cryopreservation does not stop life, to be later started anew. Rather, the low temperatures greatly slow down the embryo's microscopic movements and arrest the flux of time for the embryo. Once thawed, the embryo will continue to flourish and divide. A frozen embryo, once thawed, can, and often does, grow into a healthy child.

29. For many people, including the Plaintiffs herein, cryopreservation allows for peace of mind about their family. Since the first IVF baby was born in 1978, over 9 million children have been born using IVF procedures, including cryopreservation. It is estimated that there are over one-million frozen embryos in the United States right now.

30. If the embryonic human being is not deprived of the cryopreservation environment, he or she can be successfully transferred many years later and become a healthy child. For example, a healthy baby girl was recently birthed following a 27-year cryopreservation.

IV. Plaintiffs' history with the Center.

31. Felicia and Scott went to the Center for assistance in conceiving children. The Center provides services for conceiving and implanting embryos via IVF, as well as cryopreservation of conceived embryos.

32. The Center claims to help people "realize their dream of having a baby" through a variety of ART including IVF and cryopreservation.

33. On January 29, 2013, Felicia and Scott entered into a written agreement with the Center under which the Center would assist Felicia and Scott with having children of their own. A copy of the parties' contract is attached hereto as Exhibit A and incorporated herein by reference.

34. Pursuant to the agreement, the Center was to provide IVF services to Felicia and Scott along with cryopreservation of the conceived embryos.

35. The Center harvested eggs from Felicia, which were fertilized in vitro by Scott's sperm. The resulting zygotes developed into embryos.

36. The Center cryopreserved some of Felicia and Scott's embryos in the Center's cryogenic nursery. According to the Center, "freezing (or 'cryopreservation') of embryos is a common procedure. Since multiple eggs (oocytes) are often produced during ovarian stimulation, on occasion there are more embryos available than are considered appropriate for transfer to uterus. These embryos, if viable, can be frozen for future use." (Exhibit A, Pg. 12).

37. From these embryos, Felicia and Scott were able to conceive healthy children, including from embryos that had been frozen and then thawed.

38. Baby Aysenne was the last embryo that Felicia and Scott had conceived. Even had Felicia and Scott chosen not to get pregnant, they considered this embryo a human being or life.

39. For years following the conception of their embryos, Felicia and Scott maintained contact with the Center. They paid the Center a monthly nursery fee to ensure that the Center would preserve and protect their embryos, including Baby Aysenne, in the Center's cryogenic nursery.

40. For example, on November 20, 2020, the Center emailed Felicia confirming receipt of the December 2020 nursery fee. (Exhibit B).

41. In return for accepting Felicia and Scott's payment for embryonic-nursery fees, the Center promised and agreed to protect, secure, and care for the embryos, including Baby Aysenne.

42. These plans were ruined when the Center called Felicia and Scott stating that their last remaining embryo had been killed and/or destroyed.

V. An eloping Infirmary patient entered the Center's unsecured IVF lab and cryogenic nursery.

43. The Center's IVF lab/clinic is located in or near Defendant Mobile Infirmary's hospital facilities.

44. The Center preserves the embryos under its care in an embryonic storage-unit referred to herein as the cryogenic nursery, which is located in the Center's IVF lab/clinic.

45. Both the Center's IVF lab/clinic and its cryogenic nursery are supposed to remain locked, secured, and/or monitored at all times.

46. Both the Center's IVF lab/clinic and its cryogenic nursery are supposed to remain locked and secured at all times, in part, to prevent unauthorized person(s) from entering those areas.

47. Both the Center's IVF lab/clinic and its cryogenic nursery are supposed to remain locked, secured and/or monitored to prevent the death and/or destruction of the embryos that the Center is responsible for caring for, protecting, and securing.

48. Despite the need to have the Center's IVF lab/clinic locked, secured, and/or monitored at all times, on or about December 13, 2020, the doors to the lab were left unlocked, unsecured, and/or unmonitored.

49. Leaving the door to the Center's IVF lab/clinic unlocked, unsecured, and/or unmonitored was a direct violation of the policies and procedures of both Mobile Infirmary and the Center.

50. It was foreseeable that harm could come to the unprotected embryos preserved in the Center's cryogenic nursery should the door to the Center's IVF lab/clinic be left unlocked, unsecured, and/or unmonitored.

51. Despite the need to have the Center's cryogenic nursery locked, secured, and/or monitored at all times, on or about December 13, 2020, the nursery was left unlocked, unsecured, and/or unmonitored.

52. Leaving the Center's cryogenic nursery unlocked, unsecured, and/or unmonitored was a direct violation of the Center's policies and procedures.

53. It was foreseeable that harm could come to the unprotected embryos preserved in the Center's cryogenic nursery should the nursery be left unlocked, unsecured, and/or unmonitored.

54. Defendant Infirmary allowed one of its patients to leave and/or elope from his or her room in the Infirmary's hospital area and begin wandering the hospital. This eloping patient then accessed the Center's cryogenic nursery because the area had been left unlocked, unsecured, and/or unmonitored in direct violation of the Defendants' policies and procedures.

55. This person removed Baby Aysenne and other embryos from the cryogenic environment that was sustaining their lives.

56. It is believed that the cryopreservation's subzero temperatures burned the eloping patient's hands, causing him or her to drop the cryopreserved embryonic human beings on the floor, where they began to slowly die.

57. Once the embryos were removed from their cryogenic storage environment in such manner, they were no longer living nor could they be revived. They were forever lost.

58. By the time the Defendants' staff discovered what happened, all of the embryos that had been removed had died.

STANDARD OF REVIEW

Although the Defendants' motion cites to *Alabama Rules of Civil Procedure* 12(b)(1) and 12(b)(6), the crux of the circuit court's order was a finding that the First Amended Complaint did not survive a 12(b)(6) challenge. As such, "[t]he appropriate standard of review under Rule 12(b)(6) is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears the pleader could prove any set of facts that would entitle her to relief." *Stinnett v. Kennedy*, 232 So. 3d 202, 206 (Ala. 2016). The Court must "accept the allegations of the complaint as true," and further view all facts and inferences "most strongly in the [plaintiffs'] favor." *Weaver v. Firestone*, 155 So. 3d 952, 956 (Ala. 2013). The "Court does not consider whether the plaintiffs will ultimately prevail, but only whether [they] may possibly prevail." *Stinnett*, 232 So. 3d at 206. "[A] Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Id.*

SUMMARY OF THE ARGUMENT

A basic notion of Alabama's civil-justice system is that the law provides a right for every wrong. This principle is so important to our jurisprudence that it is enshrined in our Constitution: "every person, for any injury done him, in his lands, goods, person, or reputation, *SHALL HAVE A REMEDY* by due process of law; and right and justice shall be administered without sale, denial, or delay." Ala. Const. of 1901 §13 (emphasis added). Thus, as a starting point, the law requires that the Plaintiffs have a cause of action against all possible wrongdoers for the embryo's wrongful death.

Because the law requires a remedy, the next step is to determine what that remedy should be. The most logical remedy for the wrongful death of a conceived, human embryo would be under Alabama's Wrongful Death Act. Alabama law already provides such a remedy when an *in utero* embryo has been wrongfully killed. *Mack v. Carmack*, 79 So. 3d 597 (Ala. 2011); *Stinnett v. Kennedy*, 232 So. 3d 202 (Ala. 2016). Alabama law does not require that embryos reach viability or be born alive to be worthy of protection. All that matters is conception. Once an embryo is conceived, it is considered a minor child such that its wrongful death gives rise to a claim under the Alabama's Wrongful Death Act.

There is no reason to differentiate between an embryo *in utero* and one *in vitro*. They have both been conceived, they will exist a single, solitary time in this realm, and they contain the exact same genetic materials and characteristics as every other human being. The embryo at issue would never be anything else other than human. The law should treat her wrongful death the same way as any other human's wrongful death.

Alternatively, to the extent there is a distinction between *in utero* and *in vitro* embryos such that Alabama's Wrongful Death Act does not apply, this does not mean that the Plaintiffs should be left without any tort remedies at all. Instead, they would still have their usual negligence and wantonness claims. The Defendants certainly recognized this fact at the circuit court level given that they did not even move to dismiss these claims (nor did CRM move for dismissal of the breach of contract claim). Instead, the Defendants' motion on these alternative tort claims

was limited to the type of damages that could be recovered on a negligence claim.

And finally, this Court has not just the inherent power, but the concomitant duty, to declare the protections that will be afforded to all human life. Allowing the circuit court's order to stand would leave *in vitro* embryos as the ONLY type of life, human or otherwise, that is not protected by Alabama's civil-justice system. That wrong must be righted.

This Court should hold that conceived, human, *in vitro* embryos, are human lives worthy and deserving of legal protection. Such a finding is in line with the public policy of this State that human life begins at conception. This Court must reverse the circuit court's ruling, and in so doing confirm and declare the remedy to be afforded for the wrongful death or destruction of human, *in vitro* embryos. Our Constitution demands nothing less.

ARGUMENT

Pursuant to Rule 28(k), *Alabama Rules of Appellate Procedure*, Plaintiffs incorporate and adopt by reference the Argument made in the Appellants' Brief in *LePage v. Mobile Infirmary Association*, SC-2022-0515 as if set forth fully herein. The legal issues are nearly identical in the two cases, and Plaintiffs herein have endeavored to not overload the Court with unnecessary, repetitive arguments.

I. Alabama's Constitution Requires that "every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy." (Ala. Const. Section 13).

The circuit court's order violates the Plaintiffs' Constitutional Rights in holding that there is no

remedy for the negligent or wanton death of an *in vitro* embryo. The Alabama Constitution requires that "every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay." Ala. Const. of 1901, §13. "It will be noticed that this provision preserves the right to a remedy for an injury. That means when a duty has been breached, producing a legal claim for damages, such claimant cannot be denied the benefit of his claim for the absence of a remedy." *Pickett v. Matthews*, 192 So. 261, 263 (Ala. 1939).

In the earliest case on the subject of the legal remedies to be afforded the unborn, this Court stated that, even if no wrongful death claim existed, the parents still had a remedy for their loss. In *Stanford v. St. Louis-San Francisco Ry. Co.*, 108 So. 566 (Ala. 1926), this Court held that though there was no claim for wrongful death of an unborn child in the womb, "the mother . . . may recover for any damage which was not too removed to be recovered at all." This case was overruled by subsequent decisions affirming that since life begins at conception the wrongful death of an embryo, regardless of viability, gives rise to a wrongful death claim. But regardless, this central tenet – that every wrong must have a remedy – is ingrained in our legal system.

The circuit court's fundamental error here was ruling that the Plaintiffs were left with no tort remedies, at all, for the wrongful death of their embryo. In essence, the circuit court ruled that there is no claim for wrongful death because *in vitro* embryos are not considered "persons" under Alabama law, but also that there is no claim for negligence or

wantonness because the embryos are persons such that the only damages that can be awarded are punitive damages under Alabama's unique wrongful death system. (Doc. 103, C-397, 402, 404). If the circuit court's order is not reversed, then all other forms of life would be protected under either the wrongful death act (for human lives) or common law negligence/ wantonness claims (for non-human lives, such as livestock and crops). The only type of life that would not be protected under Alabama's tort laws would be human, *in vitro* embryos.

The fallacy of this argument can be seen in the following example: Suppose CRM decided to move from one location to another. In the process, it packed up all of its office supplies and equipment, including its cryogenic nursery equipment storing *in vitro* embryos, into a moving truck. As the truck was traveling along, a drunk driver hits it, destroying everything inside. Under the circuit court's ruling, the moving company would have a claim for the loss of its truck, CRM would have a claim for the loss of its supplies and equipment – including its cryogenic nursery equipment, but the parents of the embryos stored inside that very equipment that were being transported on that same truck would have no tort claims against the drunk driver for the loss of their embryos.

Thus, as a starting point, Alabama law mandates a mechanism of recovery for the injuries the Plaintiffs have suffered as a result of the Defendants' tortious conduct. There is simply no way that these human, *in vitro* embryos can be completely unprotected by Alabama's tort laws. The circuit court's ruling must be reversed to comply with the constitutional requirement of providing a remedy for every injury.

II. Alabama's Wrongful Death Act Provides the Remedy for the Wrongful Death of All Human Life, including an *in vitro* embryo.

Because there must be a remedy, the real question in this case is which remedy should apply. The logical starting point for the death of a human embryo is obviously Alabama's Wrongful Death Act, which provides for a cause of action "[w]hen the death of a minor child is caused by the wrongful act, omission, or negligence of any person." (*Ala. Code* § 6-5-391).

The statute is silent as to who is included as a "minor child," leaving it to the courts to interpret the term. Over the past one-hundred (100) years, this Court has endeavored to broaden this term in the prenatal context such that, at present, "the Wrongful Death Act permits an action for the death of a previable fetus." *Mack v. Carmack*, 79 So. 3d 597 (Ala. 2011); *Stinnett v. Kennedy*, 232 So. 3d 202 (Ala. 2016). Under current Alabama law, were Plaintiffs' embryo *in utero*, there is no question that her death as a result of the wrongdoing that occurred in this case would give rise to a wrongful-death claim. Why, then, would there be such a sharp legal distinction between human embryos based solely on whether they are *in utero* or *in vitro*?

The Defendants argued, and the circuit court agreed, that such a distinction was necessary to ensure congruence between criminal homicide law and civil wrongful death law. (Doc. 103, C-401). That was a mistake; however, because this Court has made clear that the congruency argument is aimed at ensuring that a defendant who is responsible criminally is ALSO responsible civilly. Congruency is only necessary in those cases where the civil law must be expanded to prevent situations where "a defendant could be

responsible criminally for the homicide of a fetal child but would have no similar responsibility civilly." *Stinnett v. Kennedy*, 232 So. 3d 202, 216 (Ala. 2016), *quoting Mack*, 79 So. 3d at 611 (Ala. 2011), *in turn quoting Huskey v. Smith*, 265 So. 2d 596, 597-97 (Ala. 1972)(internal quotation marks omitted).

In contrast, the congruence argument is not a means to limit civil liability. As this Court noted in *Stinnett*: "for fetal homicide, it simply does not follow that a person not subject to criminal punishment under the Homicide Act should not face tort liability under the Wrongful Death Act." *Jd*.[4] In fact, *Stinnett* explicitly states that attempts to harmonize or ensure congruity were "never intended to synchronize civil and criminal liability." *Id.* at 215. Justice Parker, in his special concurrence, addressed this very issue: "We settled the incongruence between civil and criminal statutes in *Mack*, not by giving unborn children less protection under the law, but by recognizing that unborn children, viable or not, were equally protected under the Wrongful Death Act." *Id.* at 223 (Parker, J. specially concurring)(emphasis added).

The congruency argument also ignores the history of this Court's jurisprudence in this area, which has worked to expand who is protected under our wrongful death law because the "paramount purposes" of Alabama's wrongful death statute are "the preservation of human life" and "to prevent homicide." *Eich v. Town of Gulf Shores*, 300 So. 2d 354, 356 (Ala. 1974); *Mack v. Carmack*, 79 So. 3d 597, 610 (Ala. 2011); and *Huskey v.*

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[4] This is true in other contexts as well. A tortfeasor that takes his eyes off the road to change the radio station and fails to see the car ahead of him stop, thereby causing a wreck, can be responsible civilly but not criminally.

Smith, 265 So. 2d 596, 597 (Ala. 1972). In light of these purposes, this Court has worked to "interpret[ed] the Wrongful Death Act in a manner that eliminate[s] a distinction that otherwise would have prevented recovery for the death of a fetus." *Mack v. Carmack*, 79 So. 3d at 605. Plaintiffs ask the Court to continue to interpret the Wrongful Death Act in such a manner, and eliminate any *in vitro* versus *in utero* distinction that would prevent recovery for the death of the human embryo that was killed in this case.

With the exception of two (2) cases in the early 1990s,[5] all of this Court's opinions on this subject over the past fifty (50) years have served to ensure that Alabama's Wrongful Death Act provides a mechanism of recovery for the death of a human life in all of its various forms and stages of development.

> *Huskey*, *Wolfe*, and *Eich* constituted seminal decisions from this Court concerning causes of action for wrongful death based on prenatal injuries. In each of those cases . . . the Court interpreted the Wrongful Death Act in a manner that eliminated a distinction that otherwise would have prevented recovery for the death of a fetus. *Mack v. Carmack*, 79 So. 3d 597, 605 (Ala. 2011)(emphasis added).

For fifty (50) years, this Court has held that "the fetus is just as much an independent being prior to viability as it is afterwards, and that from the moment of conception, the fetus or embryo is not a part of the mother, but rather has a separate existence within the

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[5] These two cases are *Lollar v. Tankersley*, 613 So. 2d 1249 (Ala. 1993) and *Gentry v. Gilmore*, 613 So. 2d 1241 (Ala. 1993) both of which were expressly overruled by *Mack v. Carmack*, 79 So. 3d 597, 611 (Ala. 2011).

body of the mother." *Wolfe v. Isbell*, 280 So. 2d 758, 761 (Ala. 1972). The reason for this is simple: human life begins at conception. At this point in time, an entirely new person has been created, with his or her own, unique DNA. Regardless of whether this new person is *in vitro* or *in utero*, he or she is fundamentally the exact same thing – a human being. The Defendants' argument, and the circuit court's Order, creates an exception to this rule, treating some embryos different than others based on nothing more than their physical location. This line of demarcation is completely arbitrary, would not serve to protect human life, and is not in line with well-established Alabama law.

The circuit court's Order treating *in vitro* embryos differently than all others ignores the fundamental fact that all embryos are human lives, and that, under Alabama law, "once we accept the basic premise that a fetus is a potential human life at the time of the injury . . . the substantive rights resulting from wrongful death must be protected." *Eich v. Town of Gulf Shores*, 300 So. 2d 354, 358 (Ala. 1974). This biological fact – that all human embryos are independent from their surroundings or living environments, explains why the death of a previable fetus gives rise to a wrongful death claim. Such a claim exists in the *in utero* context precisely because the fetus is NOT part of the mother, but merely resides in her. *Wolfe v. Isbell*, 280 So. 2d 758, 761 (Ala. 1973) (*citing Puhl v. Milwaukee Auto. Ins. Co.*, 99 N.W. 2d 163 (Wis. 1959) ("[I]t would be more accurate to say that the fetus from conception lived within its mother rather than as part of her.")). Were the previable fetus residing somewhere else when it was wrongfully killed, the wrongful death claim would still exist. It is NOT the location of the embryo that is important, but its existence alone that matters.

Similarly, the order also fails to consider that the public policy of this State is to protect unborn life, in all of its various stages. As this Court wrote in *Hamilton v. Scott*, 97 So. 3d 728, 734 n.4 (Ala. 2012):

> [T]his Court's holding in *Mack* is consistent with the Declaration of Rights in the Alabama Constitution, which states that "all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." These words, borrowed from the Declaration of Independence affirm that each person has a God-given right to life.

The Alabama Constitution is in accord, confirming that "it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life." *Ala. Const.* Art. I, §36.06(a). This public policy extends "to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate." *Id.* at §36.06(b).

This public policy means that, when interpreting the Wrongful Death Act, "Alabama courts should construe such statutes in favor of the express public policy of the State to protect unborn life, not against it." *Stinnett*, 232 So. 3d 202, 223 (Parker, J. special concurrence). As such, "[m]embers of the judicial branch of Alabama should do all within their power to dutifully ensure that the laws of Alabama are applied equally to the most vulnerable members of our society, both born and unborn." *Id.*

Based on the foregoing, this Court has worked to expand the definition of "minor child" over the past 50

years to ensure that all life is protected, regardless of its developmental stage. The law has continued to develop and adapt to new science, knowledge, and technology with the sole goal being to protect human life, from the very, very young, to the very, very old. There is no difference between an *in vitro* and *in utero* embryo, much less a difference that is so deep and wide that we should, as a legal principle, differentiate the remedy to be provided for an embryo's death based solely on its physical location. (Doc. 61, C-157, ¶26 and 28). This Court should take this opportunity to confirm that all human embryos are protected under Alabama's Wrongful Death Act.

III. Because Alabama Law Requires a Remedy for Every Wrong, if there is No Claim under the Wrongful Death Act there Must be Claims under Common Law Theories of Negligence and Wantonness.

Plaintiffs' First Amended Complaint included alternative claims of negligence and wantonness "should the Courts of this State or the United States Supreme Court ultimately rule that Baby Aysenne is not a minor child." (Doc. 61, C-169, ¶77). The Complaint sets forth, in great detail, factual allegations supporting these theories and seeks damages in the form of "the value of the embryo wrongfully destroyed, and for the severe mental anguish and emotional distress [the Plaintiffs] have been caused to suffer and will suffer in the future." (Doc. 61, C-169, ¶79).

The Defendants conceded that such claims exist should the embryo not be considered a "minor child" under Alabama's Wrongful Death Act as their Motion to Dismiss did not seek dismissal of the entirety of Plaintiffs' alternative claims under negligence and/or wantonness theories. (Doc. 71, C-269-271). Instead,

their Motion was quite limited, merely seeking dismissal of "[t]he Aysennes' claim for damages for mental anguish under a theory of negligence." (Doc. 71, C-269). Plaintiffs' counsel highlighted that Defendants had not moved to dismiss anything other than the wrongful death claim at oral argument. (R.80-81, 85-86 "And so when they filed a motion to dismiss the amended complaint, they only moved to dismiss certain claims. They certainly didn't just move to dismiss the wantonness claim. They didn't move to dismiss the breach of contract action. So I'm not sure what we're down here arguing at this point in time.").

Plaintiffs responded that such an argument was inappropriate in the motion to dismiss context. As this Court made clear in *Raley v. Citibanc of Alabama*, 474 So. 2d 640, 642 (Ala. 1985), arguments regarding the type of relief to be accorded under a specific cause of action are "not subject to a Rule 12(b)(6) motion for failure to state a cause of action." (Doc. 77, C-333). Plaintiffs further pointed out that Alabama law was not clear on whether mental anguish damages could be recovered for the wrongful destruction of an *in vitro* embryo, and noted that the Defendants' argument on this narrow point was limited to the negligence claim ONLY. (Doc. 77, C-333). Defendants' Motion sought no relief, at all, with regard to the wantonness or breach of contract claims. (Doc. 77, C-333).

The circuit court's Order; however, went beyond the limited grounds of requested relief, dismissing the negligence and wantonness claims in their entirety. Such was done without providing Plaintiffs any warning that such would occur and without giving them the opportunity to oppose such relief. In dismissing the Plaintiffs' alternative tort claims, the circuit court stated that "[i]t is well-established in this state that

the only damages a civil jury may assess for the 'wrongful' taking of a life are punitive damages," citing to *Central Alabama Electric Co-op v. Tapley*, 546 So. 2d 371 (Ala. 1989) and *Killough v. Jahandarfard*, 578 So. 2d 1041 (Ala. 1991).

A. The Circuit Court Erred in Ordering Relief on an Issue that was not Properly before it.

As an initial point, the circuit court violated the Plaintiffs' due process rights by dismissing the negligence and wantonness claims without the Defendants requesting such relief in their Motion, without providing the Plaintiffs with any notice or warning that it was going to rule on that issue, and without providing Plaintiffs with the opportunity to brief and respond to this issue.

> A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. . . . Unless all parties in interest are in court and have voluntarily litigated some issue not within the pleadings, the court can consider only the issues made by the pleadings, and the judgment may not extend beyond such issues nor beyond the scope of the relief demanded.
>
> The foregoing rules are all fundamental and state nothing more than the essentials of due process and of fair play. They assure to every person his day in court before judgment is pronounced against him.
>
> *Central Bank of Alabama, N.A. v. Ambrose*, 435 So. 2d 1203, 1206 (Ala. 1983) (*quoting Sylvan Beach, Inc. v. Koch*, 140 F.2d 852, 861-62 (8th Cir. 1944)).

In situations such as this, where a party has been "denied an opportunity to have challenged or defended against such a claim, the opposing party has suffered substantial prejudice and the judgment granting relief must be reversed. Indeed, such a rule is fundamental to the essentials of due process and fair play." *Carden v. Penney*, 362 So. 2d 266 (Ala. Civ. App. 1978).

Plaintiffs did not voluntarily litigate any issue not within the pleadings. Plaintiffs' counsel made clear at oral argument that he was "not sure what we're down here arguing at this point in time" in regards to the negligence and wantonness claims since the Defendants' motion had not sought dismissal of those claims. (R.86). The circuit court thus erred in granting Defendants' relief that they had not requested.

B. The Circuit Court's Ruling is Circular.

The circuit court's Order is based on circular logic. It held, on the one hand, that the Plaintiffs did not have a claim for wrongful death because their *in vitro* embryo is not a person or minor child under Alabama law. (Doc. 103, C-400, "Alabama law does not recognize or support a finding that an extrauterine, *in vitro*, cryopreserved embryo, not yet implanted or developing *in utero*, is a 'minor child' as that term is used [in] Ala. Code §6-5-391."). But on the other hand, the circuit court held that there were no claims for negligence or wantonness because the embryo was a human life such that "the only damages" that could be awarded for its "wrongful taking" would be "punitive damages." (Doc. 103, C-404). In other words, the Plaintiffs did not have a wrongful death claim because the embryo was not a person, but they also did not have negligence or wantonness claims because the embryo was a person.

In support of its statement that the Plaintiffs did not have negligence or wantonness claims, the circuit court relied upon *Central Alabama Electric Co-op v. Tapley*, 546 So. 2d 371 (Ala. 1989) and *Killough v. Jahandarfard*, 578 So. 2d 1041 (Ala. 1991). These two (2) cases involved wrongful death actions where this Court affirmed jury verdicts of $1 million and $2.5 million. Neither case discussed the interplay between Alabama's unique wrongful death law and the facts of this case. It is unclear why these two cases, which both involve human beings killed as a result of the defendants' misconduct, would serve to support the entire dismissal of the negligence and wantonness claims if the embryo is not considered a minor child or person under Alabama law.

Moreover, Plaintiffs agree that, should the case proceed as a wrongful death claim, then the only damages that would be available would be punitive damages under Alabama law. *See, e.g., Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927) (In the wrongful death context, even if the tortious conduct is only negligence, the damages to be awarded are punitive in nature to "strike at the evil of the negligent destruction of human life."); *accord Cent. Ala. Elec. Co-op*, 546 So. 2d at 376 (The theory behind awarding punitive damages for wrongful death claims, even if the misconduct was only negligent, is that "[p]unishing the tort-feasor dissuades others from engaging in life-endangering conduct."). The issue is not what damages are recoverable under a wrongful death claim, but what claim or theory should govern this action in the first place. If this Court holds that *in vitro* embryos are protected under Alabama's Wrongful Death Act, then the remedy will be punitive damages. If this Court holds that such embryos are protected by negligence/wantonness theories, then the Plaintiffs will be able to

recover compensatory damages (and perhaps punitive damages under the wantonness claim).

C. Alabama Law Protects All Life in All of Its Various Forms.

The circuit court's statement that "the only damages a civil jury may assess for the 'wrongful' taking of a life are punitive damages," is only true when the "life" in question is a human being. There are a myriad of other types of "life" that are not subject to Alabama's Wrongful Death Act. But this does not mean that there is no remedy at all when those lives have been wrongfully taken. Instead, those cases simply proceed under negligence and wantonness theories. For example, Section 3-1-11.1(b) of the *Alabama Code* provides for civil damages for the wrongful "killing, disabling, disfiguring, or destroying of livestock in an amount equal to double the value thereof." *See, further*, *Louisville & N.R. Co. v. Carter*, 104 So. 754 (Ala. 1925) (affirming judgment in favor of plaintiff for wrongful death of his dog); *accord Louisville & N.R. Co. v. Watson*, 208 Ala. 319 (Ala. 1922); *Cent. of Ga. Ry. Co. v. Carroll*, 50 So. 235 (Ala. 1909) (Alabama law provides a cause of action for negligent destruction of growing crops). Alabama law even allows a claim for negligence in handling a dead human body. *Levite Undertakers Co. v. Griggs*, 495 So. 2d 63 (Ala. 1986). It would be odd, indeed, for Alabama law to protect livestock, dogs, plants, and even dead bodies; while at the same time excluding human, *in vitro* embryos from protection under our tort laws.

If the circuit court's Order were left in place; however, this would be the effect. The Defendants in this case would basically have complete civil tort-law immunity from their wrongdoing so long as they destroyed or harmed *in vitro* embryos. They could be

sued for negligently destroying the very container housing the embryo, but not for the destruction of the embryo being stored therein. Though seemingly preposterous, this would come to fruition unless this Court acts to reverse the circuit court and confirm that there is a remedy for the wrongful destruction of a human, *in vitro* embryo.

IV. This Court has Not Just the Authority, but the Duty, to Provide a Remedy for the Wrongful Death of a Human, *in vitro* embryo.

As noted above, Alabama's Constitution guarantees "every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay." *Ala. Const.* §13. Beginning with the famous case of *Marbury v. Madison*, 5 U.S. 137, 177 (1803), a paramount principle of American jurisprudence is that our courts have not just the authority, but the concomitant duty, to "to say what the law is." In those instances where a rule of law violates the constitution, the court must disregard this rule of law. "This is of the very essence of judicial duty." *Id.* at 178.

This judicial duty requires that this Court espouse the remedy that will be provided to the Plaintiffs for this particular wrong. Plaintiffs believe that such a remedy is already established by Alabama's Wrongful Death Act, which protects minor children. Plaintiffs' human, *in vitro* embryo is exactly the same as all other human embryos, and should therefore be provided with the same protections. Alabama law protects human life from the moment of conception. In the context of Alabama's civil Wrongful Death Act, there is no reason to differentiate embryos based solely on their location.

In the alternative, to the extent there is a line of demarcation such that the wrongful death of an *in vitro* embryo does not give rise to a wrongful death claim, this does not mean that Plaintiffs should be left without a remedy at all. Instead, they should be allowed to proceed under common law theories of negligence and/or wantonness, just as they could in any other context for any other tangible item that had been wrongfully destroyed. Alabama law protects all other forms of life, from livestock to crops. Human, *in vitro* embryos should be protected as well.

The circuit court's Order holds that there are no tort remedies, at all, for the wrongful death or destruction of a human, *in vitro* embryo. Such an argument violates the Plaintiffs' constitutional rights to a remedy and equal protection, is inconsistent with well-established Alabama law protecting all human life from the moment of conception, and would leave *in vitro* embryos completely unprotected by Alabama's tort laws. This line of reasoning is facially incorrect, and the circuit court's Order codifying it into Alabama law must be reversed.

CONCLUSION

The judgment dismissing the tort claims presented in Plaintiffs'

First Amended Complaint should be reversed, and the case remanded for Plaintiffs to move forward with their claims.

Respectfully submitted,

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APPENDIX H

IN THE SUPREME COURT OF ALABAMA

Case No. SC-2022-0579

FELICIA BURDICK-AYSENNE AND SCOTT AYSENNE, IN THEIR INDIVIDUAL CAPACITIES AND AS PARENTS AND NEXT FRIEND OF BABY AYSENNE, DECEASED EMBRYO/MINOR,

Plaintiffs/Appellants

vs.

THE CENTER FOR REPRODUCTIVE MEDICINE, P.C.; AND MOBILE INFIRMARY ASSOCIATION D/B/A MOBILE INFIRMARY MEDICAL CENTER,

Defendants/Appellees.

On Appeal from Mobile County Circuit Court
Civil Action No. CV-2021-901640

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STATEMENT REGARDING ORAL ARGUMENT

The Aysennes request oral argument because, they say, the Circuit Court's Order improperly holds "Alabama law provides no tort remedy" for the loss of their cryopreserved *in vitro* embryo. (Pls.' Brief, p. i). This "right to a tort remedy" argument, which is the basis for their oral argument request and the primary thrust of their Brief to this Court, is a misstatement of

Alabama tort law. The Aysennes chose to plead their bailment claim as one sounding in contract (and that claim remains pending in the trial court). However, it is well-established in Alabama law that a bailor suing a bailee also has the option of seeking damages pursuant to a tort claim.[1] The fact that the Aysennes did not plead their bailment claim in tort was their decision, not the result of an unconstitutional act on the part of the trial court. Likewise, the Aysennes fail to acknowledge that ALA. CODE § 6-5-263 also provides them a potential remedy sounding in tort and the right to make a claim against any third party alleged to have caused damage to bailed property — exactly what they contend occurred here. Such a statutorily provided action was another tort option available to, but not exercised by, the Aysennes. These tort claims were not pled, which was the Aysennes' self-imposed limitation. Instead, they simply tried to re-plead a wrongful death claim under the auspices of a claim for negligent or wanton "killing" of "Baby Aysenne." The trial court should not be reversed based on a claim that its ruling left the Aysennes with no remedy at all or with no remedy in tort, since neither is correct. Nor would such a flawed argument be a proper basis for granting oral argument as requested.

Respectfully, oral argument is not necessary or indicated. The trial court followed existing Alabama law to the letter. Nothing about its ruling deprived the Aysennes of a remedy, in tort or otherwise. The question of who is a "person" in the eyes of the law under the Brody Act and the Wrongful Death Act has already been decided through an explicit directive from this Court that the definition should be

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[1] *See, e.g. Hackney v. Perry*, 44 So. 1029 (1907).

harmonized between the two Acts. The Aysennes' property/contract claim remains before the trial court. They forewent the pursuit of other available tort claims. The trial court's ruling is in complete accord with Alabama law and is due to be affirmed in the most expeditious manner possible.

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STATEMENT OF THE CASE AND RELEVANT FACTS[2]

Plaintiffs' Original and Amended Complaint.

Scott Aysenne and Felicia Burdick-Aysenne (collectively "the Aysennes") filed this action against Mobile Infirmary and The Center for Reproductive Medicine ("CRM") in their individual capacities and as parents and next friend of "Baby Aysenne" a "deceased embryo." (C. 12-21). The Aysennes' original Complaint asserted they underwent *in vitro* fertilization ("IVF") performed by CRM, followed by cryopreservation of an undisclosed number of embryos which had been fertilized *in vitro* and then stored at sub-zero temperatures in a "cryogenic storage area located within the Infirmary's hospital facilities" in exchange for payment to CRM to "store and protect Baby Aysenne." (C. 15-16). They asserted a third-party/ hospital patient left his or her room in the Infirmary's hospital area, gained unauthorized access to the cryogenic storage area, "removed Baby Aysenne and other embryos from the cryogenic environment,...and drop[ped] the cryopreserved embryonic human beings" causing them to die. (*Id*. at ¶¶ 36-38).

The original Complaint asserted three causes of action:

- Count One for "Wrongful Death," which referenced a number of listed alleged "breaches of the standard of care" and asserted a claim "pursuant to Alabama's

[2] The procedural history and relevant facts are so intertwined in a case such as this, in which a final judgment was entered at the motion to dismiss stage, Defendants found it most logical to discuss both chronologically and together in one section.

Wrongful Death laws," seeking damages to punish and deter. (C. 19).

- Count Two, entitled "Negligence/Wantonness," which asserted "Defendants were guilty of negligence and/or wantonness that directly lead to and/or caused Baby Aysenne's death." Count Two did not include any additional allegations, just one sentence asserting Mr. and Mrs. Aysenne were "severely and significantly injured" as a result of the death of Baby Aysenne. (C. 20).

- Count Three, entitled "Breach of Contract," asserted Defendants breached their duty to "protect and secure Baby Aysenne" based upon a contractual/bailment relationship. (*Id.*) No specific damages were set out in this count.

In response, the Defendants filed a Motion to Dismiss the original Complaint in its entirety based upon Rule 12(b)(6) and 12(b)(1). (C. 29-51). Among the grounds raised in the motion were that the claim for wrongful death on behalf of a cryopreserved embryo is not recognized or permissible under Alabama law; that the claims were speculative assertions of a "loss of chance" for an additional future pregnancy; that the Plaintiffs were without standing; that a parent not within the zone of danger has no cognizable claim for emotional distress for the loss of an unborn child; and that the Complaint failed to state an actionable bailment claim since it only referred to the lost embryo as a person ("Baby Aysenne") and did not allege a bailment of personal property. (*Id*.)

Thereafter, the Aysennes filed a First Amended Complaint, which replaced the original Complaint (and varies from the original in a number of ways) and became the operative Complaint in the case. (C. 157-172). This First Amended Complaint asserted the

Aysennes' last embryo-- referred to as an "embryonic human being" -- was "killed" as a result of an unauthorized third-party/"eloping patient" who entered the "cryogenic nursery" on December 13, 2020 and interfered with the subzero cryogenic environment, causing Baby Aysenne to die. (C. 164-165). Responding to the Defendants' assertion that Plaintiffs' claims for loss of a future pregnancy were speculative claims for "loss of a chance," the Aysennes specifically pled in the Amended Complaint that "even had [they] chosen not to get pregnant [with this frozen embryo], they considered this embryo a human being or life." (C. 163).

The Amended Complaint included a section entitled "Defendants' tortious conduct," containing general allegations, without any citation to any law or statute or particular cause of action, analogizing to unspecified "DHR regulations" requiring daycare centers "to be secured and closely guarded" since "small children, including embryos, cannot protect themselves." (C. 166).

Thereafter, the First Amended Complaint set out three causes of action:

• Count One, against both Defendants for "Wrongful Death," which declared "Baby Aysenne was a 'minor child' under Alabama law" and asserted a claim "[p]ursuant to Alabama's Wrongful Death laws" (without citing to a particular statute), specifically seeking damages to punish and deter. (C. 168-169).

• Count Two, against both Defendants for "Negligence/Wantonness," which stated it was pled in the alternative "and only should the Courts of this State or the United States Supreme Court ultimately rule that Baby Aysenne is not a minor child, but is instead property." (C. 169). It asserted the Aysennes "have been injured in losing the value of the embryo

wrongfully destroyed, and for the severe mental anguish and emotional distress they have been caused to suffer and will suffer in the future." (*Id.*)

• Count Three, asserted only against CRM, for "Breach of Contract/Bailment Relationship," pled in the alternative "and only should the Courts of this State or the United States Supreme Court ultimately rule that Baby Aysenne is not a minor child, but is instead property." (C. 170). This Count asserted the Aysennes and CRM "entered into a contract and/or bailment agreement" "pursuant to which [the Aysennes] paid a monthly storage charge to the Center and in return, the Center agreed to protect, secure, and care for [the Aysennes'] embryo." (*Id.*) It further asserted CRM "breached this contract and/or bailment agreement by failing to protect, secure, and care for" the Aysennes' embryo and that the Aysennes "have been injured in losing the value of the embryo wrongfully destroyed, and for the severe mental anguish and emotional distress they have been caused to suffer and will suffer in the future." (C. 171).

The Amended Complaint also incorporated by reference, and attached as Exhibit A to the pleading, the signed contracts/agreements entered into between CRM and the Aysennes. (C. 163, 173-211). Those attached documents became part of the Complaint itself[3] and demonstrated a number of additional facts

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[3] Pursuant to Ala. R. Civ. P. 10(c), "a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." The Aysennes' proclamation in their Statement of Facts that this Court should "disregard" all facts other than those articulated in the body of their Amended Complaint is inappropriate. (Pls.' Brief, p. 8). This Court has regularly and recently reiterated: "Exhibits attached to a pleading become part of the pleading...[T]he facts included in attachments to [a]

including: the cryopreservation agreement with CRM; the terms and length of CRM's agreement to store any cryopreserved pre-embryos; the attendant risks involved with IVF and cryopreservation acknowledged by the Aysennes; and the options regarding whether and when unused cryopreserved pre-embryos should be destroyed or disposed of by CRM. (*Id*.)

Not only did the Amended Complaint assert that "for many people, including the Plaintiffs herein, cryopreservation allows for peace of mind about their family" (C. 162), it incorporated into the pleading these attached documents establishing the Aysennes entered into agreements with CRM to undergo IVF and cryopreserve their pre-embryos in January of 2013, signing various forms dated January 29, 2013; April 30, 2013; and January 28, 2015. (C. 173-211). The documents demonstrate a number of choices given to and options exercised by the Aysennes in connection with their IVF. This included being informed of their option to allow CRM to use, for quality control and training purposes, any of their abnormally fertilized eggs or embryos if development did not appear to be of sufficient quality for implantation, and they chose to consent to that use:

> Quality control in the lab is extremely important. Sometimes immature or unfertilized eggs, sperm or abnormal embryos (abnormally fertilized eggs or embryos whose lack of development indicates they are not of sufficient quality to be transferred) that

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complaint are incorporated into our rendition of the facts and our consideration of them does not alter the standard of review we apply." *Sumter Co. Bd. Of Educ. v. University of West Alabama*, 2021 WL 4236438 (Ala. September 17, 2021) (emphasis added).

would normally be discarded can be used for quality control. You are being asked to allow the clinic to use this material for quality control purposes before being discarded in accordance with normal laboratory procedures and applicable laws. None of this material will be utilized to establish a pregnancy or a cell line unless you sign other consent forms to allow the clinic to use your eggs, sperm or embryos for research pruposes. Please indicate your choice belows:

☑ I/We hereby CONSENT to allow the clinic to utilize my/our immature or unfertilized eggs, left-over sperm or abnormal embryos for quality control and training purposes before they are discarded.

Patient:

/s/ [Illegible]

Date:

1/29/13

Spouse/Partner:

/s/[Illegible]

Date:

1/29/13

☐ I/We hereby DO NOT CONSENT to allow the clinic to utilize my/our immature or unfertilized eggs, left-over sperm or abnormal embryos for quality control and training purposes. This material will be discarded in accordance with normal laboratory procedures and applicable laws.

Patient: Date:

(C. 184).

They were also informed of embryo cryopreservation options including the option of harvesting more eggs than appropriate for transfer to the uterus at one time and freezing additional embryos (which required completing a separate form regarding the options for disposition of frozen embryos); the indications for cryopreservation and the reasons it can help avoid problems associated with future loss of fertility (or future medical treatment such as cancer therapy); the ways cryopreservation can help avoid multiple gestations or ovarian hyperstimulation syndrome; and the unavoidable risks associated with cryopreservation:

> c. Embryo Cryopreservation
>
> - Freezing of viable embryos not transferred after egg retrieval provides additional chances for pregnancy.
> - Frozen embryos do not always survive the process of freezing and thawing.
> - Freezing of eggs before fertilization is currently considered experimental. Research is being done under IRB oversight.
> - Ethical and legal dilemmas can arise when couples separate or divorce; disposition agreements are essential.
> - It is the responsibility of each couple with frozen embryos to remain in contact with the clinic on an annual basis.
>
> Freezing (or "cryopreservation") of embryos is a common procedure. Since multiple eggs (oocytes) are often produced during ovarian stimulation, on occasion there are more embryos avialable than are considered appropriate for

transfer to the uterus. These embryos, if viable, can be frozen for future use. This saves the expense and inconvenience of stimulation to obtain additional eggs in the future. Furthermore, the availability of cryopreservation permits patients to transfer fewer embryos during a fresh cycle, reducing the risk of high-order multiple gestations (triplets or greater). Other possible reasons for cryopreservation of embryos include freezing all embryos in the initial cycle to prevent severe ovarian hyperstimulation syndrome (OHSS), or if a couple were concerned that their future fertility potential might be reduced due to necessary medical treatment (e.g., cancer therapy or surgery). The pregnancy success rates for cryopreserved embryos transferred into the human uterus can vary from practice to practice. Overall pregnancy rates at the national level with frozen embryos are lower than with fresh embryos. This, at least in part, results from the routine selection of the best-looking embryos for fresh transfer, reserving the 'second-best' for freezing. There is some evidence that pregnancy rates are similar when there is no such selection.

Indications:

- To reduce the risks of multiple gestation
- To preserve fertility potential in the face of certain necessary medical procedures
- To increase the chance of having one or more pregnancies from a single cycle of ovarian stimulation

- To minimize the medical risk and cost to the patient by decreasing the number of stimulated cycles and egg retrievals
- To temporarily delay pregnancy and decrease the risks of hyperstimulation (OHSS- see below) by freezing all embryos, when this risk is high.

Risks of embryo cryopreservation: There are several techniques for embryo cryopreservation, and research is ongoing. Traditional methods include "slow," graduated freezing in a computerized setting, and "rapid" freezing methods, called "vitrification." Current techniques deliver a high percentage of viable embryos thawed after cryopreservation, but there can be no certainty that embryos will thaw normally, nor be viable enough to divide and eventually implant in the uterus. Cryopreservation techniques could theoretically be injurious to the embryo. Extensive animal data (through several generations), and limited human data, do not indicate any likelihood that children born of embryos that have been cryopreserved and thawed will experience greater risk of abnormalities than those born of fresh embryos. However, until very large numbers of children have been born following freezing and thawing of embryos, it is not possible to be certain that the rate of abnormalities is no different from the normal rate.

If you choose to freeze embryos, you MUST complete a Disposition for Embryos statement before freezing. This statement outlines the

> choices you have with regard to the disposition of embryos in a
>
> Initials [illegible]/[illegible]

(C. 188).

The Aysennes were also informed of available alternatives to IVF if they wished to avoid potential future issues related to disposition of any cryopreserved embryos:

> F. Alternatives to IVF
>
> There are alternatives to IVF treatment including gamete Intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT) or tubal embryo transfer (TET) where eggs and sperm, fertilized eggs of developing embryos, respectively, are placed into the fallopian tube(s). Using donor sperm, donor eggs, adoption, or not pursuing treatment are also options. Gametes (sperm and/or eggs), instead of embryos may be frozen for future attempts at pregnancy in an effort to avoid potential future legal or ethical issues relating to disposition of any cryopreserved embryos. Sperm freezing, but not egg
>
> Initials [illegible]/[illegible]

(C. 194).

The Aysennes specifically opted for all available eggs to be retrieved and fertilized, and if there were more than could be used for the initial implantation, they opted for the excess embryos to be frozen/cryopreserved and stored:

4. If more eggs are retrieved than are optimal for IVF or GIFT:

   ☐ Fertilize only ____ eggs and discard the unfertilized eggs.

   ☐ Fertilize only _____ eggs and donate the excess unfertilized eggs to another woman.

   ☐ Fertilize all eggs and transfer all viable embryos into my uterus during this cycle.

   ☑ Fertilize all eggs and cryopreserve (freeze) any excess embryos IF YOU SELECT THIS OPTION, YOU MUST EXECUTE A SEPARATE "CONSENT FOR CRYOPRESERVATION" FORM.

   ☐ Fertilize all eggs, transfer only ____ embryos, and cryopreserve any excess embryos. IF YOU SELECT THIS OPTION, YOU MUST EXECUTE A SEPARATE "CONSENT FOR CRYOPRESERVATION" FORM.

   ☐ Fertilize all eggs, transfer only ___ embryos, and discard all excess.

   ☐ Fertilize all eggs and discard all excess.

   ☐ Fertilize all eggs and donate all excess embryos.

(C. 207).

Because the Aysennes opted to cryopreserve additional embryos, they were required to sign a "Disposition of Embryos" agreement (dated January 29, 2013). In that agreement, they were informed that CRM agreed to store the cryopreserved pre-embryos for 5 years (*i.e.*, until 2018) assuming storage fees were paid, and they were given the option for transfer to a

long-term storage facility thereafter. (C. 202). The Aysennes checked the following option boxes:

> Nonpayment of Cryopreservation Storage Fees
>
> Maintaining embryo(s) in a frozen state is labor intensive and expensive. There are fees associated with freezing and maintaining cryopreserved embryo(s). Patients/couples who have frozen embryo(s) must remain in contact with the clinic on an annual basis in order to inform the clinic of their wishes as well as to pay fees associated with he storage of their embryo(s). In situations where there is no contact with the clinic for a period of 5 years or fees associated with embryo storage have not been paid for a period of 5 years and the clinic is unable to contact the patient after reasonable efforts have been made (via registered mail at last known address), the embryo(s) may be destroyed by the clinic in accordance with normal laboratory procedures and applicable law.
>
> If I/we fail to pay the overdue storage fees within 30 days from the date of said mailing, such failure to pay constitutes my/our express authorization to the clinic to follow the disposition instructions we have elected below without further communications to or from us (check one box only):
>
> ☐ Award for research purposes, including but not limited to embryonic stem cell research, which may result in the destruction of the frozen embryos but will not result in the birth of a child.
>
> ☑ Destroy the frozen embryos.

> Time-Limited Storage of Embryos
>
> The Clinic will only maintain cryopreserved embryos for a period of 5 years. After that time we elect (check one box only):
>
> ☐ Award for research pruposes, including but not limited to embryonic stem cell research, which may result in the destruction of the frozen embryos but will not result in the birth of a child.
>
> ☑ Destroy the frozen embryos.
>
> ☐ Transfer to a storage facility at our expense.
>
> Default Disposition
> I/We understand and agree that in the event none of our elected choices are available, as determined by the clinic, the clinic is authorized, without further notice to us, to destroy and discard our frozen embryos.
>
> Initials [illegible]/[illegible]

(C. 202). The Agreement also specifically states:

> I/We agree that in the absence of a more recent written and witnessed consent form, the Clinic is authorized to act on our choices indicated below, so far as it is practical.

(C. 197).

The Aysennes signed two additional agreements when they had embryos transferred to Ms. Aysenne's uterus in 2013 and 2015, which again acknowledged that "many embryos do not survive the freezing and thawing" process:

> I, Felicia Aysenne (wife) and I, Scott Aysenne (husband), consent to the thawing and replacement of a selected number of our frozen stored embryos into the woman's uterus for the purpose of establishing a pregnancy. We understand that many embryos do not survive freezing and thawing and that this can only be determined after thawing.

(C. 210-211).

The speculative nature of whether a fertilized embryo will probably progress to produce a pregnancy was also explained as part of the agreements signed by the Aysennes, with their initials on each page, including the following acknowledgements:

> It is important to note that since many eggs and embryos are abnormal, it is expected that not all eggs will fertilize and not all embryos will divide at a normal rate. The chance that a developing embryo will produce a pregnancy is related to whether its development int he lab is normal, but this correlation is not perfect. This means that not all embryos developing at the normal rate are in fact also genetically normal, and not all poorly developing embryos are genetically abnormal. Nonetheless, their visual appearance is the most common and useful guide in the selection of the best embryo(s) for transfer.

(C. 183).

The Aysennes further acknowledged that laboratory accidents can occur resulting in the loss of some or all embryos:

> In spite of reasonable precautions, any of the following may occur in the lab that would prevent the establishment of a pregnancy:
>
> - Fertilization of the egg(s) may fail to occur.
> - One of more eggs may be fertilized abnormally resulting in an abnormal number of chromosomes in the embryo; these abnormal embryos will not be transferred.
> - The fertilized eggs may degenerate before dividing into embryos, or adequate embryonic development may fail to occur.
> - Bacterial contamination or a laboratory accident may result in loss of damage to some or all of the eggs or embryos.
> - Laboratory equipment may fail, and/or extended power losses can occur which could lead to the destruction of eggs, sperm and embryos.

(C. 183).

Defendants' Motion to Dismiss Certain Claims in First Amended Complaint.

In response to the Amended Complaint, Defendants filed a second, joint Motion to Dismiss, again seeking dismissal of both Counts One and Two of the Amended Complaint.[4] (C. 256-271). Defendants' Motion to

[4] Plaintiffs represent repeatedly to this Court that Defendants only sought dismissal of Count One for wrongful death. (*See, e.g.*, Pls. Brief, p. 2). This is not accurate. Defendants' Motion to Dismiss sought dismissal of Count One and also specifically stated "Count Two, asserting a cause of action for Negligence/ Wantonness, is due to be dismissed." (C. 269). The arguments in favor of the dismissal of Count Two apply with equal force to both

Dismiss raised numerous grounds for dismissal pursuant to Rule 12(b)(1) and 12(b)(6) as well as ALA. CODE § 6-5-391, § 6-5-551, and in accord with §13A-6-1 and § 26-23H-1-8. (*Id*.)

Plaintiffs' Response.

Plaintiffs filed an Opposition to the Motion to Dismiss. (C. 316-335). They first cited Section 13 of the Alabama Constitution, arguing "regardless [sic] whether this suit will proceed as a wrongful death claim or a personal/special property claim, Alabama law mandates a mechanism of recovery for the injuries Plaintiffs have suffered."[5] (C. 321).

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negligence and wantonness. The basis for dismissal of Count Two included that Alabama does not recognize a claim by a parent not in the zone of danger for emotional distress caused by the loss of an unborn child and specifically cited *Hamilton v. Scott* , 97 So. 3d 728 (Ala. 2012) – a case in which this Court affirmed a trial court's refusal to allow a similar claim for mental anguish due to loss of an unborn child to proceed. (C. 270, n. 7). Defendants also pointed out dismissal of Count Two was proper due to the speculative nature of the claims as essentially ones for the loss of a chance for a future pregnancy (C. 270) and sought dismissal because, as pled, Count Two was an improper attempt to skirt the Wrongful Death Act and recover compensatory damages for "the value of an embryo" which is "inconsistent with Alabama law." (C. 271, n. 8). Plaintiffs' attempt in Count Two to make an end-run around the Wrongful Death Act, with what was in essence a claim for compensatory damages for the value of life, was brought into even clearer focus in Plaintiffs' Opposition to Motion to Dismiss, wherein they stated, "Whether the amount [of compensatory damages allowed under Count Two] would include the loss of future life would be up to the jury." (C. 334). All of these grounds for dismissal of Count Two were raised before the trial court.

[5] Of note, the Aysennes' suit is still proceeding below on the property/bailment claim.

Next, Plaintiffs relied on *Stinnett v. Kennedy*, 232 So. 3d 202 (Ala. 2016), *Hamilton v. Scott*, 97 So. 3d 728 (Ala. 2012), and *Mack v. Carmack*, 79 So. 3d 597 (Ala. 2011) (as well as the cases which led up to those opinions), which they argued as precedent for permitting an *in vitro*, pre-implantation cryopreserved embryo to bring a claim for wrongful death. (C. 324-330).

With regard to the Defendants' assertion Plaintiffs were seeking a non-compensable "loss of a chance" for a possible future pregnancy, the Aysennes stated the "gravamen of their action is the embryo's death in and of itself" as opposed to "loss of a chance" at a future pregnancy. (C. 330). Contradictorily, in the Conclusion of their filing, they declared: "All that matters is that an embryo has been wrongfully deprived of the chance at life." (C. 335).

With regard to the motion to dismiss their claim for compensatory damages for "the value of life" and emotional distress, the Aysennes ignored and did not address this Court's holding in *Hamilton v. Scott*. Instead, they argued that Alabama law has, in other circumstances, allowed mental anguish damages to plaintiffs not within the zone of danger. (C. 332-333). They also concluded with the statement that "whether that amount [of permissible recovery under Count Two] includes the loss of future life would be up to a jury." (C. 334).

Defendants' Reply.

Defendants filed a Reply in further support of dismissal, responding to each of Plaintiffs' arguments. (C. 343-365). They demonstrated the Alabama cases cited by Plaintiffs on the wrongful death issue actually support Defendants' position, holding the legislative definition of a "person" set out in the Brody Act is the

definition this Court has expressly held to be applicable in civil wrongful death actions involving a minor child. (C. 344-355).

Defendants also pointed out that Count Two and an attempt to assert a cause of action for the value of the life of an embryo, even one they may never have implanted, is "directly contradicted" by the documents attached to their Amended Complaint. (C. 358). The documents and agreements, signed by the Aysennes and incorporated into their Complaint, demonstrate their selection of the contractual option to destroy any unused embryos still in cryopreservation storage after five years. (*Id*.) The speculative and contradictory nature of Count Two was shown to be perfectly illustrated by the Aysennes' attempt, on the one hand, to recover for the lost potential of what their embryo could have been, while, at the same time, acknowledging they may never have allowed that embryo to be thawed or implanted. If these parents chose not to thaw and implant, this embryo would never have a chance at growing or being born, and yet the Aysennes nonetheless insisted on an entitlement to compensation for a possibility that might never occur. (C. 359). Defendants were clear that Plaintiffs had not properly pled a cause of action under Count Two. (C. 360).

This Reply was supplemented by a Motion to Strike Plaintiffs' Claims for Impermissible Damages. (C. 366-369). In that motion, Defendants further demonstrated the reasons a cause of action for the value of a potential life is "inconsistent with Alabama law;" the reasons there is no cause of action for mental anguish under these circumstances; and the reasons the claims in Count Two "are speculative, impermissible under Alabama law, and due to be stricken." (C. 367-368).

These arguments were subsequently supplemented by Defendants' further Reply in Support of their Motion to Strike. (C. 375-381). In that filing, Defendants reiterated that *Hamilton v. Scott* disallows a claim, on its face, seeking recovery for emotional distress for the loss of an unborn child. The brief also discussed the reasons cases involving mishandling of a dead body are inapplicable here and instead represent a recognized exception to the zone of danger rule. The Reply concluded with this statement: "Based on this law, and all of the grounds raised in the Defendants' Motion to Dismiss and Motion to Strike, including based on the speculative nature of the Plaintiffs' claims for mental anguish, those claims [in Count Two] are due to be dismissed and/or stricken." (C. 379).

The hearing held by the Trial Court[6]

All pending motions in this case were fully argued during a lengthy hearing on January 31, 2022 and were consolidated with oral arguments in the *LePage* case. (R. 1-99). At the hearing, counsel for the LePages/Fondes handled almost all of the oral argument, including regarding whether Alabama law permits a claim for wrongful death for an *in vitro*, cryopreserved embryo and what kind of damages are and are not permissible for the loss of human life in Alabama. (R. 47-64, 70-77). Counsel for the Aysennes had the opportunity to supplement or disagree with any portion of the previous oral argument but chose instead to fully adopt the arguments of Plaintiffs'

[6] As reflected in the transcript of the Motion to Dismiss hearing (R. 1-99), the trial court consolidated this case for purposes of oral argument with the parallel case of *LePage/Fonde v. CRM and Mobile Infirmary*, CV 2021-901607. Both cases arise out of the same incident, were before the same Circuit judge, were heard jointly, and are simultaneously on appeal before this Court.

counsel in the *LePage* case. (R. 79-81) ("MR. SMALLEY: ...I don't think there is any need to reargue the wrongful death aspect...I don't have anything to add to what Mr. Mulherin, Hines and Duncan have stated. I don't think we need to reiterate that....[And] again, we've argued, and the emotional damages aspect of the negligence claim, which I think has been covered in great detail.")

Notably, during the argument of counsel for the LePages/Fondes (adopted by the Aysennes), their counsel admitted exactly what these Defendants argued in moving to dismiss Count Two of the Aysennes' Complaint—that is that Alabama law does not permit compensatory damages for the loss of life, thereby conceding the very basis for Defendants' motion to dismiss the compensatory damage claim pled in Count Two by the Aysennes. (R. 59) ("Well, we don't get compensatory damages for death in Alabama.") Plaintiffs' counsel in the *LePage* case also conceded during oral argument that Alabama law does not recognize a claim for mental anguish for loss of life. (R. 62) ("So if it's a life, if it is a life, then absolutely, there is no cause of action for mental anguish, there is no harm to her [the mother] because that's not the law in Alabama.") Counsel for the Aysennes never disagreed with this statement but, as quoted above, adopted all arguments made by the *LePage* Plaintiffs. Thus, Plaintiffs collectively either agreed and/or adopted the agreement during oral argument that Alabama law does not recognize either of the theories asserted as a basis for compensatory damages espoused in Count Two of the Aysennes' Complaint.

The extent of the remainder of oral argument, added at the end of the hearing by counsel for the Aysennes, was a statement that "if Your Honor were to rule today

that the wrongful death claims are due to be dismissed, the Aysennes' as well as the other claims, it would still move forward on the other tort claims." (R. 81). In response, Counsel for CRM immediately clarified, stating: "I just want to make it clear that we have moved to dismiss all tort claims asserted by all." (*Id.*) Thereafter, counsel for Mobile Infirmary joined in, stating, "...[Plaintiffs' counsel] said we didn't move to dismiss wantonness, but on Document 71, page 14, we did move to dismiss Count Two....And, Judge, its 12(b)(6) but it's also 12(b)(1), which is whether you even have standing to have any of this that we're talking about at issue." (R. 92-93). The trial court took the motions under submission. (*Id.*)

The Trial Court's Rulings

The parties in both of these cases agreed to submit proposed orders for the trial court's consideration after it was suggested by counsel for the LePages/Fondes that this would help the trial court. (R. 88-89). Thus, both sides in this case submitted proposed orders after the hearing as suggested. (C. 382-383; 384-392).

Plaintiffs' submission was a two-paragraph Proposed Order, citing only Article I Section 13 of Alabama's Constitution and stating Plaintiffs are guaranteed a remedy, but adding that since "this Court is unsure of the exact contours of their remedy," "the Court will endeavor to define their available remedy upon completion of discovery." (C. 382-383). Defendants, on the other hand, submitted a Proposed Order actually addressing all of the arguments, statutes, and case law raised by the parties and quoting therefrom. (C. 384-392).

After considering the issues for several months, the trial court entered its Order of dismissal, attached

hereto as Exhibit A for this Court's ease of reference. (C. 397-406; Ex. A). In that Order, the trial court granted the Defendants' motions to dismiss Counts One and Two, leaving Count Three for bailment/ breach of contract pending (pled against CRM only). (C. 406). The trial court's Order stressed its obligation to rule on causes of action as they are pled and follow the law as it exists as opposed to accepting Plaintiffs' suggestion a trial court should or could "endeavor to define an available remedy" at some later date despite the fact that no cognizable claim was pled in Counts One and Two. (C. 404-405) ("Plaintiffs' assertion [in Count Two] that, if they cannot proceed under the Wrongful Death Act, this Court can and should side-step these well-established principles [of Alabama law] and allow an alternative tort claim for compensatory damages for the value of the life of a cryopreserved/in vitro embryo has no legal precedent in this state.") The trial court also entered a separate Order granting the Motion to Strike Plaintiffs' claims for Impermissible Damages under Count Two. (C. 407).

Thereafter, the Aysennes filed a Motion pursuant to ALA. R. CIV. P. 59(e)and 54(b) asking the trial court to Amend its Orders and make them final so as to sustain an immediate appeal. (C. 412-415). The trial court granted that motion and entered an amended dismissal Order clarifying its rulings on Count One and Two to be final judgments pursuant to Rule 54(b). (C. 416, 417-426).

STATEMENT OF THE ISSUES

1. Did the trial court "err in making findings of fact" in reaching its ruling, as asserted by Plaintiffs?

2. Did the trial court "err in relying upon appellate opinions from states other than Alabama" as asserted by Plaintiffs?

3. Were Plaintiffs improperly denied a right to remedy?

4. Does Alabama's Constitution guarantee a right to a tort remedy and were Plaintiffs improperly denied a tort remedy?

5. Did the trial court properly follow Alabama law and dismiss Plaintiffs' wrongful death claims given the clear instructions from this Court that the definition of a "person" in a civil wrongful death act should be harmonized and congruent with the definition promulgated by the Legislature in the Brody Act and applied in criminal homicide cases?

6. Does Alabama law prohibit making a "geographical" distinction between *in utero* unborn children and extra-uterine embryos as Plaintiffs contend?

7. Did the trial court properly dismiss Count Two, seeking compensatory damages for loss of life and mental anguish, given longstanding Alabama law prohibiting such recovery, especially given the concessions made at the hearing that such recovery has never been allowed in this context under Alabama law?

8. Have Plaintiffs articulated an equal protection claim on appeal and was such a claim preserved below?

STANDARD OF REVIEW

As the trial court stated in its Order (C. 398-399), in considering a challenge pursuant to Rule 12(b)(1) and (6) such as this, it accepted as true the allegations in the Complaint and undertook to decide whether "when the allegations of the complaint are viewed most

strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [the pleader] to relief." *Nance v. Matthews*, 622 So. 2d 297, 299 (Ala. 1993); *see also*, *Munza v. Ivey*, 2021 WL 1046484 (Ala. March 19, 2021); *Ex parte Mobile Infirmary Assoc.*, 2021 WL 4129400 (Ala. September 10, 2021). This Court, in reviewing such an order dismissing a case under 12(b)(6) or (1), undertakes a *de novo* review. *See Portersville Bay Oyster Co., LLC v. Blankenship*, 275 So. 3d 124, 129 (Ala. 2018); *Hutchinson v. Miller*, 962 So. 2d 884, 886 (Ala. Civ. App. 2007). The Aysennes' attempt to downplay the 12(b)(1) arguments made by the Defendants as inconsequential to this Court's review is without basis. (Pls.' Brief, p. 20).

Courts considering motions to dismiss first "eliminate any allegations in the complaint that are merely legal conclusions" and then determine whether the well-pled factual allegations of the complaint- assuming their veracity — plausibly give rise to an entitlement to relief. *Clay v. Thompson*, 2014 WL 3655990 (M.D. Ala. July 23, 2014). Neither the trial court nor this Court is required to accept as true, for the purposes of a motion to dismiss, conclusory allegations, deductions of fact, or legal conclusions set out in a complaint. *Ex parte Gilland*, 274 So. 3d 976, 985, n. 3 (Ala. 2018); *Ex parte Marshall*, 323 So. 3d 1188, 1207 n. 3 (Ala. 2020). When exhibits attached to a complaint contradict its allegations, a court is not required to accept the allegations as true. *Griffin Industries v. Irvin*, 496 F.3d 1189, 1205 (11th Cir. 2007). An exhibit made the basis of a cause of action which contradicts the averments of the pleading of which it is a part will control such pleading. *Hemphill v. Hunter-Benn & Co.*, 4 So. 2d 502 (Ala. 1941).

This Court has emphasized the importance of examining allegations *as worded* in the Complaint, instructing that a court "does not consider whether the claimant will ultimately prevail, only whether he has stated a claim under which he may possibly prevail." *Hightower & Co. v. United States Fidelity & Guar. Co.*, 527 So. 2d 689, 702-03 (Ala. 1988). Additionally, Alabama appellate courts "may affirm a trial court's judgment if it is supported by any valid legal basis." *GEICO General Insurance Co. v. Curtis*, 2018 WL 6729032 (Ala. Civ. App., December 21, 2018).

SUMMARY OF THE ARGUMENT

Like the Plaintiffs in the *LePage/Fonde* case, the Aysennes were able to build a family through the miracles of IVF and cryopreservation. They pled in their Complaint that "for many people, including the Plaintiffs herein, cryopreservation allows for peace of mind about their family." (C. 162). And yet, the position they urge here would upend the practice of freezing and storing pre-implantation embryos. It would make it difficult, if not impossible, for future couples to enjoy the same peace of mind they enjoyed. Were this Court to declare cryopreserved embryos to be "minor children" under the Wrongful Death Act, it would have to completely contradict its instructions in *Stinnett* about maintaining congruency of definitions between the Brody Act and the Wrongful Death Act. It would also be required to usurp the Legislature's role in creating the law of our state and ignore previous Legislative statements which purposefully treat IVF/*in vitro* embryos differently than those *in utero*.

Such a finding has the potential to open up a Pandora's box of legal ramifications. If all *in vitro* embryos are deemed to be minor children, can they continue to be cryopreserved at all? Can they ever be

discarded? Can the state *require* that all unused embryos be implanted or donated to another person/couple? Could the state force families to thaw and implant previously cryopreserved embryos or force couples to have more children than they wish? Could the state get involved in how many eggs can be harvested in the first place and/or fertilized? Could a frozen, unthawed embryo sue individuals who opted not to allow it to be thawed and implanted or who decided to discard it in the future? These are just some of the questions presented and some of the reasons that, without a robust legislative debate and a clear directive, every state judiciary which has considered these issues heretofore has rejected the same or similar arguments as those advanced by the Plaintiffs here.

The Aysennes adamantly insist the trial court's rulings are violative of Section 13 and have prevented them from their constitutionally guaranteed right to a remedy. This is simply not accurate. They have a pending potential remedy in the form of a bailment/contract claim currently ongoing in the trial court. They also had options to raise other tort claims which they did not assert. Instead, they improperly asked the trial court to allow them to proceed with an end-run around the Wrongful Death Act and "fashion remedies" for them after discovery, a concept which exists nowhere in the law. Alternatively, they asked the trial court to allow them to proceed on speculative and impermissible claims for emotional damages for the loss of a child in a setting not recognized in Alabama law, as well as for compensatory damages for the value of the life.

Likewise, it was improper for the Aysennes to ask the trial court to ignore this Court's prior *direct*

instruction that "...in light of the shared purpose of the Wrongful Death Act and the Homicide Act to prevent homicide,...borrowing the definition of "person" from the criminal Homicide Act to inform as to who is protected under the civil Wrongful Death Act [makes] sense....to harmonize who is a "person" protected from homicide under both the Homicide Act and Wrongful Death Act." *Stinnett v. Kennedy*, 232 So. 3d 202, 215 (Ala. 2016) (emphasis added). There would be no reason for this Court to state that the same definition of "person" should be applied in both criminal and civil settings in order to "harmonize who is a person protected from homicide under both the Homicide Act and the Wrongful Death Act," based on the shared purpose of the two acts, unless this Court wanted trial courts to adhere to that instruction. It is innately unfair to ask this Court to double-back and reverse the trial court for issuing a holding precisely in keeping with such a clear directive.

The same logic applies to Count Two and Plaintiffs' compensatory damage claims. The trial court followed precisely over a century of Alabama law prohibiting compensatory damages to compensate for the value of life or for mental anguish for the loss of life – law that was acknowledged at the hearing by Plaintiffs' counsel (speaking for the Plaintiffs in both cases). As Plaintiffs' proposed order demonstrates, the only reason given to the trial court to justify ignoring all of this controlling law was a plea that otherwise the Aysennes would be without remedy. That reasoning ignores reality. It is simply inaccurate to state that the trial court, or this Court, is required to ignore binding precedent or "fashion a remedy" for Plaintiffs who still have a portion of their claims pending and otherwise purposefully chose not to plead other available theories of recovery.

The Aysennes assert in their Amended Complaint they deserve compensation for the loss of the individual unique life this embryo represents, regardless of whether they ever intended to try to have it thawed or implanted. This argument reveals the speculative and inconsistent nature of Plaintiffs' claims and their flawed standing to bring these claims. They seem to be arguing that, on the one hand, they have the right to opt for permanent cryopreservation for this embryo or the right to decide themselves to discard it – either of which would ensure the embryo never progressed through implantation or pregnancy into a live birth. But, on the other hand, they argue if a lab accident occurs, they deserve compensation for the unique "life" lost – a "life" that would be just as absent from the world if it was stored forever in cryopreservation or destroyed at the insistence of or abandonment by Plaintiffs.

Furthermore, Plaintiffs' declaration that the location of an embryo has never been determinative of how it is treated is simply incorrect. Alabama's Legislature, like many other states, has repeatedly used the term *in utero* as a defining term to differentiate from the extrauterine setting in abortion and other statutes. Our Legislature has specifically declared ectopic or tubal pregnancies can be ended without violation of abortion laws – another example which clearly involves an intrauterine versus extrauterine designation among embryos, treating them differently in the eyes of the law based on location outside, as opposed to inside, a mother's uterus.[7]

The Defendants urge this Court to reject all arguments raised for the first time on appeal (directly

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[7] See, *e.g*. ALA. CODE § 26-23E-3(1).

or through adopting arguments improperly raised in the parallel appeal) and, like the trial court, resist the pressure to allow this case to be used as a political vehicle, and instead remain true to controlling, well-defined precedent and deference to the Alabama Legislature.

ARGUMENT

I. The trial court did not "err in making findings of fact" in reaching its ruling.

Plaintiffs' Statement of the Issues lists, as an issue on appeal, whether the "circuit court erred in making Findings of Fact when no discovery had been permitted." (Pls.' Brief, p. 7). Nowhere in the Argument section of the Brief is that issue fleshed out or mentioned again. Nowhere in their Brief do they point to any specific fact upon which they contend the trial court erroneously relied. Their only other reference to this purported issue is a vague sentence in their Statement of Facts, in which they assert this Court can only consider the facts laid out in the body of their Amended Complaint and must disregard "any assertions of purported facts filed by the Defendants as well as any purported conclusions of facts in the circuits court's Order." (Pls.' Brief, p. 8).

There are numerous problems with this unsupported declaration. First, a single mention of an issue without any further legal analysis or citation to authority, or even specification of what "purported facts" upon which the trial court supposedly improperly relied, is wholly insufficient to serve as a basis to reverse the trial court. Second, a review of the facts set out in the Defendants' Motion to Dismiss and/or the Order demonstrates that every fact mentioned is drawn from the Plaintiffs' filings and documents the

Plaintiffs attached to their Amended Complaint for the trial court's consideration.

There is nothing improper about relying on facts from attachments to a Complaint. In fact, this Court has held facts disclosed by a document appended to a complaint *govern* if there is any contradiction with what is pled. Our federal courts are in agreement. *See, e.g., Sumter County Bd. of Education v. Univ. of West Alabama*, 2021 WL 4236438 *1 (Ala. September 17, 2021) ("Exhibits attached to a pleading become part of the pleading...Therefore facts included in the [plaintiffs'] attachments to its complaint are incorporated into our rendition of the facts."); *Hemphill v. Hunter-Benn & Co*., 4 So. 2d 502 (Ala. 1941) ("An exhibit made the basis of a cause of action...contradicting the averments of the pleading of which it is a part will control such pleading."); *Griffin Industries, Inc. v. Irvin*, 496 F.3d 1189, 1205-1206 (11th Cir. 2007) ("Our duty to accept the facts in the complaint as true does not require us to ignore specific factual details of the pleading in favor of general or conclusory allegations. Indeed, when the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern.... Conclusory allegations and unwarranted deductions of fact are not admitted as true, especially when such conclusions are contradicted by facts disclosed by a document appended to the complaint. If the appended document...reveals facts which foreclose recovery as a matter of law, dismissal is appropriate.") (emphasis added).

Thus, these Defendants were correct to rely upon matters set out in the attached agreements as relevant facts for purposes of their Motion to Dismiss. Likewise, the trial court, like this Court, can properly consider these documents (and the facts established therein).

Indeed, the facts revealed in those documents trump the conclusory ones in the Plaintiffs' Complaint as a matter of law. There is nothing preventing a trial court from dismissing a case when appended documents reveal facts which directly contradict the Plaintiffs' theories of recovery, foreclose recovery as a matter of law, or demonstrate a lack of standing. The Aysennes' suggestion that the trial court erred in this regard or that this Court cannot do the same is incompatible with Alabama and federal law.

II. The trial court did not improperly rely on appellate opinions from states other than Alabama to reach its ruling.

Another proclamation in the Aysennes' Statement of the Issues which is not fleshed-out or mentioned anywhere else in their Brief is the contention that the "circuit court erred in relying upon appellate opinions from states other than Alabama." (Pls.' Brief, p. 7). The trial court's Order (Ex. A) does not reflect reliance on a single case from another state. It cites Alabama law, Alabama statutes, and Alabama pattern jury instructions as the basis of its holdings. (C. 397-406).

Ironically, the very next paragraph in the Aysennes' Brief following this statement is a reference to other cases from other states, with a lengthy footnote listing numerous cases and articles from around the country (many of which actually support the trial court's ruling or involve distinguishable and inapplicable facts such as products liability cases following cryopreservation tank malfunction, or the discovery that two embryos were discovered to have been mixed-up between families). (Pls.' Brief, p. 7-9, n. 3). It is difficult to understand why Plaintiffs would accuse the trial court of relying on out-of-state opinions with absolutely no basis to do so and, in the very next breath, cite this

Court to a string of out-of-state articles and cases in an apparent attempt to prove there is an "ever growing number of cases involving destruction of *in vitro* embryos through tortious conduct," with no attempt to show how tank malfunctions or embryo "mix-ups" relate to this appeal. Their criticism of the trial court is unfounded, and the cases listed in footnote 3 are not relevant. Notably, Plaintiffs never cite this Court to another state's decision which defines an embryo as "life" supporting a claim of wrongful death.

III. Plaintiffs have not been improperly denied a right to remedy.

The Aysennes' primary focus, emphasized in every portion of their Brief to this Court, is their insistence that the Defendants' position and the trial court's rulings denied them a right to a remedy. (*See, e.g.*, Plfs.' Summary of Argument, p. 21) ("A basic notion of Alabama's civil-justice system is that the law provides a right for every wrong... 'every person, for any injury done him, in his lands, good, person, or reputation, SHALL HAVE A REMEDY.'") In continuing to rely so heavily upon this argument, they have somehow ignored the obvious fact that they still have a contract/bailment claim pending before the trial court.

Nowhere in Section 13 of our state Constitution is there a guarantee of entitlement to any particular type of remedy or type of damages. To the contrary, this Court has been clear in stating:

> Section 13 does not focus upon any particular remedy, nor does it speak of remedies against specific parties. The essence of the provision is, instead, that an individual is entitled to *a remedy* for his injuries. Accordingly, a [holding]

> should withstand a Section 13 attack if *some* remedy is provided a plaintiff for his injuries.

Reed v. Brunson, 527 So. 2d 102, 111 (Ala. 1988) (emphasis in original). It is incontrovertible that the Aysennes still have a bailment claim pending. This Court has instructed that a Section 13 attack fails if, as here, *some* avenue for potential remedy is available.

Furthermore, the Aysennes continue to ignore what this Court has instructed for years: that only legislation which abolishes or alters a common-law cause of action triggers strict constitutional scrutiny under Section 13. "Where no common law right is affected, a judicial deference to the legislature is required." *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996, 1000 (Ala. 1982); *see also, Shelton v. Green*, 261 So. 3d 295, 297 (Ala. 2017) ("Because the statute at issue in this case does not abolish a common-law cause of action, we need not apply strict review under § 13.") A wrongful death action on behalf of an *in vitro* frozen embryo is definitely not an action that existed at common law. *See Pickett v. Matthews*, 192 So. 261, 266 (Ala. 1939) ("[T]he homicide statute is not the creation of a remedy but of a cause of action for death by wrongful act, which did not exist at common law.") Nor was there a common-law cause of action for the loss of a frozen embryo. Plaintiffs' continued insistence that they have been unconstitutionally denied a right to a remedy is without basis in law or fact.

IV. Alabama's Constitution does not guarantee a right to a tort remedy, nor were Plaintiffs improperly denied a tort remedy.

Perhaps recognizing how disingenuous it is to argue they have been deprived of *all* remedies, the Aysennes advance a slightly different argument to this Court,

now arguing that "the circuit court's fundamental error was ruling that the Plaintiffs were left with no tort remedies at all for the wrongful death of their embryo." (Pls. Brief, p. 25).

First of all, this "constitutional guarantee to a tort remedy" argument was never made to the trial court. More importantly, as mentioned in the cases cited above, there is no constitutional guarantee of a right to a tort remedy or to a particular type of damages under § 13. *See e.g., Poffenbarger v. Merit Energy Co*., 972 So. 2d 792, 802 (Ala. 2007) ("The [Plaintiffs] argue limiting compensatory damages in the present case...would contravene the guaranty in § 13 that every person has a remedy....We disagree. Our holding allows [them] to seek a remedy in the form of damages measured by objective pecuniary loss."); *Sears Termite & Pest Control Inc. v. Robinson*, 883 So. 2d 153, 158 (Ala. 2003) ("[W]e have not been furnished with any authority suggesting a limitation on the right to recover consequential damages violates Art. I, § 13.") Plaintiffs' assertion that Section 13 guarantees a cause of action sounding in tort is not supported by any citation to any legal authority for a reason.

That is not to say that the Aysennes were without options to properly plead a cause of action in tort in lieu of improperly trying to convince the trial court to allow them to maintain a pseudo-wrongful death claim posing as a negligence/wantonness claim for the loss of the life of a "baby" killed in a "cryogenic nursery." If they truly sought to plead an alternative tort claim to apply if the frozen embryos were not deemed "persons" under the law, Alabama law provides such a solution. A bailor suing a bailee for damage to bailed property unquestionably has the option under Alabama law of

seeking damages pursuant to a tort claim.[8] The fact that the Aysennes did not plead their bailment claim in tort was their decision and not the result of an unconstitutional act on the part of the trial court. Likewise, ALA. CODE § 6-5-263 provides bailors a potential remedy sounding in tort via a right to make a claim against any third party alleged to have caused damage to bailed property — exactly what they contend occurred here in Count Three. This statutorily provided cause of action was another tort option available to, but not exercised by, the Aysennes. Plaintiffs' repeated and hyperbolic insistence that they have been denied any avenue for tort remedy (which is not a constitutional guarantee despite their suggestion otherwise) is due to be rejected.

This Court should also view with skepticism the Plaintiffs' effort to analogize to a hypothetical truck wreck occurring during transport of "cryogenic nursery equipment storing *in vitro* embryos." (Pls.' Brief, p. 26). Under this generalized hypothetical, which seems to contemplate a similar bailment arrangement (but just in the transport setting), the parents of the embryos would have, at a minimum, a statutorily-created cause of action against any third-party whose actions damaged the bailed property under ALA. CODE § 6-5-263, along with the same options the Aysennes had of asserting a tort or contract bailment action against the bailee. But, as the trial court recognized here, because there is no basis under Alabama law to deem frozen, *in vitro* embryos to be "minor children" or "persons," there would likewise be no authority to allow a disguised wrongful death claim to stand, in essence seeking compensation for the death of a child and an

[8] *See, e.g. Hackney v. Perry*, 44 So. 1029 (1907).

award of damages for the value of human life, which Alabama law is clear cannot be measured or monetized.[9]

V. The trial court properly followed Alabama law in dismissing Plaintiffs' wrongful death claims, given clear instructions from this Court that the definition of a "person" in a civil wrongful death act should be harmonized and congruent with the definition promulgated by the Legislature in the Brody Act and applied in criminal homicide cases.

Plaintiffs insist —once again on the basis of their repeated mantra that "there must be a remedy" — that the trial court should have allowed a cause of action under Alabama's Wrongful Death Act, since this is, according to Plaintiffs, the most "logical" remedy. (Pls.' Brief, p. 27). This is contrary to Alabama law and a complete oversimplification of the legal issue

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[9] Plaintiffs' citation to cases allowing recovery for the death of a dog or damage to livestock and crops is unavailing. The fact that the Legislature established a statutory means of valuing livestock unlawfully killed or disabled simply demonstrates the Legislature can and does, after debate and due legislative consideration, create laws governing recovery for unique situations. It also demonstrates that the Legislature is the proper body to do so. The cases cited from the early 1900's which hold an owner was entitled to fair market value of a dog killed by a train or permitting recovery for crops damaged by cattle are not analogous to the situation at hand. It is quite an oversimplification to suggest that cases involving animals and crops, which can be sold, owned, and bred/grown for money, provide some guidance in a case involving a tiny group of *in vitro*, frozen cells which are not growing or part of an active pregnancy; which might never progress or be thawed or implanted or born; and which cannot be bought or sold. This comparison demonstrates another inherent conflict in the Plaintiffs' argument, wherein they claim their embryo was a child in a "cryogenic nursery," while at the same time analogizing to a commodity like cattle or crops.

presented to the trial court by Plaintiffs' Count One. As this Court stated in the recent case of *Ex parte Z.W.E.*, 335 So. 3d 650, 657 (Ala. 2021), when examining a question regarding paternity of an unborn child, "Our task in this case is not to interpret the word 'child' generally but to interpret the legislature's definition of 'child.'"

In the case at hand, the trial court was not tasked with declaring when life begins or when conception occurs but rather to determine whether Alabama law deems an extrauterine, pre-implantation embryo, frozen at sub-zero temperatures, not developing and certainly not yet implanted or developing *in utero* (and perhaps never to be so implanted), to be a "minor child" as that term is used ALA. CODE. § 6-5-391. The trial court correctly held that, under the law as it currently is written, it does not. As this Court instructed in *Ex parte Z.W.E., supra*, "It is for the legislature, not this Court, to change the definition of the term 'child' if it so desires." (*Id.*) *See also, Doe v. Obama*, 670 F. Supp 435, 440 (So. Dist. MD, 2009) ("The Complaint names Mary Doe, an unspecified embryo frozen in a state of cryopreservation...as a plaintiff in this action and asserts Mary Doe along with nearly 20,000 other embryos are 'human beings' who will suffer an imminent threat of destruction...if funding for stem cell research is permitted...[however] the embryos must be able to show an invasion of a legally protected interest which embryos do not possess as they are not considered to be persons under the law.")

When interpreting the meaning of the term "minor child" in civil wrongful death actions, this Court has consistently relied on Alabama's criminal Homicide Act, ALA. CODE § 13A-6-1 *et seq*. and "repeatedly has emphasized the need to establish congruence between

the criminal law and [Alabama's] civil wrongful death statutes." *Mack v. Carmack*, 79 So. 3d 597, 602, 611 (Ala. 2011) (finding that "the purpose and reach of the Wrongful Death Act [are] tied to the State's criminal homicide statutes" and "[t]he wrongful death statutes seek to prevent homicides."); *Lollar v. Tankersley*, 613 So. 2d 1249, 1253 (Ala. 1993); *Gentry v. Gilmore*, 613 So. 2d 1241, 1245 (Ala. 1993) ("There should not be different standards in the wrongful death and homicide statutes, given that the avowed public purpose of the wrongful death statute is to prevent homicide and to punish the culpable party and not to compensate for the loss.") Concurring in both *Lollar* and *Gentry*, Justice Houston discussed at length the importance of congruency between criminal Homicide Act's definition of "person" and the Wrongful Death Act's definition of "minor child."

The trial court properly rejected Plaintiffs' argument that the trial court itself had the power in this case to expand the definition of the term "minor child" in the context of Alabama's Wrongful Death of a Minor Act (ALA. CODE §6-5-391(a)). The trial court properly followed the holdings of this Court which are directly on point and which have twice addressed this issue directly. First, in *Mack v. Carmack*, 79 So. 3d 597 (Ala. 2011), this Court instructed unequivocally that the term should be defined in the civil context consistent with the definition of a person utilized by the Legislature in the Brody Act, stating as follows:

> In pertinent part, the so-called "Brody Act," Act No. 2006–419, Ala. Acts 2006, codified as Ala. Code 1975, § 13A–6–1, changed the definition of the term "person" in the article of the Alabama Code defining homicide offenses. Before its amendment in 2006, this article

defined the term "person" as "a human being who had been born and was alive at the time of the homicidal act." § 13A–6–1(2), Ala. Code 1975. As amended by the Brody Act, § 13A–6–1(a)(3), Ala. Code 1975, now defines the term "person" as "a human being, *including an unborn child in utero at any stage of development, regardless of viability.*"...

Our legislature has now expressly amended Alabama's homicide statutes to include as a victim of homicide "an unborn child in utero at any stage of development, *regardless of viability.*" § 13A–6–1(a)(3), Ala. Code 1975 (emphasis added). This change constitutes clear legislative intent to protect even nonviable fetuses from homicidal acts. As Justice Houston's comment in his special writings in *Gentry* and *Lollar* indicated, this Court repeatedly has emphasized the need for congruence between the criminal law and our civil wrongful-death statutes. We have already noted that the *Huskey* Court stated that "[o]ne of the purposes of our wrongful death statute is to prevent homicides." *Huskey,* 289 Ala. at 55, 265 So.2d at 597. The Court in *Eich* similarly observed that "the pervading public purpose of our wrongful death statute ... is to prevent homicide through punishment of the culpable party and the determination of damages by reference to the quality of the tortious act...." *Eich,* 293 Ala. at 100, 300 So.2d at 358

In accord then with the numerous considerations discussed throughout this opinion, and on the basis of the legislature's amendment of

> Alabama's homicide statute to include protection for "an unborn child in utero at any stage of development, regardless of viability," § 13A–6–1(a)(3), we overrule *Lollar* and *Gentry,* and we hold that the Wrongful Death Act permits an action for the death of a previable fetus.

Mack, 79 So. 3d at 600, 610-611 (emphasis added).

Several years later, in *Stinnett v. Kennedy*, 232 So. 3d 202 (Ala. 2016), this Court reaffirmed the logic and holding in *Mack*, explaining that while there may not always be mirror civil and criminal liability or mirror exceptions to liability under both the Brody Act and the Wrongful Death Act, it nonetheless "made sense" to use the same definitions in both Acts to "harmonize" the definition of who is a person under the two Acts, stating:

> Of course, it is also true that the amended definition of "person" upon which we relied in *Mack*, strictly speaking, defined only the victim of a criminal homicide or assault. Nevertheless, in light of the shared purpose of the Wrongful Death Act and the Homicide Act to prevent homicide, the amendment was an important pronouncement of public policy concerning who is a "person" protected from homicide. Thus, borrowing the definition of "person" from the criminal Homicide Act to inform as to who is protected under the civil Wrongful Death Act made sense. We reasoned "it would be 'incongruous' if 'a defendant could be responsible criminally for the homicide of a fetal child but would have no similar responsibility civilly.'" 79 So. 3d at 611 (quoting *Huskey*, 289 Ala. at 55, 265 So.2d at 597–98).

> This attempt to harmonize who is a "person" protected from homicide under both the Homicide Act and Wrongful Death Act, however, was never intended to synchronize civil and criminal liability under those acts, or the defenses to such liability....Thus, we fail to see how applying an exception from criminal punishment to civil liability would promote congruence between the Homicide Act and the Wrongful Death Act.

Stinnett, 232 So. 3d at 215 (emphasis added).

The holding of *Stinnett* was very limited, turning on whether "the physician exception from criminal liability found in the Brody Act should be extended" to bar recovery for tort liability imposed under the Wrongful Death Act. In reaching its decision, this Court re-emphasized its prior instruction in *Mack* that the same definition of a "person" should apply to both Acts, given the shared purpose of the two acts. Indeed, the *Stinnett* Court specifically stated that it "made sense" to "harmonize" these definitions so that there is congruency between "who is protected from homicide under both the Homicide Act and the Wrongful Death Act." *Id*. It is unclear how Plaintiffs can argue that the holding in *Stinnett* supports the application of inconsistent definitions of who is a person/child between the two Acts; this Court plainly stated just the opposite in both *Mack* and *Stinnett*. Given that the shared purpose of both acts is to prevent homicide, it is inconsistent for Plaintiffs to argue for a substantial expansion of the wrongful death statute to include the "homicide" of a cryopreserved embryo when the Aysennes themselves, at the time the agreements were signed, personally contracted to permit destruction of

any remaining embryos after the passage of a certain amount of time.

Given this Court's stated intent that there be congruency between the definition of a "person" in Alabama's homicide laws and its civil wrongful death statutes, it would have been improper for the trial court to hold otherwise. There was no proper legal basis upon which the trial court could have redefined the term "person" more expansively in the civil context than in the criminal one; destroy congruence between the statutes; expand the term "person" to include *in vitro*, as opposed to *in utero*, pre-embryos; and usurp the role of the Legislature.

Plaintiffs' Brief relies upon a portion of Justice Parker's concurrence in *Stinnett*, seemingly without understanding that it actually supports the holding in *Mack* and the goal of congruence for "unborn children" under both Acts:

> We settled the incongruence between civil and criminal statutes in *Mack* not by giving unborn children less protection but by recognizing that unborn children, viable or not, are equally protected under the Wrongful Death Act.

(Pls.' Brief, p. 29). Nothing in Justice Parker's concurrence rejects the logic of *Mack* or suggests disagreement with the application of the same definition of "minor child" equally under both Acts. The trial court was bound to follow suit and apply that same definition, *i.e.* "a human being including an unborn child *in utero* at any stage of development regardless of viability." ALA. CODE §13A-6-1. Had the trial court held otherwise, it would have violated the very principles of deference to legislative intent and

separation of powers cited by Justice Parker in his concurrence: "This Court is not at liberty to rewrite statues or to substitute its judgment for that of the Legislature." *Stinnett*, 232 So. 3d at 223.

VI. Alabama law does not prohibit making a distinction between *in utero* unborn children and extra-uterine embryos as Plaintiffs contend.

Plaintiffs repeatedly suggest there is "no difference" between cryopreserved *in vitro* embryos and those developing *in utero* except location. (Pls.' Brief, p. 13). They assert any distinction drawn between the two is completely arbitrary, and pose the following question to this Court, "Why would there be such a sharp legal distinction between human embryos based solely on whether they are *in utero* or *in vitro*?" (Pls.' Brief, p. 27, 31). The answer to that question is self-evident, and the distinction is one our Legislature has repeatedly applied in acknowledgement of the realities of science and IVF. There are marked differences between a cryopreserved/frozen, pre-implantation, *in vitro* embryo and one developing in a mother's uterus. For example, one is growing as part of an active pregnancy,[10] and one will never be unless the decision is made to attempt thawing and implantation. Until that time, the *in vitro* embryo is not growing or developing in any sense of those words, and there is no way to know whether a frozen *in vitro* embryo will ever be successfully thawed and implanted, so that an *in utero* process can ever begin. Similarly, there is no way to

[10] And again, critical to the issue of standing, cryopreserved embryos can be placed in any medically-suitable woman, and are not legally limited to implantation into the person who produced the egg.

know if the *in vitro* embryo will be eternally frozen without any further development, purposefully destroyed, or unintentionally destroyed in the thawing process itself. As courts and Legislatures across this country have recognized, the differences are myriad.

Plaintiffs ask this Court to issue a ruling, based on a public policy argument, which will "eliminate any *in vitro* versus *in utero* distinction." (Pls.' Brief, p. 30). First of all, this request demonstrates a lack of any awareness that the Aysennes' chosen course of undergoing IVF and utilizing cryopreserved embryos was in and of itself dependent on this distinction. They would never have been allowed the option to permanently freeze and store an already growing *in utero* fetus. They would have never checked the box opting for destruction after 5 years if they did not view *in vitro* embryos differently from *in utero* ones. Just as importantly, this request ignores that it is not up to this Court to make such an absolute, all-encompassing pronouncement of public policy and disregard distinctions drawn by the Legislature. As this Court stated in *Tolbert v. Tolbert*, 903 So. 2d 103, 108 (Ala. 2004), "The legislative process, through elective representatives... is the best method yet derived by man for the enactment of law expressive of the public policy of its people." All of the complexities and nuances surrounding the process of *in vitro* fertilization and storage, as demonstrated by the briefing by both sides, crystalizes exactly why this is a public policy issue which should be debated in the Legislature, not through a sweeping pronouncement from this Court, with untold and unforeseen consequences for thousands of Alabama families impacted by IVF.

In fact, the Alabama Legislature has already, on more than one occasion, specifically drawn the very

distinction Plaintiffs insist is improper between an *in utero* pregnancy and an *in vitro* or extra-uterine embryo.[11] Had the Legislature not mindfully made a legal distinction between *in vitro* and *in utero* embryos, countless numbers of couples like the Aysennes would already have been vulnerable to criminal and civil liability when, for whatever reason (whether it be death of a spouse; divorce; the passage of time; other successful pregnancies; or entirely private and personal reasons; etc.), they opted to discard unused embryos or donate them to science for research purposes rather than store them indefinitely. It is truly inconsistent for Plaintiffs to insist that the loss of their cryopreserved embryo should be deemed a killing or homicide, when it is undisputed that: they themselves opted to inseminate more eggs than they were potentially planning to have implanted; they have taken the position they may not ever have opted to implant their remaining cryopreserved embryo; and they were given, and at one point exercised, the option of choosing disposal of unused embryos in the event of the passage of a certain number of years.

Notably, the distinction between embryos which are *in utero* versus those outside the uterus, which Plaintiffs' Opposition contends is so offensive and improper, was not only used by the Legislature in the 2019 Human Life Protection Act, it is also, as

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[11] *See*, ALA. CODE §13A-6-1(a)(3) ("PERSON – The term...means a human being including an unborn child *in utero* at any stage of development regardless of viability."); ALA. CODE §26-23H-3(7) ("UNBORN CHILD, CHILD, OR PERSON – a human being, specifically including an unborn child *in utero* at any stage of development, regardless of viability."); ALA. CODE § 26-23F-3(12) (defining "unborn infant" as "a human being *in utero* at any stage of development.")

mentioned above, the key distinguishing factor in the exemption of ectopic or extra-uterine pregnancies in Alabama's anti-abortion statutes. *See,* ALA. CODE § 26 23H-3(7) ("UNBORN CHILD, CHILD, OR PERSON – a human being, specifically including an unborn child in utero at any stage of development, regardless of viability."); ALA. CODE § 26-23E-3. This distinction, based on location of the embryo outside the uterus combined with the lack of an ongoing-intrauterine pregnancy, is one which other states have made as well in both the abortion and wrongful death context. *See, e.g., Saleh v. Damron*, 836 S.E.2d 716, 723-724 (W.Va. Ct. App. 2019) ("[T]his Court stated twice that its decision was limited to children who were en ventre sa mere (in the womb) which necessarily excludes an ectopic embryo or ectopic fetus...We must assume that our decision correctly interpreted the Legislature's intent that the meaning of the term "person" for purposes of the wrongful death statute also includes only a child that is en ventre sa mere or in the womb.")

It is also a matter of public record (over which this Court may take judicial notice) that during the debate on the Alabama Senate floor regarding that Act, one of the bill's sponsors, Senator Clyde Chambliss, publicly clarified that the "*in utero*" language in the Act was indeed intentional (as opposed to a meaningless, "non-exclusionary" term as suggested by Plaintiffs' brief). In fact, Senator Chambliss is on record as stating it was *not* the intent of the Legislature through this Act to impact or prevent the destruction of fertilized *in vitro* eggs in the IVF lab setting.[12]

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[12] *See,* Lambe, Jerry, *Alabama Abortion Law Says Terminating a Fertilized Egg Is Legal in a Lab Setting* (May 29, 2019) https://lawandcrime.com/high-profile/alabama-abortion-law-says-terminating-a-fertilized-egg-is-legal-in-a-lab-setting/ ("During the

Alabama's Legislature has also utilized this very distinction through its efforts to tailor Alabama's Uniform Parentage Act in recognition of the realities of modern artificial reproduction techniques ("ART"). *See*, ALA. CODE § 26-17-101, *et seq*. For example, that Act provides that in the event an assisted reproduction occurs after a divorce and unless there is a signed record of consent, a former spouse is not a parent of the resulting child – a distinction that would never apply outside the context of ART. ALA. CODE § 26-17-706(a). Also, in a big departure from how inheritance and paternity has historically been treated, Alabama's Uniform Parentage Act provides that if a spouse dies before placement of a cryopreserved embryo, the deceased spouse is not a parent of the resulting child in the eyes of the law. ALA. CODE § 26-17 707.

In fact, the Uniform Comment to Article 7 of Title 26 specifically reference ART-related changes in the law, some of which have already occurred and some of which are still needed:

> During the last thirty years, medical science has developed a wide array of assisted

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bill's legislative debate, a Democratic state Senator inquired as to how the law would impact labs that discard fertilized eggs at an *in vitro* fertilization clinic. Republican state Senator and sponsor of the bill, Clyde Chambliss, responded that, 'The egg in the lab doesn't apply. It's not in a woman. She's not pregnant.'")

See also, Ariana Eunjung Cha and Emily Wax-Thibodeaux, American Civil Liberties Union sues Alabama over near-total abortion ban, Washington Post (May 24, 2019) https://www.washingtonpost.com/health/2019/05/24/planned-parenthood-other-health-clinics-sue-alabama-over-near-total-abortion-ban-law/, quoting Eric Johnston, founder and president of the Alabama Pro-Life Coalition and who helped write the bill, as stating the Alabama Human Life Protection Act would "absolutely not" affect *in vitro* fertilization.

> reproductive technology often referred to as ART which have enabled childless individuals and couples to become parents. Thousands of children are born in the United States each year as a result of ART....Many couples employ a common ART procedure that combines sperm and eggs to form a pre-zygote[13] that is then frozen for future use....Disposition of such pre-zygotes or even issues of their ownership create not only broad publicity but also are problems on which courts need guidance.

ALA. CODE § 26-17-7 cmt. (1975). In light of these comments and others found within our state's Uniform Parentage Act, there can be no question that the Legislature is both aware of the benefits of ART and aware of the complex issues these medical advances can create in the law. There is simply no basis upon which to conclude that it is impermissible in Alabama to draw a legal distinction between *in vitro* and *in utero* embryos.

This Court should also be aware that in *Tenn. Op. Att'y Gen.,* No. 22-12 (Oct. 20, 2022) (attached hereto at Ex. B), Tennessee's Attorney General recently drew this very distinction when answering the question of whether the disposal of a human *in vitro* embryo that has not been transferred to a woman's uterus is a "criminal abortion" under Tennessee's Human Life Protection Act (an Act quite similar to Alabama's "Human Life Protection Act," with similar goals of

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[13] Notably, the term "pre-zygote" is found in the comments to Alabama's Uniform Parentage Act to describe a fertilized *in vitro* embryo. This certainly disproves the Plaintiffs' contention that the term "pre-embryo" is one made up by Defendants and/or intended to dehumanize.

protecting unborn life). In response, the Attorney General advised:

> No. The Human Life Protection Act only applies when a woman has a living unborn child within her body.... To "perform an abortion" within the meaning of the law, a person must use an "instrument, medicine, drug, or ... other substance or device with intent to terminate the pregnancy of a woman known to be pregnant." Id. § 39-15-213(a)(1). And to be "pregnant" within the meaning of the law, a woman must have "a living unborn child within her body." Id. § 39-15 213(a)(4) (emphasis added).
>
> Disposing of an embryo that was created outside a woman's body and that has never been transferred to a woman's body thus does not qualify as "abortion." Id. § 39-15-213(a)(1). Such an embryo may fit the Act's definition of "[u]nborn child," id. § 39-15-213(a)(4), but the Act does not prohibit the embryo's disposal unless and until it is "living within" a woman's body, id. § 39-15-213(a)(3). Only then can the embryo's gestation render a woman ""[p]regnant," id., and if there is no "pregnancy" to "terminate," there can be no "abortion," id. § 39-15-213(a)(1)....In sum, the Human Life Protection Act does not apply to a human embryo before it has been transferred to a woman's uterus and, therefore, disposing of a human embryo that has not been transferred to a woman's uterus is not punishable as a "criminal abortion" under the Act.

See also, Jeter v. May Clinic Arizona, 121 P. 3d 1256 (Ariz. Ct. App. 2005); *Miller v. American Infertility Group of Illinois, S.C.*, 897 N.E.2d 837 (Ill. 2008); *Penniman v. Univ. Hospitals Health System, Inc.*, 130 N.E.3d 333 (Ohio 2019); *Institute for Women's Health P.L.L.C. v. Imad*, 2006 WL 334013 (Tx. 2006); *McQueen v. Gadberry, 507 S.W.3d 127 (Mo. Ct. App. 2016).*

Plaintiffs urge this Court to deem frozen, pre-implantation embryos to be the same as *in utero,* developing fetuses and therefore legal "persons." Yet they cannot cite a single case from a single court that has been willing to do so without a clear legislative directive. Respectfully, this Court should act in accord with courts nationwide, recognizing it is up to the Legislature to make such a change in the law.

VII. The trial court properly dismissed Count Two, which sought compensatory damages for loss of life and mental anguish, given long-standing Alabama law prohibiting such recovery and the concessions made at the hearing that such recovery has never been allowed in this context under Alabama law.

The trial court had valid bases under both Rule 12(b)(6) and 12(b)(1) to dismiss Count Two. Even counsel for the LePages/Fondes (to whom counsel for the Aysennes specifically deferred at oral argument) admitted that there is no right provided by Alabama law to any of the remedies sought by the Aysennes in Count Two. Plaintiffs now seek to minimize their pleading insufficiencies and convince this Court they pled a recognized cause of action but were just inexact in delineating what damages they would be able to recover under Count Two. To the contrary, this case did not involve the assertion of a recognized cause of action that was missing some minor details. This is an

unprecedented attempt to articulate a variation of a claim for wrongful death on behalf of a cryopreserved, *in vitro* embryo asserted to be an "embryonic child," named "Baby Aysenne," who died in a "cryogenic nursery," and then recover for the value of the "life" lost and the mental anguish of "losing a child."

Importantly, this Count was not pled as a true alternative claim for loss of "property." The Aysennes purported to assert Count Two as an alternative "property" claim if "Baby Aysenne" was not deemed to be a person, but property instead. Yet, their Amended Complaint contradictorily did just the opposite under Count Two and sought only impermissible damages for the value of human life and emotional distress for loss of a child with no pretense of being in the zone of danger. And, in further contradiction, the Aysennes pled entitlement to this claim based on the asserted right to recover for the value of a "human life," despite the fact that the documents attached to the Complaint demonstrated they could not have viewed their frozen embryo as a "minor child" and "unique human life" at the time they opted for placing time parameters on storage and allowing destruction of any remaining embryos. Certainly, it is inconsistent for Plaintiffs to declare they might not have ever thawed or tried to implant this embryo, yet claim compensation for the loss of a unique life. It does not make sense to keep a cryopreserved embryo frozen indefinitely or otherwise unused if your goal is to honor it as a unique life. (C. 197, 202, 210-211).

It is well-established in this state that it is impermissible to ask a civil jury to assess damages for the value of human life, which is exactly what the Aysennes sought in Count Two. *See Central Ala. Electric Co-op v Tapley*, 546 So. 2d 371, 376 (Ala. 1989)

("This view [of permitting only punitive damages in a wrongful death action] rests on the premise that one may be adequately compensated for injuries but the value of a human life has no measure."); *Killough v. Jahandarfard*, 578 So. 2d 1041, 1044 1045 (Ala. 1991) ("In limiting the damages in a wrongful death action to punitive damages only, the Legislature reflects the conviction of the citizens of this state that the value of human life cannot be measured in dollars... The Supreme Court of the United States...[has also] recognized that ...the value of human life cannot be measured...Alabama's law in a civil wrongful death action requires of the jury...that the focus of the jury be the defendant's conduct. [A jury] cannot consider the value of the life of the victim.") Every argument advanced by the Aysennes in support of Count Two violated these well-entrenched principles of Alabama law.

Likewise, Plaintiffs' claims for compensatory damages for mental anguish due to negligence were unsustainable and properly dismissed. As a matter of law, Alabama does not recognize emotional distress as a compensable injury when the plaintiff has not been physically injured or placed at risk of physical injury by the alleged negligence. The face of the Complaint demonstrates neither of the Aysennes was injured or at risk of physical harm as a result of the alleged negligence, nor do they claim to have been present at the time of the incident made the basis of this suit or in the "zone of danger."

This Court has adhered to this very principle specifically in the context of a parent claiming emotional distress due to the loss of an unborn child. *See Hamilton v. Scott*, 97 So. 3d 728 (Ala. 2012). In *Hamilton*, this Court held there was *no* exception

carved out for loss of an unborn child, and instead held the zone of danger test applies and limits recovery for emotional injury *only* to Plaintiffs who sustained a physical injury as a result of the alleged negligence or who were placed in immediate risk of physical harm by that negligence. *Id.* at 737. ("Because [the Plaintiff] conceded that she was 'not entitled to zone of danger damages' and her argument suggesting that *Taylor* created an exception to the zone-of-danger test is misplaced, and because she presented no evidence showing that she suffered a physical injury as a result of Defendants' actions, we conclude that the trial court properly entered a summary judgment insofar as it concerns Hamilton's claim for damages for emotional distress.") *See also, Bailey v. City of Leeds*, 304 So. 3d 719, 721-22, 740 (Ala. 2020); Marsh, Jenelle, *Alabama Law of Damages* § 36:6 (6th ed. 2021) ("Though there are cases with language broad enough to extend mental anguish damages to negligence cases with no physical injury, these have been limited in later cases to only recovery when the plaintiff is placed in a zone of danger by the defendant's negligent conduct."); *AALAR, Ltd. Inc. v. Francis*, 716 So. 2d 1141 (Ala. 1998); ALA. PATTERN JURY INSTR. CIV. 11.11 *Mental Anguish – Zone of Danger* (3d ed.) ("You do not consider the monetary value of [the decedent's] life because the damages [for an alleged wrongful death] are not to compensate the decedent's family from a monetary standpoint because of his/her death.") (emphasis added). These points of law were conceded at the hearing in this case by counsel for the LePages/Fondes, to whom the Aysennes' counsel deferred and whose argument the Aysennes' adopted. The trial court's ruling on Count Two is most certainly due to be affirmed.

Perhaps most incredible is Plaintiffs' suggestion that they were blind-sided by the trial court's ruling on Count Two and were "without any warning" that the Defendants sought to dismiss Count Two completely. (Pls.' Brief, p. 36). As outlined above, the Defendants stated repeatedly in their motions to dismiss and motion to strike that Count Two was contrary to Alabama law and was due to be dismissed. Counsel for both Defendants also affirmatively confirmed that position at the hearing with no real engagement by counsel for the Aysennes in response. *See e.g.*, (R. 92-94) ("And just real quickly procedurally, Mr. Smalley said that we didn't move to dismiss wantonness, and on Document 71, page 14, we did move to dismiss Count Two, so I just wanted to say that.") For Plaintiffs to contend now they had no notice or warning of this is untenable. Nothing prevented them from presenting any argument they wanted in their briefs or at the hearing in response to Defendants' unequivocal request for dismissal. Their alleged surprise is illogical and not a proper basis to support a Due Process claim.

VIII. Plaintiffs have not articulated an equal protection or due process claim on appeal, and no such claim was preserved below.

The Aysennes' Brief states they "adopt and incorporate the arguments made by the *LePage* Plaintiffs" in the parallel appeal pending before this Court (Case No: SC-2022-0515). (Pls.' Brief, p. 3, n. 1). The Aysennes also state in one passing sentence, in the very last paragraph of their Brief and for the first time on appeal, that "the circuit court's Order...violates the Plaintiffs' constitutional rights to...equal protection." (Pls.' Brief, p. 43). It is therefore important to note that the Aysennes did not preserve any equal protection or

due process argument below, nor did they ever cite the Equal Protection clause or any law analyzing equal protection. Their filings below did not contain any analysis of what level of scrutiny would apply; made no mention of a lack of due process; and did not contain any reference or analysis of what defines a fundamental right in the context of constitutional analysis. None of those constitutional arguments (which were also improperly raised by the LePages and the Fondes for the first time on appeal) appear anywhere in the Aysennes' lower court filings. It is insufficient for them make a passing reference to the term "equal protection" on the last page of their brief and then declare that they "adopt and incorporate" all of the arguments in the *LePage* briefing, which includes equal protection and due process arguments never raised below. The same is true with regard to an improper attempt to adopt the arguments raised for the first time on appeal in the *LePage* case based upon the Women's Right to Know Act.

It is correct that ALA. R. APP. P. 28(k) provides that "in cases involving more than one appellant or appellee...[or] in cases consolidated for purposes of appeal," an appellant or appellee may adopt by reference any part of the brief of another. Although a joint hearing for both cases was held before the trial court, this case was not technically consolidated with the *LePage* case, either at the trial court level or for purposes of appeal, nor are there any Plaintiffs other than the Aysennes in this case. It therefore is not clear that Rule 28(k) would apply here to provide the Aysennes an avenue to adopt, carte blanche, all of the arguments made in a separate appeal by parties to another case. Most importantly, however, is that Rule 28(k), even if it did apply here, does not change the fact that this Court will not consider an argument raised

for the first time on appeal, whether it is made directly or adopted by reference. *See Birmingham Hockey Club, Inc. v. Nat'l Council on Comp. Ins., Inc*., 827 So. 2d 73, 81 (Ala. 2002); *P.J. Lumber Co., Inc. v. City of Prichard*, 249 So. 3d 1135, 1138 (Ala. Civ. App. 2017) ("It is axiomatic that '[t]his Court cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial court.' ... Because '[i]t is well settled that an appellate court may not hold a trial court in error in regard to theories or issues not presented to that court,' ... we will not reverse the judgment of the circuit court on this ground.") None of the arguments regarding equal protection, due process, or the Women's Right to Know Act were preserved by the Aysennes (or the LePages/Fondes), and none are proper for this Court's consideration in this appeal.

CONCLUSION

To adopt the Aysennes' position regarding Count One, this Court would have to reject the established legislative definition of a "person" set out in the Brody Act which has twice been deemed by this Court to be the definition applicable in civil wrongful death actions involving a minor child in this state. This Court would then have to contradict its prior holdings and supplant the definition set out in the Brody Act with a new, judicially-created definition which includes not just *in utero* pregnancies but also *in vitro*, cryopreserved embryos not implanted in a uterus. This would go beyond any holding of this Court heretofore; it would go beyond the holding of *any* of the other state courts which have considered this issue thus far; and it would go beyond any law codified by our Legislature.

To accept the Aysennes' position regarding Count Two, this Court would have to condone a complete failure to assert any true alternative property claim compatible with Alabama law and reverse a trial court for refusing to permit an obvious attempt to create an unprecedented hybrid cause of action unrecognized heretofore in this state.

To accept the Aysennes' argument that they have been left without a remedy and/or left without a tort remedy, this Court would have to ignore the continued pendency of their bailment claim and their missed opportunity to assert available tort claims.

The trial court followed the law and, respectfully its ruling is due to be affirmed. The dramatic and sweeping changes in the law urged by the Plaintiffs, which would dramatically impact thousands of Alabama citizens currently benefiting from IVF, should only be made after careful and deliberate consideration by the Legislature.

Respectfully submitted,

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APPENDIX I

IN THE SUPREME COURT OF ALABAMA

No. SC-2022-0579

FELICIA BURDICK-AYSENNE AND SCOTT AYSENNE, IN THEIR INDIVIDUAL CAPACITIES AND AS PARENTS AND NEXT FRIEND OF BABY AYSENNE, DECEASED EMBRYO/MINOR

Appellants,

v.

THE CENTER FOR REPRODUCTIVE MEDICINE, P.C.; AND MOBILE INFIRMARY ASSOCIATION D/B/A MOBILE INFIRMARY MEDICAL CENTER

Appellees.

APPEAL FROM THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA
CASE NO. 02-CV-2021-901640

APPELLANTS' REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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SUMMARY OF THE ARGUMENT

The Plaintiffs request that this Court do nothing more than confirm that the wrongful death of a conceived, human, IVF embryo gives rise to a viable tort claim against any and all wrongdoers. Plaintiffs believe this is most easily accomplished under Alabama's Wrongful Death Act. This Court has already held that the wrongful death of all other human embryos, regardless of viability, location, or any other delineating factor, gives rise to such a claim. Alternatively, if the embryo's death does not give rise to a wrongful-

death claim, then the case would simply move forward under the usual tort remedies. Regardless of the manner; however, the case should proceed given the facts alleged in the Amended Complaint.

The Defendants, in contrast, ask this Court to rule that there are NO tort remedies against them for their malfeasance which lead to the Plaintiffs' loss herein. They argue that a conceived, human IVF embryo is not a person or minor child, such that the Wrongful Death Act does not apply. But they then assert that such an embryo is a human life, such that the only remedy for its death is under the Wrongful Death Act. This circular logic places IVF embryos in purgatory – not quite worthy of protection as to one claim, but too good for protection on the other.

Defendants' wrongful-death argument begins by making the very same "congruence" argument that this Court has explicitly rejected. *Stinnett v. Kennedy*, 232 So. 3d 202, 216 (Ala. 2016) (Holding that congruence between the civil and criminal law is only needed to prevent situations where "a defendant could be responsible criminally for the homicide of a fetal child but would have no similar responsibility civilly."). As this Court has made clear a number of times now, the congruence argument was never intended to limit civil liability in this context. Instead, the need for congruence only applies to ensure "that unborn children, viable or not, [are] equally protected under the Wrongful Death Act." *Id.* at 223 (Parker, J. specially concurring).

Defendants ask the Court to ignore this precedent and further seek to have the Court differentiate between embryos. They ask this Court to draw a line in the sand - some embryos would be protected, while

others would not, based on nothing more than their location.

On the alternative tort claims, the Defendants' primary weakness is that they obviously failed to move the trial court to dismiss those claims in their entirety. Their motion to dismiss was limited to "certain claims" which involved only the wrongful-death claim and the request for mental anguish damages under the negligence claim.

Perhaps realizing their error, they have changed tack on appeal, now arguing that there are valid tort claims against unknown "third parties," but that Plaintiffs just failed to plead them. This argument is ridiculous – how could the embryos' destruction give rise to one tort remedy but not another? But it suffers from another flaw – it is the exact type of hyper-technical, form over substance argument that the *Alabama Rules of Civil Procedure* abrogated in 1973.

The applicable procedural rules require that courts look at the substance of the claim over form, construe the pleading liberally in favor of the pleader, and endeavor to do substantial justice. To the extent there is a valid tort claim, it was surely plead in the fifteen page, eighty-six paragraph Amended Complaint drafted by an Alabama attorney and based on forms found not just in Appendix I to the *Alabama Rules of Civil Procedure*, but also used in literally thousands of other cases over the years without issue.

Because this issue was not argued before the trial court, the applicable order does not support Defendants' newly constructed argument. The trial court did not find that the Plaintiffs had failed to articulate the correct claim under Alabama law, as Defendants now suggest. Were that the case, the Plaintiffs could have

(and still can) filed an amended complaint to rectify the pleading error. Instead, the trial court's ruling was incredibly broad, holding that there was no viable tort remedy for the wrongful death or destruction of an IVF embryo under any circumstances regardless of what was pled. As with the Defendants' wrongful-death argument, the trial court's ruling was circular: the embryo is not a minor child protected by the wrongful-death act but it is a human life such that the only remedy is under the wrongful-death act. Because of this, there was no way for the Plaintiffs to amend their complaint to state any viable tort causes of action. Their only remedy was to appeal.

Lastly, the Defendants' reliance on the contract documents is misplaced. The Defendants conveniently ignore the fact that, regardless of what boxes were checked in 2013, when this incident occurred in 2020, the Plaintiffs were actively paying Defendant CRM a monthly nursery fee to ensure that CRM would preserve and protect the Plaintiffs' embryo. (Doc. 61, C-163). Likewise, the Defendants' reliance on the contract documents fails to account for the fact that the Plaintiffs' embryo was not destroyed in a manner set forth in those documents, but was instead killed because of the Defendants' malfeasance.

The trial court's order should be reversed as it disregards longstanding Alabama law that human life begins at conception. The wrongful death of a conceived, human embryo, regardless of its location, viability, chances of survival, or any other factor, gives rise to a wrongful-death claim.

Alternatively, if the embryo's death does not give rise to a wrongful-death claim, then the case would simply proceed under the usual tort theories. Regardless of how, the case should proceed. The Plaintiffs

must have a civil-law remedy against all possible wrongdoers. To that end, the circuit court erred in dismissing all of the Plaintiffs' alternative tort claims.

ARGUMENT

Pursuant to Rule 28(k), *Alabama Rules of Appellate Procedure*, Plaintiffs again incorporate and adopt by reference the Reply Brief the Appellants in *LePage v. Mobile Infirmary Association*, SC-2022-0515 filed as if set forth fully herein. The legal issues are identical in the two cases, and Plaintiffs attempted to avoid making unnecessary, repetitive arguments.

I. Alabama's Wrongful Death Act Governs this Action.

Because this issue has been extensively briefed by both sides in the *LePage* case, Plaintiffs have kept this aspect of their brief particularly succinct.

A. This Court has Previously Rejected the Defendants' Congruency Argument.

The Defendants' argument on the wrongful-death claim seeks to reargue the very same issues this Court previously decided in *Stinnett v. Kennedy*, 232 So. 3d 202 (Ala. 2016); *Hamilton v. Scott*, 97 So. 2d 728 (Ala. 2012); and *Mack v. Carmack*, 79 So. 3d 597 (Ala. 2011). Those cases relied on the Homicide Act to EXPAND who was protected under the civil law. Those cases explicitly rejected the notion that the need for congruency between the two acts serves as a limitation on civil liability.

Under Alabama law, a "child is an entity, a 'person' from the moment of conception." *Stinnett*, 232 So. 3d at 209. Because of this, there is a "biological separateness of mother and child from the moment of conception." *Id.* This person exists regardless of viability, stage of

development, age, or any other characteristic. All that matters is whether a human being exists. If so, and if that human being has suffered a wrongful death, a claim exists under Alabama's Wrongful Death Act. *Stinnett*, 232 So. 3d at 210.

This notion that the civil law must be narrowly read to ensure congruency between civil and criminal has been examined and expressly rejected by this very Court in this context and others. This Court has noted, time and again, that the attempt to harmonize whether and how human embryos are protected under criminal and civil law "was never intended to synchronize civil and criminal liability under those acts, or the defenses to such liability." *Stinnett*, 232 So. 3d at 215. Instead, the need for congruency simply ensures that any wrongdoer who is subject to criminal punishment, is also subject to civil liability. "Although we noted that it would be unfair for a tortfeasor to be subject to criminal punishment, but not civil liability, for fetal homicide, it simply does not follow that a person not subject to criminal punishment under the Homicide Act should not face tort liability under the Wrongful Death Act." *Stinnett*, 232 So. 3d at 215 (emphasis added).

The same is true in other contexts as well. As far back as 1887, this Court applied those same principles to find that the exact same negligent conduct could give rise to an assault and battery claim under civil law while not constituting a criminal act. "There may, no doubt, be cases of assault and battery, as well as of mere assault, which would sustain a civil action for damages, and yet not be punishable criminally, by indictment." *Thomason v. Gray*, 3 So. 38 (Ala. 1887). This principle can be seen in Alabama's trial courts every day – lawsuits are filed when a person is injured

through the negligence of another. The fact that the wrongful conduct does not also give rise to criminal exposure is irrelevant to determining the tortfeasor's civil liability.

B. Alabama Law Does Not Provide Different Protections to Human Beings Based on Their Location.

According to the Defendants, conceived, human embryos should be treated differently under the Wrongful Death Act based solely on their location. The Defendants would allow i*n utero* embryos to be protected by the Wrongful Death Act, while IVF embryos would have no tort protections, at all. The Defendants' position is that IVF embryos can be wrongfully killed by a tortfeasor who would face no civil liability and could get off scot-free. Defendants ask this Court to enact and enforce a rule that would treat the exact same embryos differently. The Defendants' position, which would require implantation or viability before protections apply, is an unfair and arbitrary line, one that this Court rejected in *Stinnett*, 232 So. 3d at 214.

Another problem with the Defendants' argument, as adopted by the trial court, is that it would end up benefiting the tortfeasor who inflicts a more severe injury. If the tortfeasor were to alter the embryo such that it was still alive but no longer capable of implantation, a cause of action would accrue. If; however, the tortfeasor were to kill or destroy the embryo, no liability would attach. This "bizarre" result was examined and rejected in *Stinnett*: "It would be bizarre, indeed, to hold that the greater the harm inflicted the better the opportunity for exoneration of the defendant." *Stinnett*, 232 So. 3d at 214, *quoting Eich v. Town of Gulf Shores*, 300 So. 2d 354 (Ala. 1974).

The Defendants' position is not supported by common sense or this Court's well-reasoned case law. The Wrongful Death Act should apply to the wrongful death of all human beings, including human, IVF embryos.

II. The First Amended Complaint Asserts Viable Tort Claims Against Both Defendants Should the Case Proceed Under the Alternative Property Theories.

A. The Defendants Failed to Move the Trial Court to Dismiss the Tort Claims in Their Entirety.

The primary weakness with the Defendants' argument on appeal is that they failed to move the trial court to dismiss the Plaintiffs' alternative tort claims in their entirety. The Defendants' attempt to reconfigure their Motion to Dismiss Certain Claims to say something that it does not. Defendants write that they made an "unequivocal request for dismissal" of Count Two in its entirety. (Red Brief, p. 65). The record proves otherwise.

The Defendants initially moved to dismiss all three Counts pled in the initial Complaint. (Doc. 24, C-29). Bearing in mind arguments that motion raised, the Plaintiffs filed a First Amended Complaint. (Doc. 61, C-157). In this Amended Complaint, the Plaintiffs clarified that they were bringing a wrongful-death claim if the embryo was a person, but would proceed under alternative theories if the courts "ultimately rule that Baby Aysenne is not a minor child, but is instead property." (Doc. 61, C-169-171, Paras. 77 and 81). At the time they filed the First Amended Complaint, the Plaintiffs had conducted no discovery and were limited in their understanding of what had

occurred. As such, their claims were general as one would expect.

In light of these amendments, when the Defendants filed a second Motion to Dismiss, they titled it differently and limited their requested relief. (Doc. 71, C-256). Now, rather than being a general "Motion to Dismiss" as their initial motion had been, it was a narrow "Motion to Dismiss Certain Claims." (*Compare*, Doc. 24, C-29 *with* Doc. 71, C-256). The arguments in the two motions were different as well. In their initial motion, Defendants argued that the Plaintiffs lacked standing to bring their tort claims, and asked the "Court to dismiss this action in its entirety." (Doc. 24, C-29, 46, 49). But in their Motion to Dismiss Certain Claims, they dropped the standing argument, and sought much more limited relief, merely asking that the "claims for emotional distress pursuant to a claim for negligence . . . be dismissed." (Doc. 71, C-269-271).

The Motion to Dismiss Certain Claims does not include any substantive argument on the negligence and wantonness claims. There is no explanation or argument as to how these claims are lacking, improperly plead, or why Alabama law does not support claims for negligence and/or wantonness under the facts as pled. The fact of the matter is that the Defendants made no argument supporting a blanket request that the entirety of the tort claims be dismissed.

All of the Defendants' argument on this issue is found in three paragraphs, which are clearly limited in scope to the relief that Plaintiffs could obtain under their negligence claim. Paragraph 25 asserts "[t]he Aysennes' claim for damages for mental anguish under a theory of negligence are unsustainable and due to be dismissed [because] neither Plaintiff was at risk of physical harm as a result of the alleged negligence

[nor] in the zone of danger." (Doc. 71, C-269 – 270). Paragraph 26 is similar, arguing there can be no claim for "emotional distress as a compensable injury for a claim of negligence when the plaintiff has not been physically injured or at risk of physical injury." (Doc. 71, C-270). Paragraph 27 contends that, to the extent "the Aysennes have suffered mental anguish due to being deprived an additional future pregnancy, such a claim is speculative." (Doc. 71, C-270). There is no further or additional argument on this subject in the Defendants' filing.

Plaintiffs highlighted that Defendants had not moved to dismiss the tort claims in their entirety in their Opposition to the Defendants' Motion to Dismiss Certain Claims. (Doc. 77, C-332-334). Plaintiffs wrote: "Note that the Defendants' argument on this point [the recovery of mental anguish damages] only concerns Plaintiffs' negligence claim. Defendants have correctly conceded that the Plaintiffs are allowed to recover mental anguish damages under their wantonness and breach of contract claims, as is specifically allowed by Alabama law." (*Id.*).

In response to Plaintiff's Opposition, which stated that the Defendants argument on the mental anguish damages was really a motion to strike and thus inappropriate in the motion to dismiss context (Doc. 77, C-332), the Defendants filed a new motion on this point. (Doc. 91, C-366).

Plaintiffs further clarified this issue at oral argument:

> Judge, the difference in our complaint is that we include four counts. We include the wrongful death claim . . . We also included tort claims, but we, just as Mr. Duncan did, said, hey, to the extent this isn't life, it's something

> else for which Alabama law gives a remedy under wantonness and negligence. . .
>
> The Defendants filed a motion to dismiss certain claims of the amended complaint. The certain claims they moved to dismiss were the wrongful death claim, which again we've argued, and the emotional damages aspect of the negligence claim. . .
>
> Given that, if Your Honor were to rule today that the wrongful death claims are due to be dismissed, the Aysennes as well as the other claim[ants] would still move forward on the other tort claims. It wouldn't be a full dismissal of the entire complaint." (R. 80-81, emphasis added).
>
> . . .
>
> And so when they filed [their] motion to dismiss the amended complaint, they only moved to dismiss certain claims. (R. 86).

Nowhere does the Motion to Dismiss Certain Claims make any argument or cite to any case law that would support dismissal of the negligence and wantonness claims, *in toto*. The Defendants did not mention or make any argument as to the wantonness claim at all. As such, the trial court erred in dismissing the tort claims in their entirety.

Defendants write that "[n]othing prevented [the Plaintiffs] from presenting any argument they wanted in their briefs. . ." (Red Brief, pp. 64-65). This argument totally misses the boat. The Plaintiffs' arguments before the trial court were limited to rebutting the Defendants' requested relief. The Defendants moved to dismiss the mental anguish damages under the

negligence claim, and so the Plaintiffs responded in kind. (Doc. 77, C-316, 332-334). It would have been silly for the Plaintiffs, as the responding party, to oppose relief that had not been requested by the moving party.

The record shows that the trial court's order granted the Defendants relief which they had not requested. Under well-established legal principles, the trial court's order is due to be reversed for this fact, alone. (*See, e.g., Carden v. Penney*, 362 So. 2d 266 (Ala. Civ. App. 1978).

B. The Defendants Admit that if the Embryo is Considered Property, Tort Claims May be Brought Against Them.

Apparently realizing their mistake, the Defendants' Red Brief raises a new argument on the tort claims. The Defendants now admit that there is a viable tort claim, but say that the Plaintiffs just chose not to plead it. According to the Defendants, the Plaintiffs could have pursued a tort remedy against "any third party alleged to have caused damage to the bailed property" under *Alabama Code* Section 6-5-263. (Red Brief, pp. 40-41). That code section provides that a bailor has a right of action for a trespass committed during the existence of the bailment. (*Ala. Code* § 6-5-263). Section 6-5-262 defines trespass as "[a]ny abuse of or damage done to the personal property of another unlawfully." According to the Defendants, this tort remedy was available all along, but Plaintiffs just failed to pursue it.

The Defendants' brief is notably silent as to why the embryo's destruction could give rise to a claim under only this specific cause of action and only against some unnamed "third party." If the embryo's destruction is

compensable against third parties who abuse or damage it while bailed to another, then it would also be compensable when the abuse or damage was the result of the bailee's own negligence or wantonness. Such a claim would also exist against other parties, such as Defendant MIMC, whose tortious conduct caused the embryo's destruction even if they did not directly "abuse" or "damage" it.

The Defendants' admission that there are viable tort theories explains why they did not move to dismiss the Amended Complaint in its entirety. The Defendants, by acknowledging that valid tort claims exist for the embryo's destruction, concede that the Amended Complaint adequately asserts alternative tort theories under a property claim. This explains:

(1) Why the Defendants' Motion to Dismiss was specifically limited to "Certain Claims;"

(2) Why there was no argument as to the substance of the negligence or wantonness claims in the motion itself; and

(3) Why Defendant CRM did not move to dismiss the breach of contract claim. After all, the requested relief was identical under all three claims. If Defendants really believed that there were no alternative property claims, they would have moved to dismiss the Amended Complaint in its entirety, something they did not do here for obvious reasons.

Additionally, the Defendants' argument suffers another fatal flaw. The Defendants argue that the procedural rules are hyper-technical, requiring that specific terms or "magic words" be used or else the complaint will be dismissed. As this Court is obviously aware, the procedural rules are not so demanding.

Under Alabama law, a complaint is sufficient so long as it includes "a short and plain statement of the claim showing that the pleader is entitled to relief" and "a demand for judgment for the relief the pleader seeks." (*Ala. R. Civ. P.* 8(a)). "No technical forms of pleading . . . are required." (*Ala. R. Civ. P.* 8(e)(1)). Furthermore, "[a]ll pleadings shall be so construed as to do substantial justice." (*Ala. R. Civ. P.* 8(f)).

According to the Committee Comments to Rule 8, "the prime purpose of pleadings is to give notice." As a result, the "rules abolish the doctrine of 'theory of the pleading,'" meaning that a claim will proceed so long as the complaint includes "a simple statement in sequence of the events which have transpired, coupled with a direct claim by way of demand for judgment." (*Committee Comments* to *Ala. R. Civ. P.* 8). The title or "form" of the claim for relief is thus irrelevant.

"Rule 8(a) eliminates many technical requirements of pleading." (*Committee Comments* to *Ala. R. Civ. P.* 8). "The rules are designed to discourage battles over mere form of statement which often delay trial on the merits or prevent a party from having a trial because of mistakes in statement." (*Committee Comments* to *Ala. R. Civ. P.* 8).

Because Alabama's procedural rules are not as strict as Defendants would have the Court believe, the Amended Complaint clearly sets forth a viable tort claim. The question is not whether the form of the complaint matches some special, magic words. The question is whether it sets forth enough substance that it gives rise to any claim for relief. Thus, the actual title given to the count is irrelevant. All that matters is whether a valid claim has been alleged. The First Amended Complaint, which was prepared by an Alabama attorney based on the forms found in

Appendix I to the *Alabama Rules of Civil Procedure*, which includes eighty-six factual allegations over fifteen pages, and which has been used in thousands of other cases over the years without issue, adequately alleges negligence and wantonness claims. (Doc. 61, C-157).

C. The Trial Court's Order Held that There were No Viable Tort Claims Under any Circumstances Regardless of How the Claims are Pled.

Because the First Amended Complaint sets forth valid tort claims, the Defendants' real argument on this point, and the trial court's actual basis for dismissal of the tort claims, is more nuanced. Although Defendants write on Page 41 that there is a valid tort claim that the Plaintiffs failed to plead; they change their mind later, writing on Page 60 that "this case did not involve the assertion of a recognized cause of action that was missing some minor details. This is an unprecedented attempt to articulate a variation of a claim for wrongful death. . ." (Red Brief, p. 60). In other areas of their brief, they make a similar argument, writing on Page 42:

> [T]here is no basis under Alabama law to deem frozen, *in vitro* embryos to be 'minor children' or 'persons,' there would likewise be no authority to allow a disguised wrongful death claim to stand, in essence seeking compensation for the death of a child and an award of damages for the value of human life, which Alabama law is clear cannot be measured or monetized.

The trial court's order was in accord, dismissing the tort claims in their entirety, not because they were

pled incorrectly, but because the claims did not exist under Alabama law:

> This alternative claim for compensatory damages for the loss of "Baby Aysenne" is not one provided for under Alabama law. It is well established in this state that the only damages a civil jury may asses for the "wrongful" taking of a life are punitive damages. The Plaintiffs' assertion that, if they cannot proceed under the Wrongful Death act, this Court can and should side-step these well-established principles and allow an alternative tort claim for compensatory damages for the "value" of a cryopreserved/*in vitro* embryo has no legal precedent in this state. (Doc. 103, C-404-405) (internal citations omitted) (emphasis added).

Thus, the Defendants' argument, accepted by the trial court, is that the Plaintiffs have no tort remedies in this case. They do not have a wrongful-death claim because the embryo is not a "minor child" or "person." But they also do not have any other tort claims because the embryo is a "human life" such that the only damages that may be awarded are punitive under the wrongful death act. It is a classic Catch 22 – the embryo isn't this because it's that, but it's also not that because it's this.

Similar to the trial court's order, the Defendants' Red Brief asserts that the Plaintiffs are "seeking compensation for the death of a child and an award of damages for the value of human life," that the Amended Complaint "sought only impermissible damages for the value of human life," and that the Plaintiffs seek "to recover for the value of a 'human life.'" (Red Brief, pp. 42, 60).

These assertions are patently untrue. The First Amended Complaint seeks no such remedies. The Amended Complaint is quite clear in alleging wrongful-death damages under one theory and compensatory damages for destroyed property under alternative theories. But more importantly, the ONLY way these assertions would benefit the Defendants' argument on the tort claims is if the embryo at issue is a child and human life.

This is the part that the Defendants fail to fully grasp: If the embryo is a child and human life, then the Plaintiffs agree the only remedy is under the Wrongful Death Act. As such, assuming that the Defendants are admitting that the embryo is a child and human life, then the parties agree that the Wrongful Death Act would apply.

But the Defendants go farther, accusing the Plaintiffs of somehow trying to run an end-around the wrongful-death statute. This accusation is nonsensical – either the embryo is a human being and its death gives rise to a wrongful-death claim; or it is not a human being and its death gives rise to other tort claims (such as negligence and wantonness). But it is simply preposterous for the Defendants to continue to argue that the embryo is a human life when it benefits them but not a human life when it does not. The embryo cannot be both a human being and not a minor child or person.

Getting back to the point at hand, the Plaintiffs' First Amended Complaint does not seek compensatory damages for the loss of a human life. Count One seeks wrongful-death damages, which are punitive only. Counts Two and Three are alternative claims that only apply if the courts determine that the embryo "is not a minor child, but is instead property." (Doc. 61, C-169,

171). The claim for relief under Counts Two and Three seek damages for "the value of the embryo wrongfully destroyed, and for the severe mental anguish and emotional distress [the Plaintiffs] have been caused to suffer and will suffer in the future." (Doc. 61, C-169, 171). At no point did the claims seek compensatory damages for the loss of a human life. If the embryo is human, then the Wrongful Death Act would apply. The tort remedies ONLY apply if the embryo is not human.

Defendants' Red Brief states, without citation, that Counsel for the LePages/Fondes "admitted that there is no right provided by Alabama law to any of the remedies sought by the Aysennes in Count Two." (Red Brief, p. 59). This is incorrect. Counsel specifically argued that "regardless of whether somebody determined that they were property or they were 'potential lifes,' they are something that existed. Just like if they are the same as the valuables that were in my security box at the bank, we should be entitled to the value of what those embryos were." (R. 61-62).

The Defendants' argument on this point is circular. They want for the embryo to be both a human life, but also not a minor child or person. That dichotomy is irrational. If the embryo is human, then it is human. If it is not, then it's not. But it cannot be considered human to defeat one claim and not human to defeat the other.

D. The Trial Court's Order Leaves the Plaintiffs Without a Remedy Against All of the Wrongdoers.

Defendants next argue that the Plaintiffs have not been denied a right to a remedy because they still have a breach of contract claim against Defendant CRM. In the words of the Defendants, their argument somehow

ignores the obvious fact that the contract claim is limited to parties with whom the Plaintiffs had a contract – which in this case is only CRM. The Plaintiffs did not have a contract with Defendant MIMC, who has been dismissed entirely from the case. The Plaintiffs did not have a contract with the so-called eloping patient, who the Defendants argue should be allowed to escape all liability.

On this point, a question must be posed: Why would the embryo's destruction give rise to a breach of contract action but not a tort claim? The damages sought are identical: "Felicia and Scott Aysenne have been injured in losing the value of the embryo wrongfully destroyed, and for the severe mental anguish and emotional distress they have been caused to suffer and will suffer in the future."[1] (Doc. 61, C-169 (Para. 79) and C-171 (Para. 86)). How is it that this loss is compensable when the malfeasance was the breach of a contract, but not when the loss was the result of negligence, wantonness, or some other tort theory? The simple answer is that there is no difference, which is why the Defendants did not move for dismissal of the tort claims in the first place.

E. The Trial Court Improperly Ruled that the Plaintiffs May Not Recover Mental Anguish Damages in this Case.

The trial court erred in determining at the pleading stage that the Plaintiffs cannot recover mental anguish damages for the tortious destruction of their embryo. For one, the Defendants did not make this request in

[1] As to both claims, it must be remembered that they were brought in the alternative and would only apply if the courts "ultimately rule that Baby Aysenne is not a minor child, but is instead property." (Doc. 61, C-169 (Para. 77) and C-170 (Para. 81)).

regards to the wantonness claim. For two, Alabama law allows for the recovery of mental anguish damages in situations such as this. *See, e.g., Taylor v. Baptist Med. Ctr., Inc.*, 400 So. 2d 369 (Ala. 1981) (patient could recover mental anguish damages on account of defendant's negligence without proving actual physical injury); *and Gray v. BrownServ. Mortuary, Inc. v. Lloyd*, 729 So. 280, 285 (Ala. 1999) ("It has long been the law of Alabama that mistreatment of burial places and human remains will support the recovery of damages for mental suffering.").

III. The Parties' Contract Documents Do Not Shield the Defendants from Liability for Their Wrongful Conduct.

Regarding the contract documents, it must be remembered that the issues on appeal are limited to what type of tort claim should apply to the wrongful death or destruction of IVF embryos. The undisputed truth is that the Plaintiffs NEVER authorized ANYONE to destroy or discard their embryo in any way, shape, or form. Rather, the evidence shows that the Plaintiffs were paying CRM to care for the embryo, and that CRM accepted Plaintiffs' payment giving in return a promise to do so.

Moreover, the contract documents would not provide the Defendants with full and complete tort immunity, as they seem to suggest. The contract documents do set forth foreseeable issues that CRM should know to guard against. But that does not mean that the Plaintiffs have no remedy for the wrongful death or destruction of their embryo. The Plaintiffs' embryo was not destroyed while being frozen or thawed by CRM's staff. This was not a laboratory accident or power loss. No lab equipment failed. The embryo was not discarded because the Plaintiffs failed to pay the storage fees or

because too much time had passed without contact from the Plaintiffs. The Plaintiffs did not die or get divorced. None of the contingencies discussed in those documents caused the Plaintiffs' damages. And even if they did, this would not provide the Defendants with full immunity from civil liability.

Additionally, reliance on contract documents in a situation such as this can be perilous. The Plaintiffs signed these documents as a married couple attempting to overcome fertility problems – to achieve their dream of having children and growing their family. In such a situation, "the parties' initial 'informed consent' to IVF procedures will often not be truly informed because of the near impossibility of anticipating, emotionally and psychologically, all the turns that events may take. . ." *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992). As a result, "initial agreements may later be modified *by agreement*." (*Id.*, emphasis in original). That is exactly what occurred here.

The Plaintiffs maintained contact with CRM for years, paying a monthly fee to ensure that CRM would preserve and protect their embryo. (Doc. 61, C-163). Though they may at one time have initialed a form that the embryo could be disposed of in 2018, they later changed their mind. They no longer wished to dispose of the embryo, but now wanted to maintain it, which was their right.

CRM had obviously agreed with this modification as it accepted the Plaintiffs' money, in return promising to protect it and keep it safe. In fact, on November 20, 2020, CRM emailed Ms. Aysenne confirming receipt of the December 2020 nursery fee. (Doc. 62, C-217). This payment was supposed to ensure CRM properly stored, protected, and safeguarded the embryo. If CRM did not plan on doing so, if CRM believed that it had

the right to dispose of the embryo under the terms of the contract by allowing an Infirmary patient to access CRM's lab and destroy the embryo without the Plaintiffs' authority or consent, then the Plaintiffs would have a textbook fraud claim. (*See, e.g., APJI* 18.07 – setting forth the elements of Promissory Fraud).

Rather than do their jobs and keep the embryo safe, the Defendants allowed an unknown third party to elope from the Infirmary's hospital, gain access to CRM's unlocked and unsecured storage/nursery area, and then kill/destroy a number of embryos, including the Plaintiffs' last embryo. (Doc. 161, C-164-168). The contract documents are nothing but a red-herring, aimed at throwing attention away from the Defendants' misconduct. Those documents have nothing to do with the current dispute and are due to be stricken and ignored for the reasons set forth in the *LePage* Plaintiffs' Motion to Strike (which the Aysenne Plaintiffs again join in by reference). (*See, e.g.,* Doc. 77, C-316, R. 90).

As a final point on the contract documents, the Defendants take extreme liberties with the implications that can be drawn from a couple checking boxes prior to trying to start a family. But there is one particular part of the Defendants' Red Brief that is so outrageous that it must be addressed directly. On Page 61, the Defendants write that "[i]t does not make sense to keep a cryopreserved embryo frozen indefinitely or otherwise unused if your goal is to honor it as a unique life." The Plaintiffs obviously thought enough of their embryo to pay a monthly fee to keep it alive, to keep it protected, to keep it safe. It was their embryo, and it was their choice how it would be used.

If CRM had issues with the manner in which the Plaintiffs were treating their embryo, the answer was to call them to discuss it. CRM was not allowed to just leave the doors to its lab unlocked and unsecured so that an unauthorized person could walk in and destroy it without repercussion. The Plaintiffs could have chosen to attempt another pregnancy or donate the embryo to another couple, among other options.

The entire point of cryostorage is to allow the embryos to continue living, which is what the Plaintiffs were paying CRM to do. A recent news story explains why this is so important. In October 2022, twins were born from embryos that were conceived and placed in cryostorage in April 1992. The embryos were almost older than their birth-mother. Jen Christensen and Nadia Kounang, *Parents Welcome Twins from Embryos Frozen 30 Years Ago*, (November 21, 2022), https://www.cnn.com/2022/11/21/health/30-year-old-embryos-twins/index.html (last visited December 27, 2022). This very well could have been the Plaintiffs' embryo at some point in the future had the Defendants not allowed it to be wrongfully destroyed and forever lost.

The Plaintiffs' embryo, like all other human life, existed a single, solitary time in this world. It will never exist again. It can never be replaced. For the Defendants to denigrate the Plaintiffs for doing nothing more than paying to keep their embryo alive in some attempt to belittle this claim is patently absurd. The Plaintiffs have done everything that was asked of them. The Defendants have failed to do even the most simplest of things to keep their promises. They should not be allowed to escape justice for their wrongdoing.

CONCLUSION

The trial court's order dismissing the claim for wrongful death should be reversed and the case remanded with instructions that Plaintiffs may proceed with discovery toward a trial on that claim. Alternatively, the case should be remanded for proceedings on the alternative claims alleged in Count Two.

Respectfully submitted,

/s/ Jack Smalley III

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APPENDIX J

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

CASE NO.: CV-21-901640

FELICIA BURDICK-AYSENNE AND SCOTT AYSENNE, in their Individual capacities and as parents And next friend of BABY AYSENNE, Deceased embryo/minor,

Plaintiffs,

v.

THE CENTER FOR REPRODUCTIVE MEDICINE, P.C.; MOBILE INFIRMARY ASSOCIATION d/b/a MOBILE INFIRMARY MEDICAL CENTER, et al.,

Defendants.

ORAL ARGUMENT REQUESTED

MOTION TO DISMISS CERTAIN CLAIMS IN PLAINTIFFS' FIRST AMENDED COMPLAINT

COME NOW the Defendants identified in the First Amended Complaint as MOBILE INFIRMARY ASSOCIATION d/b/a MOBILE INFIRMARY MEDICAL CENTER and THE CENTER FOR REPRODUCTIVE MEDICINE, P.C. by and through undersigned counsel, and pursuant to ALA. R. CIV. PRO. 12(b)(1) and 12(b)(6) and ALA. CODE §§ 6-5-391 and 6-5-551 (and in accord with ALA. CODE §§ 13A-6-1(2) and 26-23H-1-8), respectfully move this Court to dismiss certain claims contained in Plaintiffs' First Amended Complaint.

In support of this motion, the Defendants show unto the Court as follows:

I. THE FACTS SET OUT IN THE AYSENNES' FIRST AMENDED COMPLAINT

1. The named Plaintiffs in this case are Felicia Burdick-Aysenne and Scott Aysenne (collectively referred to hereinafter as the Aysennes[1]), a couple who bring suit in their individual capacities and as parents and next friend of "Baby Aysenne" a "deceased embryo" (hereinafter referred to as the Aysennes' "pre-embryo"). (Doc. 61, p. 1)

2. The Aysennes assert they underwent *in vitro* fertilization ("IVF") performed by The Center for Reproductive Medicine, P.C. (hereinafter "CRM") followed by cryopreservation of an undisclosed number of embryos which had been fertilized *in vitro*. (*Id*. at ¶¶ 35-36) The First Amended Complaint asserts these cryopreserved embryos were stored in a cryogenic "nursery" or "storage unit" located in or near the Infirmary in exchange for the Aysennes' payment to CRM to "preserve and protect" the embryos. (*Id*. at ¶¶ 35, 36, 39, 43, 44)

3. The Aysennes assert that their "last embryo"--also referred to in the First Amended Complaint as an "embryonic human being"[2] -- was "killed" as a result of

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[1] The Defendants have collectively referred to the couple by the name common to both of them, -- Aysenne -- as a matter of linguistic convenience in an effort to streamline the motion but recognize that Ms. Burdick-Aysenne has a hyphenated last name.

[2] The Defendants have used the terms pre-embryo and pre-implantation embryo interchangeably with the term embryo in this motion. It should be noted that Alabama courts have previously used the term "frozen zygotes" when referring to cryopreserved embryos. *Cahill v. Cahill*, 757 So. 2d 465, 466 (Ala. Civ. App., 2000). Courts around the country looking at similar

an incident on December 13, 2020. (*Id*. at p. 1, ¶ 3) Specifically, they assert that a hospital patient left his or her room in the Infirmary's hospital area, gained unauthorized access to the cryogenic storage area,

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issues have noted that the term "pre-embryo" is the medically accurate term for a zygote, or fertilized egg, that has not been implanted in a uterus. *See, Loeb v. Vergara*, 313 So.3d 346, 353 54 nn.3-4 (4th Cir 2021) (finding that though 'embryo' and 'pre-embryo' were used interchangeably in the record, 'pre-embryo' is the medically accurate term for the products of IVF); *York v. Jones*, 717 F. Supp. 421, 427 (E.D. Va. 1989) (using the term pre-zygote based on an IVF contract's language); *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256, 1258, n.1 (Ariz. Ct. App. 2005) ("To avoid entering into the emotional discussion about when life begins, in this opinion we use the term "pre-embryo." Our use of that term is meant to be neutral and not meant to demean or minimize the special respect which the Jeters and others claim for such fertilized, unimplanted eggs"); *McQueen v. Gadbury*, 507 S.W.3d 127, 134 n.4 (Mo. Ct. App. 2017) ("'Pre– embryo' is a medically accurate term for a zygote or fertilized egg that has not been implanted in a uterus"); *Davis v. Davis*, 842 S.W.2d 588, 592-93 (Tenn. 1992) (relying on physician expert's testimony that "the currently accepted term for the zygote immediately after division is 'preembryo'"); *Frisina v. Women and Infants Hosp. of Rhode Island*, 2002 WL 1288784 at *2, n.2 (R.I. Super. 2002) ("The term preembryo is used to describe the four-to-eight cell stage of a developing fertilized egg. *See A.Z. v. B.Z.,* 431 Mass. 150, 151 n.1 (2000) (citations omitted)"); *Roman v. Roman*, 193 S.W.2d 40, at p. 55 n. 1 (Tex. Ct. App. 2006); *Penniman v. University Hospitals Health System, Inc.*, 130 N.E.3d 333, 335-36 (Ohio Ct. App. 2019) (noting use of 'embryo' for ease of discussion only); *see also*, Jennifer Marigliano Dehmel, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos?,* 27 CONN. L.REV. 1377 n. 4 (1995) (The term "frozen embryos" is recognized as "the term of art denoting cryogenically-preserved pre-embryos."). Importantly, no Alabama court (nor the Alabama legislature) has used the Plaintiffs' chosen term of "embryonic human being."

removed their pre-embryo, and dropped it, causing it to "die." (*Id*. at ¶¶ 54-58)

II. THE AYSENNES' ASSERTED CAUSES OF ACTION

4. The Aysennes' First Amended Complaint first includes a general section entitled "Defendants' tortious conduct," which asserts the following allegations:

- general allegations, without any citation to any law or statute or particular cause of action, alleging that the Defendants failed to secure the facilities in which the Aysennes' pre-embryo was stored, analogizing to unspecified "DHR regulations" requiring daycare centers "to be secured and closely guarded" since "small children, including embryos, cannot protect themselves." (*Id*. at ¶¶ 59-63)
- an allegation that CRM's conduct "fell below the applicable standard of care" as set out in Paragraph 64(a)-(h);
- an allegation that the Infirmary's conduct "fell below the applicable standard of care" as set out in Paragraph 65(a)-(k); and
- general allegations that "Baby Aysenne suffered a wrongful death" and that "[the Aysennes] were damaged" as a result of the Defendants' tortious conduct. (*Id*. at ¶¶ 66-71)

5. Thereafter, the First Amended Complaint sets out three specific causes of action:

- Count One, against both Defendants for "Wrongful Death," adopts and incorporates by reference all of the alleged claims of "tortious conduct" asserted generally in prior paragraphs. It states that "Baby Aysenne was a 'minor child' under

Alabama law," asserts a claim "[p]ursuant to Alabama's Wrongful Death laws" without citing to a particular statute,[3] and it seeks damages to punish and deter. (*Id.* at ¶¶ 72-75)

- Count Two, against both Defendants for "Negligence/Wantonness," adopts and incorporates by reference all of the alleged claims of "tortious conduct" asserted generally in prior paragraphs. (*Id*. at ¶ 76) The First Amended Complaint states that Count Two is pleaded in the alternative "and only should the Courts of this State or the United States Supreme Court ultimately rule that Baby Aysenne is not a minor child, but is instead property." (*Id*. at ¶ 77) It asserts that "Defendants were guilty of negligence and/or wantonness that directly lead to and/or caused the destruction of the Plaintiffs' embryo" and that Aysennes "have been injured in losing the value of the embryo wrongfully destroyed, and for the severe mental anguish and emotional distress they have been caused to suffer and will suffer in the future." (*Id*. at ¶¶ 78-79)
- Count Three, against CRM for "Breach of Contract/Bailment Relationship," adopts and incorporates by reference all of the alleged

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[3] Because Plaintiffs state that "Baby Aysenne was 'minor child' under Alabama law," (Doc. 61 ¶ 73), their wrongful death claim is necessarily brought pursuant to Ala. Code § 6-5-391, entitled "Wrongful Death of Minor," which provides:

> "(a) When the death of a minor child is caused by the wrongful act, omission, or negligence of any person, persons, or corporation, or the servants or agents of either, the father, or the mother as specified in Section 6-5-390... may commence an action."

claims of "tortious conduct" asserted generally in prior paragraphs. (*Id*. at 80) The First Amended Complaint states that Count Three is pleaded in the alternative "and only should the Courts of this State or the United States Supreme Court ultimately rule that Baby Aysenne is not a minor child, but is instead property." (*Id*. at ¶ 81) Count Three asserts that the Aysennes and CRM "entered into a contract and/or bailment agreement" "pursuant to which [the Aysennes] paid a monthly storage charge to the Center and in return, the Center agreed to protect, secure, and care for [the Aysennes'] embryo." (*Id*. at ¶ 82) It further asserts that CRM "breached this contract and/or bailment agreement by failing ot protect, secure, and care for" the Aysennes' embryo and that the Aysennes "have been injured in losing the value of the embryo wrongfully destroyed, and for the severe mental anguish and emotional distress they have been caused to suffer and will suffer in the future." (*Id*. at ¶¶ 85-86)

III. THE AYSENNES' AGREEMENTS WITH CRM

6. The First Amended Complaint asserts that the Aysennes "entered into a written agreement with [CRM] under which [CRM] would assist [the Aysennes] with having children of their own." (*Id*. at 33)

7. A copy of the IVF and cryopreservation agreements executed by the Aysennes are attached as Exhibit A.[4] These signed agreements include the cryopreservation agreement with CRM; the terms and

[4] The agreements attached hereto as Exhibit A are the same agreements attached as Exhibit A to Plaintiffs' First Amended Complaint, (Doc. 62 pp. 001-035).

length of CRM's agreement to store these cryopreserved pre-embryos; the attendant risks involved with IVF and cryopreservation; and options regarding whether and when unused cryopreserved pre-embryos should be destroyed or disposed of by CRM.

8. The Aysennes entered into agreements with CRM to undergo IVF and cryopreserve their pre-embryos in January of 2013, signing various forms dated January 29, 2013; April 30, 2013; and January 28, 2015. These agreements consent to the procedures; acknowledge the risks and limitations of IVF and cryopreservation; the limitations and risks of the thawing process; and outline how and when the frozen pre-embryos could be disposed of in a "Disposition of Embryos" form. (*See*, Agreements attached collectively at Ex. A)

9. The speculative nature of whether a fertilized embryo will probably progress to produce a pregnancy is explained as part of the agreements signed by the Aysennes, with their initials on each page, including the following acknowledgements:

> It is important to note that since many eggs and embryos are abnormal, it is expected that not all eggs will fertilize and not all embryos will divide at a nromal rate. The chance that a developing embryo will produce a pregnancy is related to whether its development in the lab is normal, but this correlation is not perfect. This means that not all embryos developing at the normal rate are in fact also genetically normal, and not all poorly developing embryos are genetically abnormal. Nonetheless, their visual appearance is the most common and useful guide in the selection of the best embryo(s) for transfer.

(Ex. A, p. 7)

10. The Aysennes also acknowledged in this signed agreement that laboratory accidents can occur which result in the loss of some or all embryos:

> In spite of reasonable precautions, any of the following may occur in the lab that would prevent the establishment of a pregnancy:
>
> - Fertilization of the egg(s) may fail to occur.
> - One or more eggs may be fertilized abnormally resulting in an abnormal number of chromosomes in the embryo; these abnormal embryos will not be transferred.
> - The fertilized eggs may degenerate before dividing into embryos, or adequate embryonic development may fail to occur.
> - Bacterial contamination or a laboratory accident may result in loss or damage to some or all of the eggs or embryos.
> - Laboratory equipment may fail, and/or extended power losses can occur which could lead to the destruction of eggs, sperm and embryos.
>
> Initials: [illegible]/[illegible]

(Ex. A, p. 7)

11. With regard to cryopreservation, the agreement specifies that frozen embryos do not always survive the process of freezing and thawing, and that it is the responsibility of each couple with frozen embryos to remain in contact with the clinic on an annual basis:

c. Embryo Cyropreservation

- Freezing of viable embryos not transferred after egg retrieval provides additional chances for pregnancy.
- Frozen embryos do not always survive the process of freezing and thawing.
- Freezing of eggs before fertilization is currently considered experimental. Research is beind done under IRB oversight.
- Ethical and legal dilemmas can arise when couples separate or divorce; disposition agreements are essential.
- It is the responsibility of each couple with frozen embryos to remain in contact with the clinic on an annual basis.

(Ex. A, p. 12)

12. Because the Aysennes opted to cryopreserve embryos, they were required to sign a "Disposition of Embryos" agreement (dated January 29, 2013), in which they agreed CRM would store the cryopreserved pre-embryos for five (5) years (*i.e.*, until 2018). After five years, the Aysennes authorized CRM to destroy any unused frozen pre-embryos, checking and initialing the following option box:

> Time-Limited Storage of Embryos
>
> The Clinic will only maintain cyropreserved embryos for a period of 5 years. After that time, we elect (check one box only):
>
> ☐ Award for research purposes, including but not limited to embryonic stem cell

> research, which may result in the destruction of the frozen embryos but will not result in the birth of a child.
>
> ☑ Destroy the frozen embryos.
>
> ☐ Transfer to a storage facility at our expense.
>
> Default Disposition
>
> I/We understand and agree that in the event none of our elected choices are available, as determined by the clinic, the clinic is authorized, without further notice to us, to destroy and discard our frozen embryos.
>
> Initials: [illegible]/[illegible]

(Ex. A, p.26) The Agreement specifically states :

> I/We agree that in the absence of a more recent written and witnessed consent form, the Clinic is authorized to act on our choices indicated below, so far as it is practical.

(Ex. A, p. 21)

13. The Aysennes signed two more agreements when they had embryos transferred to Ms. Aysenne's uterus in 2013 and 2015, which again acknowledged that "many embryos do not survive the freezing and thawing" process:

> I, Felicia Aysenne (wife) and I, Scott Aysenne (husband), consent to the thawing and replacement of a selected number of our frozen stored embryos into the woman's uterus for the purpose of establishing a pregnancy. We understand that many embryos do not

> survive the freezing and thawing and that this can only be determined after thawing.

(Ex. A, pp. 34-35)

IV. APPLICABLE STANDARD

14. For purposes of this motion, and despite strong disagreement with a number of misstatements in the First Amended Complaint which are inflammatory, medically incorrect and/or factually inaccurate, as well as an improper introductory quote from a *non-binding* special concurrence, these Defendants have assumed the facts as they have been pled by the Aysennes. When considering a challenge under Rule 12(b)(1) or (6), this Court is to accept as true the allegations in the complaint and decide whether, "when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [the pleader] to relief." *Nance v. Matthews*, 622 So. 2d 297, 299 (Ala. 1993); *see also*, *Munza v. Ivey*, 2021 WL 1046484 (Ala. March 19, 2021). Dismissal is proper when it appears that the plaintiff can prove no set of facts in support of the claims as plead that would entitle the plaintiff to relief, or if this Court determines that it lacks jurisdiction. *Nance*, 622 So. 2d at 299; *Ex parte Mobile Infirmary Assoc.*, 2021 WL 4129400 (Ala. September 10, 2021), *Munza, supra* at *4.

V. THE AYSENNES' GENERAL ALLEGATION THAT ALABAMA IMPOSES A DUTY ON THE DEFENDANTS NO DIFFERENT FROM "DHR REGULATIONS" ON DAYCARE CENTERS IS DUE TO BE DISMISSED

15. While not part of any specific cause of action, to the extent that the Aysennes seek to hold the Defendants liable under a duty analogous to unspecified

"DHR regulations" requiring daycare centers to "be secured and closely guarded" since "small children, including embryos, cannot protect themselves," such claims are due to be dismissed as unsupported under Alabama law and not in compliance with the specificity requirements of Alabama Code Section 6-5-551. (*Id*. at ¶ 63)

VI. COUNT ONE ASSERTING A CLAIM FOR WRONGFUL DEATH ON BEHALF OF A CRYOPRESERVED EMBRYO IS DUE TO BE DISMISSED

- Count One is Contrary to Alabama law

16. There is no right of action at common law for wrongful death in the civil context and "the right to recover damages therefore is purely statutory." *Taylor v. City of Clanton*, 18 So. 2d 369, 372 (Ala. 1944). In Alabama, a civil action asserting the type of claims made here must arise from Alabama's "Wrongful Death of Minor" Act, ALA. CODE § 6-5-391. In determining under what conditions a suit may be brought under this Act, this Court must "strictly enforce the wrongful death statute as written, and intended, by the legislature." *Alvarado v. Estate of Kidd ex rel. Kidd*, 205 So. 3d 1188, 1192 (Ala. 2016); *see also Ex parte Weeks*, 294 So. 3d 147, 153-154 ("Alabama statues allowing recovery on a theory of wrongful death are 'in derogation the common law, creating a new punitive liability not recognized by the common law, and will not be extended by construction beyond the reasonable import of' the language of the pertinent statutes.") (quoting *Giles v. Parker*, 159 So. 826 (Ala. 1935)).

17. The issue presented here is a legal one -- whether Alabama law deems an extrauterine, pre-

embryo frozen at sub-zero temperatures such that it is not developing and which is not yet implanted or developing *in utero,* to be a "minor child" as that term is used ALA. CODE. § 6-5-391. For the reasons explained below, it cannot.

18. In interpreting the term "minor child" in wrongful death actions, the Alabama Supreme Court has consistently relied on Alabama's criminal Homicide Act, ALA. CODE § 13A-6-1 *et seq*., and "repeatedly has emphasized the need to establish congruence between the criminal law and [Alabama's] civil wrongful death statutes." *Mack v. Carmack*, 79 So. 3d 597, 602, 611 (Ala. 2011) (finding that "the purpose and reach of the Wrongful Death Act [are] tied to the State's criminal homicide statutes" and "[t]he wrongful death statutes seek to prevent homicides."); *Lollar v. Tankersley*, 613 So.2d 1249, 1253 (Ala. 1993); *Gentry v. Gilmore*, 613 So. 2d 1241, 1245 (Ala. 1993) ("There should not be different standards in the wrongful death and homicide statutes, given that the avowed public purpose of the wrongful death statute is to prevent homicide and to punish the culpable party and not to compensate for the loss.") Concurring in both *Lollar* and *Gentry*, Justice Houston discussed at length the importance of congruency between criminal Homicide Act's definition of "person" and the Wrongful Death Act's definition of "minor child."

19. The Alabama Legislature has made its intent clear on this point. The State's criminal homicide statute provides that a child must be *in utero* to be considered a "person." Specifically, in 2006, the Homicide Act's definition of "person" was amended by the Brody Act to include an unborn child but only if *in utero*, defining the term "person" as "a human being, including an unborn child *in utero* at any stage of

development, regardless of viability." ALA. CODE § 13A-6-1(a)(3) (emphasis added). Likewise, in May of 2019, Alabama's Legislature enacted the Alabama Human Protection Act ("AHPA"). *See*, ALA. CODE § 26-23H-1-8. The AHPA does not attempt to prohibit or limit the disposal of pre-implantation embryos produced in the IVF process. Rather, the AHPA adopts the same definition used in Alabama's homicide statutes, defining an "unborn child" as "a human being, specifically including an unborn child *in utero* at any stage of development, regardless of viability." ALA. CODE § 26-23H-3(7)1-8 (emphasis added). Thus, the Legislature has twice specifically excluded extrauterine/pre-implantation embryos from the definition of "person" and "unborn child."

20. As it is the stated intent of the Alabama Supreme Court that there be congruency between Alabama's criminal laws and its civil wrongful death statutes, it would be improper for this Court to find that ALA. CODE. § 6-5-391 creates a civil cause of action for wrongful death of an extrauterine, cryopreserved pre-embryo. There is no proper legal basis upon which this Court can redefine the term "person" more expansively in the civil context than in the criminal one; destroy congruence between the statutes; and expand the term "person" to include *in vitro*, as opposed to *in utero*, pre-embryos.[5] Count One of the

[5] Indeed, courts nationwide have looked at this issue and refused to extend civil wrongful death claims to cryopreserved pre-embryos. See, e.g., *Jeter v. Mayo Clinic*, 121 P.2d 1256, 1262 63 (Ariz. Ct. App. 2005)(Arizona Court of Appeals refused to extend wrongful death claims to eight-celled, three-day-old pre-embryos because it was the place of the Legislature, not the courts); *Miller v. American Infertility Group of Illinois, S.C.,* 897 N.E.2d 837, 846 (Ill. App. Ct. 2008) (The Illinois Court of Appeals refused to include cryopreserved embryos in its wrongful death

Aysennes' First Amended Complaint for wrongful death and punitive damages is therefore due to be dismissed, as it is contrary to Alabama law and fails to state a claim upon which relief can be granted.

- Count One is Speculative and is based upon a loss of chance.

21. Additionally, Count One is due to be dismissed. It is speculative on its face and contrary to Alabama law, which has specifically rejected the "loss of chance doctrine." *McAfee by and through McAfee v. Baptist Medical Center*, 641 So. 2d 265 (Ala. 1994). The documents before this Court establish on their face that whether this frozen pre-embryo probably would have resulted in a successful pregnancy is unknowable, and the loss of a cryopreserved pre-embryo can only be seen as the loss of a chance for a pregnancy, which is not a proper basis for a claim in this state.

- The Aysennes lack standing to assert a claim as "parents" before placement of the pre-embryos *in utero,* and the frozen, pre-implantation embryos lack standing, as they are not "persons" under the law.

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statute because legislative intent clearly indicated the legislature had only discussed live-born and in utero fetuses.); *Institute for Women's Health P.L.L.C. v. Imad*, 2006 WL 334013 at * 3 (Tex. App. 2006) (Texas wrongful death statute does not provide a cause of action for the destruction of cryopreserved embryos because "person" does not include cryopreserved embryos); *Penniman v. University Hospitals Health System, Inc.,* 130 N.E.3d 333 (Ohio Ct. App. 2019) (Embryo destruction case in which the Court found that no wrongful death claim can be brought by parents on behalf of embryos destroyed pre-implantation because Ohio's statutory definition of a person does not include embryo, and any extension in liability in this context should be through the Legislature).

22. The Aysennes bring Count One in their representative capacity, as the "parents" of their pre-embryo. Alabama law – both statutory and case law – indicates that, within the context of assisted reproduction, the term "parent" is intended to apply to persons only after there is an *in utero* placement of eggs, sperm or embryos. (*See* ALA. CODE § 26-17-707/"Uniform Parentage Act/Child of Assisted Reproduction") ("If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child..."); *Cahill v. Cahill,* 757 So. 2d 465 (Ala. Civ. App. 2000) (Case holding non-implanted, frozen zygotes were not "property of the marriage," because the Disposition Agreement signed provided that after a dissolution of the marriage and/or after three years the medical facility/IVF provider was "the owner of the zygotes."). Because Alabama law does not consider the Aysennes to be the "parents" of the pre-embryo, they lack standing to assert a claim for the wrongful death of a minor pursuant to Ala. Code § 6-5-391. (*See* Ala. Code § 6-5-391) (permitting the "mother" or the "father" to file suit for the wrongful death of a minor child).

23. Likewise, pre-embryos, prior to being implanted *in utero,* would not have standing to assert a wrongful death claim because, as discussed above, they are not yet "persons" or "children" in the eyes of the law. *See Sherley v. Sebelius*, 686 F. Supp. 2d 1 (D.C. Cir. 2009) ("The Court finds, however, that the embryos are not 'persons' under the law and therefore do not have standing.")

24. A lack of standing equates to a lack of subject-matter jurisdiction, and these claims are therefore due to be dismissed. "When a party without standing purports to commence an action, the trial court

acquires no subject-matter jurisdiction." *Munza v. Ivey*, 2021 WL 1046484 *4 (Ala. March 19, 2021).

VII. COUNT TWO ASSERTING A CAUSE OF ACTION FOR NEGLIGENCE/WANTONNESS IS DUE TO BE DISMISSED

- The Aysennes' claims for emotional distress pursuant to a claim for negligence are contrary to Alabama law and due to be dismissed.

25. The Aysennes' claim for damages for mental anguish under a theory of negligence are unsustainable and due to be dismissed.[6] The face of the First Amended Complaint demonstrates neither Plaintiff was at risk of physical harm as a result of the alleged negligence, nor do the Aysennes claim to have been present at the time of the incident made the basis of this suit or in the zone of danger.

26. As a matter of law, Alabama does not recognize emotional distress as a compensable injury for a claim of negligence when the plaintiff has not been physically injured or at risk of physical injury. *See Bailey v. City of Leeds*, 304 So. 3d 719, 721-22, 740 (Ala. 2020); Marsh, Janelle, A*labama Law of Damages* § 36:6 (6th ed. 2021) ("Though there are cases with language broad enough to extend mental anguish damages to negligence cases with no physical injury, these have been limited in later cases to only recovery when the plaintiff is placed in a zone of danger by the defendant's negligent conduct."); *AALAR, Ltd. Inc. v. Francis*, 716 So. 2d 1141 (Ala. 1998); Ala. Pattern Jury Instr. Civ. 11.11 (3d ed.), *Mental Anguish – Zone of*

[6] Count Two references "Negligence" rather than "Negligent Infliction of Emotional Distress," which is not a recognized, independent cause of action in Alabama. See, *AALAR, Ltd. Inc. v. Francis*, 716 So. 2d 1141 (Ala. 1998).

Danger. The Alabama Supreme Court adheres to this principle when the alleged tortious conduct results in property damage only. *See Wal-Mart Stores, Inc. v. Bowers*, 827 So. 2d 63 (Ala. 2001).[7]

27. To the extent Count Two claims that the Aysennes have suffered mental anguish due to being deprived an additional future pregnancy, such a claim is speculative given the acknowledged uncertainties of the "chance" at a future pregnancy. *McAfee by and through McAfee v. Baptist Medical Center*, 641 So. 2d 265 (Ala. 1994). The documents before this Court establish on their face the parties' agreement that whether this frozen pre-embryo probably would have resulted in a successful pregnancy is unknowable. The loss of a cryopreserved pre-embryo can only be seen as the loss of a chance for a pregnancy, which is not a proper basis for a claim in this state. Additionally, in the First Amended Complaint, the Aysennes do not allege that they necessarily intended to try to have an additional pregnancy with their last preembryo. (Doc. 61 ¶ 38).[8]

28. As pleaded, the First Amended Complaint characterizes the legal status of a frozen preembryo as

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[7] The Alabama Supreme Court also adheres to this principle when a parent claims emotional distress caused by the loss of an unborn child. *See*, *Hamilton v. Scott*, 97 So. 3d 728 (Ala. 2012).

[8] The Aysennes allege that they were "injured in losing the value of the embryo wrongfully destroyed," and they seek compensatory damages for "the value of their embryo." (Doc. 61 ¶ 77, 79) How Alabama law would value their preembryo is unclear, but to the extent the Aysennes intend to rely on the preembryo's potential for life as an aspect of its value, it would be inconsistent with Alabama law. *See Central Ala. Electric Co-op v Tapley*, 546 So. 2d 371 (Ala. 1989). *See also*, *Killough v. Jahandarfard*, 578 So. 2d 1041, 1044-1045 (Ala. 1991). The same is true for the Aysennes' compensatory damages claim in Count Three. (Doc. 61 ¶¶ 81, 86)

a dichotomy, with the preembryo treated as either a legal person or property. The Defendants accordingly respond to the claims as pleaded by the Plaintiffs but also note the existence of authority, outside the State of Alabama, that characterizes a preembryo as occupying an interim third position that recognizes the "special respect" a preembryo is owed. *See, e.g.*, *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992).

29. These Defendants reserve the right to more fully brief the issues raised herein.

WHEREFORE, PREMISES CONSIDERED, the Defendants respectfully request this Court dismiss the claims specified herein.

Respectfully submitted,

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EXHIBIT A

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

CIVIL ACTION NO. CV-21-901640

FELICIA BURDICK-AYSENNE AND SCOTT AYSENNE, in their individual capacities and as parents and next friend of BABY AYSENNE, deceased embryo/minor,

Plaintiffs,

v.

THE CENTER FOR REPRODUCTIVE MEDICINE, P.C.; MOBILE INFIRMARY ASSOCIATION, d/b/a MOBILE INFIRMARY MEDICAL CENTER; AND FICTITIOUS DEFENDANTS A through I, all of whose names and true legal identities are otherwise unknown at this time, but who will be added by amendment when ascertained, jointly and severally;

Defendants.

CERTIFICATE

I, Sofia Z. Roe, hereby certify and affirm in writing that I am the Practice Manager of the office of Center for Reproductive Medicine located at 3Mobile Infirmary Cir. Ste 401 Mobile, AL 36607, that I am custodian of the records of said office of the Center for Reproductive Medicine. I certify that the attached copy is a true and complete copy of the agreements signed by Felicia Burdick-Aysenne and/or Scott Aysenne. I further certify that these agreements were made and kept in the usual and regular course of business of the Center

for Reproductive Medicine, that it was in the regular course of business of the Center for Reproductive Medicine to make and keep such agreements, and that the agreements were made at the time of such acts, transactions, occurrences or events to which it refers or within a reasonable time thereafter.

Dated Oct 14, 2021

/s/ Sofia Z. Roe
CUSTODIAN OF RECORDS

Sworn and subscribed to before me on this 14th day of October, 2021

/s/ Sara E. Smith
NOTARY PUBLIC

My Commission Expires:
[Notary Seal: Sara E Smith
My Commission Expires
January 21, 2025
Notary Public
State of Alabama]

The Center for Reproductive Medicine
The Best Science, Medicine And Care for Each Family

Informed Consent for Assisted Reproduction:
In Vitro fertilization, Intracytoplasmic Sperm Injection, Assisted Hatching, Embryo Cryopreservation

Please place your initials below to indicate which components of IVF treatment you agree to undertake in your upcoming treatment cycle. Also, initial each page to indicate that you have read and understand the information provided. If you do not understand the information provided, please speak with your treating physician. There are a few locations within the consent form where you are being asked to make a decision. Please initial your choice and sign where requested.

hosen Elements of Treatment:

Print

Patient:	Partner:	Date:
Felicia Burdick-Aysenne	Scott Aysenne	1/29/13

Option _____

/s/ Felicia Burdick-Aysenne /s/ Scott Aysenne 1/29/13

In-Vitro Fertilization (includes egg-retrieval and embryo transfer)

/s/ Felicia Burdick-Aysenne /s/ Scott Aysenne

Intracytoplasmic Sperm Injection (or "ICSI")

/s/ Felicia Burdick-Aysenne /s/ Scott Aysenne

Assisted Hatching

/s/ Felicia Burdick-Aysenne /s/ Scott Aysenne

Embryo Cyropreservation (requires completion of Disposition of Embryos statement)

Phsycian/Witness Date:

/s/ Sofia Z. Roe 2-12-13

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OVERVIEW

In Vitro Fertilization (IVF) has become an established treatment for many forms of infertility. The main goal of IVF is to allow a patient the opportunity to become pregnant using her own eggs or donor eggs and sperm from her partner or from a donor. This is an elective procedure designed to result in the patient's pregnancy when other treatments have failed or are not appropriate.

This consent reviews the IVF process from start to finish, including the risks that this treatment might pose to you and your offspring. While best efforts have been made to disclose all known risks, there may be risks of IVF that are not yet clarified or even suspected at the time of this writing.

An IVF cycle typically includes the following steps or procedures:

- Medications to grow multiple eggs
- Retrieval of eggs from the ovary or ovaries
- Insemination of eggs with sperm
- Culture of any resulting fertilized eggs (embryos)
- Placement ("transfer) of one or more embryo(s) into the uterus
- Support of the uterine lining with hormones to permit and sustain pregnancy

In certain cases, these additional procedures can be employed:

- Intracytoplasmic sperm injection (ICSI) to increase the chance for fertilization
- Assisted hatching of embryos to potentially increase the chance of embryo attachment ("implantation")
- Embryo Cryopreservation (freezing)

Note: At various points in this document, rates are given which reflect what are believed to be U.S. national averages for those employing IVF treatments. These include items such as pregnancy rates, Cesarean delivery rates, and preterm delivery rates. These rates are not meant to indicate the rates of these outcomes within individual practices offering IVF, and are not to be understood as such. Individual practices may have higher or lower pregnancy and delivery rates than these national averages, and also higher or lower risks for certain complications. It is appropriate to ask the practice about their specific rates.

Also note that while this information is believed to be up to date at the time of publication (2008), newer reports may not yet be incorporated into this *document.*

Outline of Consent for IVF

A. Technique of In Vitro Fertilization

1. Core elements and their risk
    a. Medications for IVF treatment
    b. Transvaginal oocyte retrieval
    c. In vitro fertilization and embryo culture
    d. Embryo transfer

e. Hormonal support of uterine lining

2. Additional elements and their risk

a. Intracytoplasmic sperm injection (ICSI)

b. Assisted hatching

c. Embryo cyropreservation

B. Risks to the woman

1. Ovarian hyperstimulation syndrome

2. Cancer

3. Risks of pregnancy

C. Risks to offspring

1. Overall risks

2. Birth defects

3. Risks of a multiple pregnancy

D. Ethical and religious considerations in infertility treatment

E. Psychosocial effects of infertility treatment

F. Alternatives to IVF

G. Reporting Outcomes

H. References

Disposition of Embryos statement

A. Technique of IVF

a. Medications for IVF Treatment

- The success of IVF largely depends on growing multiple eggs at once
- Injections of the natural hormones FSH and/or LH (gonadotropins) are used for this purpose

- Additional medications are used to prevent premature ovulation
- An overly vigorous ovarian response can occur, or conversely an inadequate response

Medications may include the following (not a complete list):

- *Gonadotropins, or injectable "fertility drugs"* (Follistim®, Gonat-F®, Bravelle®, Menopur®): These natural hormones stimulate the ovary in hopes of inducing the simultaneous growth of several oocytes (eggs) over the span of 8 or more days. All injectable fertility drugs have FSH (follicle stimulating hormone), a hormone that will stimulate the growth of your ovarian follicles (which contain the eggs). Some of them also contain LH (Luteinizing hormone) or LH like activity. LH is a hormone that may work with FSH to increase the production of estrogen and growth of the follicles. Luveris®, recombinant LH, can also be given as a separate injection in addition to FSH or alternatively, low-dose hCG can be used. These medications are given by subcutaneous or intramuscular injection. Proper dosage of these drugs and the timing of egg recovery require monitoring of the ovarian response, usually by way of blood tests and ultrasound examinations during the ovarian stimulation.

  As with all injectable medications, bruising, redness, swelling, or discomfort can occur at the injection site. Rarely, there can be there an allergic reaction to these drugs. The intent of giving these medications is to mature multiple follicles, and many women experience some

bloating and minor discomfort as the follicles grow and the ovaries become temporarily enlarged. Up to 2.0 % of women will develop Ovarian Hyperstimutation Syndrome (OHSS) [see full discussion of OHSS in the Risks to Women section that follows]. Other risks and side effects of gonadotropins include, but are not limited to, fatigue, headaches, weight gain, mood swings, nausea, and clots in blood vessels.

Even with pre-treatment attempts to assess response, and even more so with abnormal pre-treatment evaluations of ovarian reserve, the stimulation may result in very few follicles developing, the end result may be few or no eggs obtained at egg retrieval or even cancellation of the treatment cycle prior to egg retrieval.

Some research suggested that the risk of ovarian tumors may increase in women who take any fertility drugs over a long period of time. These studies had significant flaws that limited the strength of the conclusions. More recent studies have not confirmed this risk. A major risk factor for ovarian cancer is infertility per se, suggesting that early reports may have falsely attributed the risk resulting from infertility to the use of medications to overcome it. In these studies, conception lowered the risk of ovarian tumors to that of fertile women. (see 2.b.2 below for further discussion)

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- *GnRH-agonists (leuprolide acetate)* (Lupron®): This medication is taken by injection. There are two forms of the medication: A short acting medication requiring daily injections and a

long-acting preparation lasting for 1-3 months. The primary role of this medication is to prevent a premature LH surge, which could result in the release of eggs before they are ready to be retrieved. Since GnRH-agonists initially cause a release of FSH and LH from the pituitary, they can also be used to start the growth of the follicles or initiate the final stages of egg maturation. Though leuprolide acetate is an FDA (U.S. Food and Drug Administration) approved medication, it has not been approved for use in IVF, although it has routinely been used in this way for more than 20 years. Potential side effects usually experienced with long-term use include but are not limited to hot flashes, vaginal dryness, bone Loss, nausea, vomiting, skin reactions at the injection site, fluid retention, muscle aches, headaches, and depression. No long term or serious side effects are known. Since GnRH-a are oftentimes administered after ovulation, it is possible that they will be taken early in pregnancy. The safest course of action is to use a barrier method of contraception (condoms) the month you will be starting the GnRH- a. GnRH-a have not been associated with any fetal malformations however you should discontinue use of the GnRH-a as soon as pregnancy is confirmed.

- *GnRH-antagonists (ganirelix acetate or cetrorelix acetate)* (Antagon®, Cetrotide®): These are another class of medications used to prevent premature ovulation. They tend to be used for short periods of time in the late stages of ovarian stimulation. The potential side effects include, but are not limited to, abdominal pain,

headaches, skin reaction at the injection site, and nausea.

- *Human chorionic gonadotropin (hCG)* (Profasi®, Novarel®, Pregnyl®, Ovidrel®): hCG is a natural hormone used in IVF to induce the eggs to become mature and fertilizable. The timing of this medication is critical to retrieve mature eggs. Potential side effects include, but are not limited to breast tenderness, bloating, and pelvic discomfort.
- *Progesterone, and in some cases, estradiol:* Progesterone and estradiol are hormones normally produced by the ovaries after ovulation. After egg retrieval in some women, the ovaries will not produce adequate amounts of these hormones for long enough to fully support a pregnancy. Accordingly, supplemental progesterone, and in some cases estradiol, are given to ensure adequate hormonal support of the uterine lining. Progesterone is usually given by injection or by the vaginal route (Endometrin®, Crinone®, Prochieve®, Prometrium®, or pharmacist-compounded suppositories) after egg retrieval. Progesterone is often continued for some weeks after a pregnancy has been confirmed. Progesterone has not been associated with an increase in fetal abnormalities. Side effects of progesterone include depression, sleepiness, allergic reaction and if given by intra-muscular injection includes the additional risk of infection or pain at the injection site. Estradiol, if given, can be by oral, trans-dermal, intramuscular, or vaginal administration. Side effects of estradiol include nausea, irritation at the application site if given

by the trans-dermal route and the risk of blood clots or stroke.

- *Oral contraceptive pills:* Some treatment protocols include oral contraceptive pills to be taken for 2 to 4 weeks before gonadotropin injections are started in order to suppress hormone production or to schedule a cycle. Side effects include unscheduled bleeding, headache, breast tenderness, nausea, swelling and the risk of blood clots or stroke.
- *Other medications:* Antibiotics may be given for a short time during the treatment cycle to reduce the risk of infection associated with egg retrieval or embryo transfer. Antibiotic use may be associated with causing a yeast infection, nausea, vomiting, diarrhea, rashes, sensitivity to the sun, and allergic reactions. Anti-anxiety medications or muscle relaxants may be recommended prior to the embryo transfer; the most common side effect is drowsiness. Other medications such as steroids, heparin, low molecular weight heparin or aspirin may also be included in the treatment protocol.

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b. Transvaginal Oocyte Retrieval

- Eggs are removed from the ovary with a needle under ultrasound guidance
- Anesthesia is provided to make this comfortable
- Injury and infection are rare

Oocyte retrieval is the removal of eggs from the ovary. A transvaginal ultrasound probe is used to visualize the ovaries and the egg-containing follicles within the ovaries. A long needle, which can be seen on ultrasound,

can be guided into each follicle and the contents aspirated. The aspirated material includes follicular fluid, oocytes (eggs) and granulosa (egg-supporting) cells. Rarely the ovaries are not accessible by the transvaginal route and laparoscopy or transabdominal retrieval is necessary. These procedures and risks wilt be discussed with you by your doctor if applicable. Anesthesia is generally used to reduce if not eliminate discomfort. Risks of egg retrieval include:

Infection: Bacteria normally present in the vagina may be inadvertently transferred into the abdominal cavity by the needle. These bacteria may cause an infection of the uterus, fallopian tubes, ovaries or other intra-abdominal organs. The estimated incidence of infection after egg retrieval is less than 0.5%. Treatment of infections could require the use of oral or intravenous antibiotics. Severe infections occasionally require surgery to remove infected tissue. Infections can have a negative impact on future fertility. Prophylactic antibiotics are sometimes used before the egg retrieval procedure to reduce the risk of pelvic or abdominal infection in patients at higher risk of this complication. Despite the use of antibiotics, there is no way to eliminate this risk completely.

Bleeding: The needle passes through the vaginal watt and into the ovary to obtain the eggs. Both of these structures contain blood vessels. In addition, there are other blood vessels nearby. Small amounts of blood loss are common during egg retrievals. The incidence of major bleeding problems has been estimated to be less than 0.1%. Major bleeding will frequently require surgical repair and possibly loss of the ovary. The need for blood transfusion is rare. (Although very rare, review of the world experience with IVF indicates that unrecognized bleeding has lead to death.)

Trauma: Despite the use of ultrasound guidance, it is possible to damage other intra-abdominal organs during the egg retrieval. Previous reports in the medical literature have noted damage to the bowel, appendix, bladder, ureters, and ovary. Damage to internal organs may result in the need for additional treatment such as surgery for repair or removal of the damaged organ. However, the risk of such trauma is low.

Anesthesia: The use of anesthesia during the egg retrieval can produce unintended complications such as an allergic reaction, low blood pressure, nausea or vomiting and in rare cases death.

Failure: It is possible that the aspiration will fail to obtain any eggs or the eggs may be abnormal or of poor quality and otherwise fail to produce a viable pregnancy.

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c. in vitro fertilization and embryo culture

- Sperm and eggs are placed together in specialized conditions (culture media, controlled temperature, humidity and light) in hopes of fertilization
- Culture medium is designed to permit normal fertilization and early embryo development, but the content of the medium is not standardized.
- Embryo development in the lab helps distinguish embryos with more potential from those with less or none.

After eggs are retrieved, they are transferred to the embryology laboratory where they are kept in conditions that support their needs and growth. The embryos are placed in small dishes or tubes containing "culture medium," which is special fluid developed to

support development of the embryos made to resemble that found in the fallopian tube or uterus. The dishes containing the embryos are then placed into incubators, which control the temperature and atmospheric gasses the embryos experience.

A few hours after eggs are retrieved, sperm are placed in the culture medium with the eggs, or individual sperm are injected into each mature egg in a technique called intracytoplasmic Sperm Injection (ICSI) (see below). The eggs are then returned to the incubator, where they remain to develop. Periodically over the next few days, the dishes are inspected so the development of the embryos can be assessed.

The following day after eggs have been inseminated or injected with a single sperm (ICS1), they are examined for signs that the process of fertilization is underway. At this stage, normal development is evident by the still single cell having 2 nuclei; this stage is called a zygote. Two days after insemination or ICSI, normal embryos have divided into about 4 cells. Three days after insemination or ICSI, normally developing embryos contain about 8 cells. Five days after insemination or ICSI, normally developing embryos have developed to the blastocyst stage, which is typified by an embryo that now has 80 or more cells, an inner fluid-filled cavity, and a small cluster of cells called the inner cell mass.

It is important to note that since many eggs and embryos are abnormal, it is expected that not all eggs will fertilize and not all embryos will divide at a normal rate. The chance that a developing embryo will produce a pregnancy is related to whether its development in the lab is normal, but this correlation is not perfect. This means that not all embryos developing at the normal rate are in fact also

genetically normal, and not all poorly developing embryos are genetically abnormal. Nonetheless, their visual appearance is the most common and useful guide in the selection of the best embryo(s) for transfer.

In spite of reasonable precautions, any of the following may occur in the lab that would prevent the establishment of a pregnancy:

- Fertilization of the egg(s) may fail to occur.
- One or more eggs may be fertilized abnormally resulting in an abnormal number of chromosomes in the embryo; these abnormal embryos will not be transferred.
- The fertilized eggs may degenerate before dividing into embryos, or adequate embryonic development may fail to occur.
- Bacterial contamination or a laboratory accident may result in loss or damage to some or all of the eggs or embryos.
- Laboratory equipment may fail, and/or extended power losses can occur which could lead to the destruction of eggs, sperm and embryos.

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- Other unforeseen circumstances may prevent any step of the procedure to be performed or prevent the establishment of a pregnancy.
- Hurricanes, floods, or other 'acts of God' (including bombings or other terrorist acts) could destroy the Laboratory or its contents, including any sperm, eggs, or embryos being stored there.

Quality control in the lab is extremely important. Sometimes immature or unfertilized eggs, sperm or abnormal embryos (abnormally fertilized eggs or embryos whose lack of development indicates they are not of sufficient quality to be transferred) that would normally be discarded can be used for quality control. You are being asked to allow the clinic to use this material for quality control purposes before being discarded in accordance with normal laboratory procedures and applicable laws. None of this material will be utilized to establish a pregnancy or a cell line unless you sign other consent forms to allow the clinic to use your eggs, sperm or embryos for research purposes. Please indicate your choice below:

☑ I / We hereby CONSENT to allow the clinic to utilize my/our immature or unfertilized eggs, left-over sperm or abnormal embryos for quality control and training purposes before they are discarded.

Patient:	Date:
/s/ Felicia Aysenne	1/29/13
Spouse/Partner	Date:
/s/ Scott Aysenne	1/29/13

☐ I / We hereby DO NOT CONSENT to allow the clinic to utilize my/our immature or unfertilized eggs, left-over sperm or abnormal embryos for quality control and training purposes. This material will be discarded in accordance with normal Laboratory procedures and applicable laws.

Patient:	Date:
_____	_____
Spouse/Partner	Date:
_____	_____

d. Embryo transfer

- After a few days of development, the best appearing embryos are selected for transfer
- The number chosen influences the pregnancy rate and the multiple pregnancy rate
- A woman's age and the appearance of the developing embryo have the greatest influences on pregnancy outcome
- Embryos are placed in the uterine cavity with a thin tube
- Excess embryos of sufficient quality that are not transferred can be frozen

Initials: [illegible]/[illegible]

After a few days of development, one or more embryos are selected for transfer to the uterine cavity. Embryos are placed in the uterine cavity with a thin tube (catheter). Ultrasound guidance may be used to help guide the catheter or confirm placement through the cervix and into the uterine cavity.

Although the possibility of a complication from the embryo transfer is very rare, risks include infection and loss of, or damage to the embryos.

The number of embryos transferred influences the pregnancy rate and the multiple pregnancy rate. The age of the woman and the appearance of the developing embryo have the greatest influence on pregnancy outcome and the chance for multiple pregnancy. While it is possible, it is unusual to develop more fetuses than the number of embryos transferred. It is critical to discuss with your doctor the number to be transferred before the transfer is done.

In an effort to help curtail the problem of multiple pregnancies (see multiple pregnancies), national guidelines published in 2006 recommend limits on the number of embryos to transfer (see Tables below). These limits should not be viewed as a recommendation on the number of embryos to transfer. These limits differ depending on the developmental stage of the embryos and the quality of the embryos and take into account the patient's personal history.

Recommended limits on number of 2-3 day old embryos to transfer

Embryos	age <35	age 35-37	age 38-40	age >40
favorable	1 or 2	2	3	5
unfavorable	2	3	4	5

Recommended limits on number of 5-6 day old embryos to transfer

Embryos	age <35	age 35-37	age 38-40	age >40
favorable	1	2	2	3
unfavorable	2	2	3	3

In some cases, there will be additional embryos remaining in the lab after the transfer is completed. Depending on their developmental normalcy, it may be possible to freeze them for later use. (See section 2.c. for an in-depth discussion of embryo cryopreservation).

e. Hormonal; support of the uterine lining

- Successful attachment of embryo(s) to the uterine lining depends on adequate hormonal support
- Progesterone, given by the intramuscular or vaginal route, is routinely given for this purpose

Successful attachment of embryos to the uterine lining (endometrium) depends on adequate hormonal support of the lining. The critical hormones in this support are progesterone and estradiol. Normally, the ovary makes

sufficient amounts of both hormones. However, in IVF cycles, this support is not always adequate. Therefore, progesterone is routinely given, and some clinics also prescribe estradiol. Progesterone is given by the intramuscular or vaginal route. Estradiol is given by the oral, vaginal, trans-dermal or intramuscular route. The duration of this support is from 2 to 10 weeks.

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a. Intracytoplasmic Sperm Injection (ICSI)

- ICSI is used to increase the chance of fertilization when fertilization rates are anticipated to be lower than normal
- Overall success rates with 1051 are slightly lower than for conventional insemination
- An increased risk of genetic defects in offspring is reported
- ICSI will not improve oocyte defects

The use of ICSI provides an effective treatment for male factor infertility. The negative effects of abnormal semen characteristics and sperm quality on fertilization can be overcome with ICSI if viable sperm are available because the technique bypasses the shell around the egg (zona pellucida) and the egg membrane (oolemma) to deliver the sperm directly into the egg. ICSI involves the direct injection of a single sperm into the interior of an egg using an extremely thin glass needle. ICSI allows couples with male factor infertility to achieve fertilization and live birth rates close to those achieved with in vitro fertilization (IVF) using conventional methods of fertilization in men with normal sperm counts. ICSI can be performed even in men with no sperm in the ejaculate if sperm can be successfully collected from the epididymis or the testis.

Reports on the risk of birth defects associated with ICSI (compared to those associated with conventional fertilization in IVF cycles) have yielded conflicting results. The most comprehensive study conducted thus far, based on data from five-year-old children, has suggested that ICSI is associated with an increased risk of certain major congenital anomalies. However, whether the association is due to the ICSI procedure itself, or to inherent sperm defects, could not be determined because the study did not distinguish between male factor conditions and other causes of infertility. Note that even if there is an increased risk of congenital malformations in children conceived with ICSI, the risk is relatively low (4.2% versus -3% of those conceived naturally). The impact of ICSI on the intellectual and motor development of children conceived via ICSI also has been controversial. An early report suggested that development in such children lagged significantly behind that of children resulting from conventional WE or those conceived naturally. However, more recent studies from larger groups, using standardized criteria for evaluation, have not detected any differences in the development or the abilities of children born after ICSI, conventional IVF, or natural conception.

The prevalence of sex chromosome abnormalities in children conceived via ICSI is higher than observed in the general IVF population, but the absolute difference between the two groups is small (0.8% to 1.0% in ICSI offspring vs. 0.2% in the general IVF population). The reason for the increased prevalence of chromosomal anomalies observed in ICSI offspring is not clear. Whereas it may result from the ICSI procedure itself, it might also reflect a direct paternal effect. Men with sperm problems (low count, poor motility, and/or abnormal shape) are more likely themselves to have genetic

abnormalities and often produce sperm with abnormal chromosomes; the sex chromosomes (X and Y) in the sperm of men with abnormal semen parameters appear especially prone to abnormalities. If sperm with abnormal chromosomes produce pregnancies, these pregnancies will likely carry these same defects. The prevalence of translocations (a re-arrangement of chromosomes that increases the risk of abnormal chromosomes in egg or sperm and can cause miscarriage) of paternal origin and of de novo balanced translocations in ICSI offspring (0.36%) also appears higher than in the general population (0.07%).

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Some men are infertile because the tubes connecting the testes to the penis did not form correctly. This condition, called congenital bilateral absence of the vas deferens (CBAVD), can be bypassed by aspirating sperm directly from the testicles or epididymis, and using them in IVF with ICSI to achieve fertilization. However, men with CBAVD are affected with a mild form of cystic fibrosis (CF), and this gene wilt be passed on to their offspring. All men with CVABD, as well as their partners, should be tested for CF gene mutations prior to treatment, so that the risk of their offspring having CF can be estimated and appropriate testing performed. It is important to understand that there may be CF gene mutations that are not detectable by current testing and parents who test negative for CF mutations can still have children affected with CF.

Some men have no sperm in their ejaculate because their testes do not produce adequate quantities (non-obstructive azoospermia). This can be due to a number of reasons such as prior radiation, chemotherapy or undescended testicles. in some men, small deletions on

their Y chromosome lead to extremely low or absent sperm counts. Testicular biopsy and successful retrieval of viable sperm can be used to fertilize eggs with ICSI. However, any sperm containing a Y chromosomal microdeletion wilt be transmitted to the offspring. Thus the risk that male offspring might later manifest disorders including infertility is very real. However, men without a detectable deletion by blood testing can generate offspring having a Y chromosome microdetetion, because the chromosomes in the sperm may not be the same as those seen when tested by a blood test.

b. Assisted Hatching

- Assisted Hatching involves making a hole in the outer shell (zona pellucida) that surrounds the embryo
- Hatching may make it easier for embryos to escape from the shell that surrounds them.

The cells that make up the early embryo are enclosed within a flexible membrane (shell) called the zona pellucida. During normal development, a portion of this membrane dissolves, allowing the embryonic cells to escape or "hatch" out of the shell. Only upon hatching can the embryonic cells implant within the wait of the uterus to form a pregnancy.

Assisted hatching is the Laboratory technique in which an embryologist makes an artificial opening in the shell of the embryo. The hatching is usually performed on the day of transfer, prior to Loading the embryo into the transfer catheter. The opening can be made by mechanical means (slicing with a needle or burning the shell with a laser) or chemical means by dissolving a small hole in the shell with a dilute acid solution.

Some programs have incorporated artificial or "assisted hatching" into their treatment protocols because they believe it improves implantation rates, and ultimately, live birth rates although definitive evidence of this is tacking.

Risks that may be associated with assisted hatching include damage to the embryo resulting in loss of embryonic cells, or destruction or death of the embryo, Artificial manipulation of the zygote may increase the rates of monozygotic (identical) twinning which are significantly more complicated pregnancies. There may be other risks not yet known.

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c. Embryo Cryopreservation

- Freezing of viable embryos not transferred after egg retrieval provides additional chances for pregnancy.
- Frozen embryos do not always survive the process of freezing and thawing.
- Freezing of eggs before fertilization is currently considered experimental. Research is being done under IRB oversight.
- Ethical and legal dilemmas can arise when couples separate or divorce; disposition agreements are essential.
- It is the responsibility of each couple with frozen embryos to remain in contact with the clinic on an annual basis.

Freezing (or "cryopreservation") of embryos is a common procedure. Since multiple eggs (oocytes) are often produced during ovarian stimulation, on occasion there are more embryos available than are considered

appropriate for transfer to the uterus. These embryos, if viable, can be frozen for future use. This saves the expense and inconvenience of stimulation to obtain additional eggs in the future. Furthermore, the availability of cryopreservation permits patients to transfer fewer embryos during a fresh cycle, reducing the risk of high-order multiple gestations (triplets or greater). Other possible reasons for cryopreservation of embryos include freezing all embryos in the initial cycle to prevent severe ovarian hyperstimulation syndrome (OHSS), or if a couple were concerned that their future fertility potential might be reduced due to necessary medical treatment (e.g., cancer therapy or surgery). The pregnancy success rates for cryopreserved embryos transferred into the human uterus can vary from practice to practice. Overall pregnancy rates at the national level with frozen embryos are lower than with fresh embryos. This, at least in part, results from the routine selection of the best-looking embryos for fresh transfer, reserving the 'second-best for freezing. There is some evidence that pregnancy rates are similar when there is no such selection.

Indications:

- To reduce the risks of multiple gestation
- To preserve fertility potential in the face of certain necessary medical procedures
- To increase the chance of having one or more pregnancies from a single cycle of ovarian stimulation
- To minimize the medical risk and cost to the patient by decreasing the number of stimulated cycles and egg retrievals

- To temporarily delay pregnancy and decrease the risks of hyperstimulation (011S5- see below) by freezing all embryos, when this risk is high.

Risks of embryo cryopreservation: There are several techniques for embryo cryopreservation, and research is ongoing. Traditional methods include "slow," graduated freezing in a computerized setting, and "rapid" freezing methods, called "vitrification." Current techniques deliver a high percentage of viable embryos thawed after cryopreservation, but there can be no certainty that embryos will thaw normally, nor be viable enough to divide and eventually implant in the uterus. Cryopreservation techniques could theoretically be injurious to the embryo. Extensive animal data (through several generations), and limited human data, do not indicate any likelihood that children born of embryos that have been cryopreserved and thawed will experience greater risk of abnormalities than those born of fresh embryos. However, until very large numbers of children have been born following freezing and thawing of embryos, it is not possible to be certain that the rate of abnormalities is no different from the normal rate.

If you choose to freeze embryos, you MUST complete a Disposition for Embryos statement before freezing. This statement outlines the choices you have with regard to the disposition of embryos in a

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variety of situations that may arise. This statement is attached at the end of this consent form. You are free to submit a statement at a later time indicating different choices, provided you both agree in writing. It is also incumbent upon you to remain in touch with the clinic

regarding your residence, and to pay for storage charges as they come due.

B. Risks to the Woman

To increase the number of eggs that develop, a series of hormone shots are given to support the simultaneous growth of numerous follicles instead of just one. The hormones used in this regimen are known to have, or suspected of having a variety of side effects, some minor and some potentially major.

The most serious side effect of ovarian stimulation is ovarian hyperstimulation syndrome (DHSS). Its symptoms can include increased ovarian size, nausea and vomiting, accumulation of fluid in the abdomen, breathing difficulties, an increased concentration of red blood cells, kidney and liver problems, and in the most severe cases, blood clots, kidney failure, or death. The severe cases affect only a very small percentage of women who undergo in vitro fertilization-0.2 percent or less of all treatment cycles—and the very severe are an even smaller percentage. Only about 1.4 in 100,000 cycles has Lead to kidney failure, for example. DHSS occurs at two stages: early, 1 to 5 days after egg retrieval (as a result of the hCG trigger); and late, 10 to 15 days after retrieval (as a result of the hCG if pregnancy occurs). The risk of severe complications is about 4 to 12 times higher if pregnancy occurs which is why sometimes no embryo transfer is performed to reduce the possibility of this occurring.

Many have worried that the use of fertility drugs could Lead to an increased risk of cancer—in particular, breast, ovarian, and uterine (including endometrial) cancers. One must be careful in interpreting epidemiological studies of women taking fertility drugs, because all of these cancers are more common in

women with infertility, so merely comparing women taking fertility drugs with women in the general population inevitably shows an increased incidence of cancer_ When the analysis takes into account the increased cancer risk due to infertility per se, the evidence does not support a relationship between fertility drugs and an increased prevalence of breast or ovarian cancer, More research is required to examine what the long-term impact fertility drugs may be on breast and ovarian cancer prevalence rates. For uterine cancer, the numbers are too small to achieve statistical significance, but it is at Least possible that use of fertility drugs may indeed cause some increased risk of uterine cancer.

Pregnancies that occur with IVF are associated with increased risks of certain conditions (see Table below from the Executive Summary of a National Institute of Child Health and Human Development Workshop held in September 2005, as reported in the journal Obstetrics Et Gynecology, vol. 109, no. 4, pages 967.77, 2007). Some of these risks stem from the higher average age of women pregnant by IVF and the fact that the underlying cause of infertility may be the cause of the increased risk of pregnancy complications. There may be additional risks related to the IVF procedure per se, but it is difficult to assign the relative contributions.

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Potential Risks in Singleton IVF-conceiveci Pregnancies

	Absolute Risk (%) in IVF-conceived Pregnancies	Relative Risk (vs. non IVF-conceived Pregnancies)
Pre-eclampsia	10.3%	1.6 (1.2-2.0)
Placenta previa	2.4%	2.9 (1.5--5.4)
Placental abruption	2.2%	2.4 (1.1--5.2)
Gestational diabetes	6.8%	2.0 (1.4--3.0)
Cesarean delivery	26.7%	2.1 (1.7-2.6)

In this table, the Absolute risk is the percent of IVF Pregnancies in which the risk occurred. The Relative Risk is the risk in IVF versus the risk in non-IVF pregnancies; for example, a relative risk of 2.0 indicates that twice as many IVF pregnancies experience this risk as compared to non-IVF pregnancies. The numbers in parentheses (called the "Confidence interval") indicate the range in which the actual Relative Risk lies.

Please note that most experts believe the rate of Cesarean delivery to be well above the 26.7% rate quoted here.

Currently more than 30% of IVF pregnancies are twins or higher-order multiple gestations (triplets or greater), and about half of all IVF babies are a result of multiple gestations. identical twinning occurs in 1.5% to 4.5% of IVF pregnancies. IVF twins deliver on average three weeks earlier and weigh 1,000 gm less than IVF singletons. Of note, IVF twins do as welt as spontaneously conceived twins. Triplet (and greater) pregnancies deliver before 32 weeks (7 months) in almost half of cases.

Additionally, while embryos are transferred directly into the uterus with IVF, ectopic (tubal, cervical and abdominal) pregnancies as well as abnormal intrauterine pregnancies have occurred either alone or concurrently with a normal intrauterine pregnancy, These abnormal pregnancies oftentimes require medical treatments with methotrexate (a weak chemotherapy drug) or surgery to treat the abnormal pregnancy. Side effects of methotrexate include nausea or vomiting, diarrhea, cramping, mouth ulcers, headache, skin rash, sensitivity to the sun and temporary abnormalities in liver function tests. Risks of surgery include the risks of anesthesia, scar tissue formation inside the uterus, infection, bleeding and injury to any internal organs.

C. Risks to Offspring

- IVF babies may be at a slight increased risk for birth defects
- The risk for a multiple pregnancy is significantly higher for patients undergoing IVF, even when only one embryo is transferred
- Multiple pregnancies are the greatest risk for babies following IVF
- Some risk may also stem from the underlying infertile state, or from the IVF techniques, or both

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Since the first birth of an IVF baby in 1978, more than 3 million children have been born worldwide following IVF treatments. Numerous studies have been conducted to assess the overall health of IVF children and the majority of studies on the safety of IVF have been reassuring. As more time has passed and the dataset

has enlarged, some studies have raised doubts about the equivalence of risks for IVF babies as compared to naturally conceived babies.

A major problem in interpreting the data arises from the fact that comparing a group of infertile couples to a group of normally fertile couples is not the proper comparison to make if one wants to assess the risk that IVF technology engenders. Infertile couples, by definition, do not have normal reproductive function and might be expected to have babies with more abnormalities than a group of normally fertile couples. This said, even if the studies suggesting an increased risk to babies born after IVF prove to be true, the absolute risk of any abnormal outcome appears to be small.

Singletons conceived with IVF tend to be born slightly earlier than naturally conceived babies (39.1 weeks as compared to 39.5 weeks). IVF twins are not born earlier or later than naturally conceived twins. The risk of a singleton IVF conceived baby being born with a birth weight under 5 pounds nine ounces (2500 grams) is 12.5% vs. 7% in naturally conceived singletons.

The risk of birth defects in the normal population is 2-3 %. In IVF babies the birth defect rate may be 2.6-3.9%. The difference is seen predominately in singleton males. Studies to date have not been large enough to prove a link between IVF treatment and specific types of birth defects.

Imprinting Disorders. These are rare disorders having to do with whether a maternal or paternal gene is inappropriately expressed. In two studies approximately 4% of children with the imprinting disorder called Beckwith-Weidemann Syndrome were born after IVF, which is more than expected. A large Danish study

however found no increased risk of imprinting disorders in children conceived with the assistance of IVF. Since the incidence of this syndrome in the general population is 1/15,000, even if there is a 2 to 5-fold increase to 2-5/15,000, this absolute risk is very low.

Childhood cancers. Most studies have not reported an increased risk with the exception of retinoblastoma: In one study in the Netherlands, five cases were reported after IVF treatment which is 5 to 7 times more than expected.

Infant Development. In general, studies of long-term developmental outcomes have been reassuring so far; most children are doing well. However, these studies are difficult to do and suffer from limitations. A more recent study with better methodology reports an increased risk of cerebral palsy (3.7 fold) and developmental delay (4 fold), but most of this stemmed from the prematurity and low birth weight that was a consequence of multiple pregnancy.

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Potential Risks in Singleton IVF Pregnancies

	Absolute Risk (%) in IVF Pregnancies	Relative Risk (vs. non-lVF Pregnancies)
Preterm birth	11.5%	2.0 (1.7-2.2)
Low birth weight (< 2500 g)	9.5%	1.8 (1.4--2.2.)
Very low birth weight (< 1500g)	2.5%	2.7 (2.3--3,1)
Small for gestational age	14.6%	1.6 (1.3--2.0)
NICU (intensive care) admission	17.8%	1.6 (1.3-2.0)
Stillbirth	1.2%	2.6 (1.8--3.6)
Neonatal mortality	0.6%	2.0 (1.2-3.4)
Cerebral palsy	0.4%	2.8 (1.3--5.8)
Genetic risks		
-imprinting disorder	0.03%	17.8 (1.8--432.9)
-major birth defect	4.3%	1.5 (1.3-1.8)
-chromosomal abnormalities (after ICSI):		
-of a sex chromosome	0.6%	3.0
-of another .chromosome	0.4%	5.7

In this table, the Absolute risk is the percent of IVF Pregnancies in which the risk occurred. The Relative Risk is the risk in IVF versus the risk in non-IVF pregnancies; for example, a relative risk of 2.0 indicates that twice as many IVF pregnancies experience this risk as compared to non-IVF pregnancies. The numbers in parentheses (called the "Confidence Interval") indicate the range in which the actual Relative Risk lies.

The most important maternal complications associated with multiple gestation are preterm labor and delivery, pre-eclampsia, and gestational diabetes (see prior section on Risks to Woman). Others include gall

bladder problems, skin problems, excess weight gain, anemia, excessive nausea and vomiting, and exacerbation of pregnancy-associated gastrointestinal symptoms including reflux and constipation. Chronic back pain, intermittent heartburn, postpartum laxity of the abdominal wall, and umbilical hernias also can occur. Triplets and above increase the risk to the mother of more significant complications including postpartum hemorrhage and transfusion.

Prematurity accounts for most of the excess perinatal morbidity and mortality associated with multiple gestations. Moreover, IVF pregnancies are associated with an increased risk of prematurity, independent of maternal age and fetal numbers. Fetal growth problems and discordant growth among the fetuses also result in perinatal morbidity and mortality. Multifetal pregnancy reduction (where one or more fetuses are selectively terminated) reduces, but does not eliminate, the risk of these complications.

Fetal death rates for singleton, twin, and triplet pregnancies are 4.3 per 1,000, 15.5 per 1,000, and 21 per 1,000, respectively, The death of one or more fetuses in a multiple gestation (vanishing twin) is more common in the first trimester and may be observed in up to 25% of pregnancies after IVF. Loss of a fetus in the first trimester is unlikely to adversely affect the surviving fetus or mother. No excess perinatal or maternal morbidity has been described resulting from a "vanishing" embryo.

Demise of a single fetus in a twin pregnancy after the first trimester is more common when they share a placenta, ranging in incidence from 0.5% to 6.8%, and may cause harm to the remaining fetus.

Multiple fetuses (including twins) that share the same placenta have additional risks. Twin-twin transfusion syndrome in which there is an imbalance of circulation between the fetuses may occur in

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up to 20% of twins sharing a placenta. Excess or insufficient amniotic fluid may result from twin-to-twin transfusion syndrome. Twins sharing the same placenta have a higher frequency of birth defects compared to pregnancies having two placentas. Twins sharing the same placenta appear to occur more frequently after blastocyst transfer.

Placenta previa (placenta extends over the cervical opening) and vasa previa (where one or more of the blood vessels extends over the cervical opening) are more common complications in multiple gestations. Abruptio placenta (premature separation of the placenta) also is more common and postpartum hemorrhage may complicate 12% of muttifetal deliveries. Consequences of multiple gestations include the major sequelae of prematurity (cerebral palsy, retinopathy of prematurity, and chronic lung disease) as well as those of fetal growth restriction (polycythemia, hypoglycemia, necrotizing enterocolitis). It is unclear to what extent multiple gestations themselves affect neurobehavioral development in the absence of these complications. Rearing of twins and high-order multiples may generate physical, emotional, and financial stresses, and the incidence of maternal depression and anxiety is increased in women raising multiples. At mid-childhood, prematurely born offspring from multiple gestations have lower IQ scores, and multiple birth children have an increase in behavioral problems compared with singletons. It is not clear to what extent these risks are affected by IVF per se.

The Option of Selective Reduction: Pregnancies that have more than 2 fetuses are considered an adverse outcome of infertility treatment. The greater the number of fetuses within the uterus, the greater is the risk for adverse perinatal and maternal outcomes. Patients with more than twins are faced with the options of continuing the pregnancy with all risks previously described, terminating the entire pregnancy, or reducing the number of fetuses in an effort to decrease the risk of maternal and perinatal morbidity and mortality. Multifetal pregnancy reduction (MFPR) decreases risks associated with preterm delivery, but often creates profound ethical dilemmas. Pregnancy loss is the main risk of MFPR. However, current data suggest that such complications have decreased as experience with the procedure has grown. The risk of loss of the entire pregnancy after MFPR is approximately 1%.

In general, the risk of loss after MFPR increases if the number of fetuses at the beginning of the procedure is more than three. White there is little difference between the loss rates observed when the final number of viable fetuses is two or one, the loss rate is higher in pregnancies reduced to triplets. Pregnancies that are reduced to twins appear to do as well as spontaneously conceived twin gestations, although an increased risk of having a small for gestational age fetus is increased when the starting number is over four. The benefit of MFPR can be documented in triplet and higher-order gestations because reduction prolongs the length of gestation of the surviving fetuses. (This has been demonstrated for triplets; triplets have a 30-35% risk of birth under 32 weeks compared to twins which is 7 to 10%)

D. Ethical and Religious Considerations in Infertility Treatment

Infertility treatment can raise concerns and questions of an ethical or religious nature for some patients. The technique of in vitro fertilization (IVF) involves the creation of human embryos outside the body, and can involve the production of excess embryos and/or 'high-order' multiple pregnancy (triplets or more). We encourage patients and their spouses or partners who so desire to consult with trusted members of their religious or ethics community for guidance on their infertility treatment.

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E. Psychosocial Effects of Infertility Treatment

A diagnosis of infertility can be a devastating and life-altering event that impacts on many aspects of a patient's life. Infertility and its treatment can affect a patient and her spouse or partner medically, financially, socially, emotionally and psychologically. Feelings of anxiousness, depression, isolation, and helplessness are not uncommon among patients undergoing infertility treatment. Strained and stressful relations with spouses, partners and other loved ones are not uncommon as treatment gets underway and progresses.

Our health care team is available to address the emotional, as well as physical symptoms that can accompany infertility. In addition to working with our health care team to minimize the emotional impacts of infertility treatments, patients may also consider working with mental health professionals who are specially trained in the area of infertility care.

While it is normal to experience emotional ups and downs when pursuing infertility treatment, it is

important to recognize when these feelings are of a severe nature. If you experience any of the following symptoms over a prolonged period of time, you may benefit from working with a mental health professional:

- Loss of interest in usual activities
- Depression that doesn't lift
- Strained interpersonal relationships (with partner, family, friends and/or colleagues)
- Difficulty thinking of anything other than your infertility
- High levels of anxiety.
- Diminished ability to accomplish tasks
- Difficulty with concentration
- Change in your sleep patterns (difficulty failing asleep or staying asleep, early morning awakening, sleeping more than usual for you)
- Change in your appetite or weight (increase or decrease)
- Increased use of drugs or alcohol
- Thoughts about death or suicide
- Social isolation
- Persistent feelings of pessimism, guilt, or worthlessness
- Persistent feelings of bitterness or anger

Our health care team can assist you in locating a qualified mental health professional who is familiar with the emotional experience of infertility, or you can contact a national support group such as RESOLVE, (www.resolve.org, Tel. 1-888-623-0744) or The American

Fertility Association (AFA), (www.theafa.orq, Tel: 1-888-917-3777).

F. Alternatives to IVF

There are alternatives to IVF treatment including gamete Intrafallopian transfer (GIFT), zygote intra-fallopian transfer (ZIFT) or tubal embryo transfer (TET) where eggs and sperm, fertilized eggs or developing embryos, respectively, are placed into the fallopian tube(s). Using donor sperm, donor eggs, adoption, or not pursuing treatment are also options. Gametes (sperm and/or eggs), instead of embryos may be frozen for future attempts at pregnancy in an effort to avoid potential future legal or ethical issues relating to disposition of any cryopreserved embryos. Sperm freezing, but not egg

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freezing, has been an established procedure for many decades. Egg freezing is considered an experimental procedure at this time.

G. Reporting Outcomes

The 1992 Fertility Clinic Success Rate and Certification Act requires the Centers for Disease Control and Prevention (CDC) to collect cycle-specific data as well as pregnancy outcome on all assisted reproductive technology cycles performed in the United States each year and requires them to report success rates using these data. Consequently, data from my/our IVF procedure will be provided to the CDC, and to the Society of Assisted Reproductive Technologies (SART) of the American Society of Reproductive Medicine (ASRM) (if my/our clinic is a member of this organization), The CDC may request additional information from the treatment center or contact the me/us directly for

additional follow-up. Additionally, my/our information may be used and disclosed in accordance with HIPAA guidelines in order to perform research or quality control. All information used for research will be de-identified prior to publication. De-identification is a process intended to prevent the data associated with my/our treatment being used to identify me/us as individuals.

H. References:

General IVF overviews available on the Internet

http://www.sart.org/

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Ovarian Hyperstimulation

Ovarian hyperstimulation syndrome, The Practice Committees of the American Society for Reproductive Medicine. Fertil Steril 2006; 86 (suppl 4): S178-S183.

Risks of pregnancy

Infertility, assisted reproductive technology, and adverse pregnancy outcomes. Executive Summary of a National Institute of Child Health and Human Development Workshop. Reddy UM, Wapner RJ, Rebar RW, Tasca RJ. Obstet Gynecol 2007; 109(4):967-77.

Risks to offspring

Infertility, assisted reproductive technology, and adverse pregnancy outcomes. Executive Summary of a National Institute of Child Health and Human Development Workshop. Reddy UM, Wapner RJ, Rebar RW, Tasca RJ. Obstet Gynecot 2007; 109(4):967-77.

Multiple pregnancy associated with infertility therapy. The Practice Committees of the American Society for Reproductive Medicine Fertil Steril 2006; 86 (suppl 4): S106-S110.

Imprinting diseases and IVF: A Danish National IVF cohort study. Lidegaard 0, Pinborg A and Anderson AN Human Reproduction 2005; 20(4):950-954.

Initials: [illegible]/[illegible]

Disposition of Embryos

Because of the possibility of you and/or your partner's separation, divorce, death or incapacitation after embryos have been produced, it is important to decide on the disposition of any embryos (fresh or cryopreserved) that remain in the laboratory in these situations. Since this is a rapidly evolving field, both medically and Legally, the clinic cannot guarantee what the available or acceptable avenues for disposition will be at any future date.

Currently, the alternatives are:

1. Discarding the cryopreserved embryo(s)
2. Donating the cryopreserved embryo(s) for approved research studies.
3. Donating the cryopreserved embryos to another couple in order to attempt pregnancy. (In this case, you may be required to undergo additional infectious disease testing and screening due to Federal or State requirements)
4. Use by one partner with the contemporaneous permission of the other for that use.

This agreement provides several choices for disposition of embryos in these circumstances (death of the patient or the patient's spouse or partner, separation or divorce of the patient and her spouse/partner, successful completion of IVF treatment, decision to discontinue IVF treatment, and by failure to pay fees for frozen storage).

I/We agree that in the absence of a more recent written and witnessed consent form, the Clinic is authorized

to act on our choices indicated below, so far as it is practical.

I/We also agree that in the event that either our chosen dispositional choices are not available or we fail to preserve any choices made herein, whether through nonpayment of storage fees or otherwise, the clinic is authorized to discard and destroy our embryos.

Note:

- Embryos cannot be used to produce pregnancy against the wishes of the partner. For example, in the event of a separation or divorce, embryos cannot be used to create a pregnancy without the express, written consent of both parties, even if donor gametes were used to create the embryos.
- Embryo donation to achieve a pregnancy is regulated by the FDA (U.S. Food and Drug Administration) as well as state laws, as donated tissue; certain screening and testing of the persons providing the sperm and eggs are required before donation can occur.
- You are free to revise the choices you indicate here at any time by completing another form and having it notarized.

Initials: [illegible]/[illegible]

- Your wills should also include your wishes on disposition of the embryos and be consistent with this consent form. Any discrepancies will need to be resolved by court decree.
- Please check the appropriate box in each section to delineate your wishes and initial the bottom of each page.

Death of Patient

In the event the patient dies prior to use of all the embryos, we agree that the embryos should be disposed of in the following manner (check only one box):

☑ Award to patient's spouse or partner, which gives complete control for any purpose, including implantation, donation for research, or destruction. This may entail maintaining the embryos in storage, and the fees and other payments due the clinic for these cryopreservation services.

☐ Donate to another couple or individual for reproductive purposes. This may entail maintaining the embryos in storage, and the fees and other payments due the clinic for these cryopreservation services. If you wish, you may designate a couple or individual to receive the embryos. In the event the designated couple or individual is unable or unwilling to accept the embryos, the clinic will control the donation.

Please donate to:

Name _____
Address _____
_____
Telephone _____
Email _____

Special note for embryos created with gamete donors: If your embryos were formed using gametes (eggs or sperm) from a known third party donor, your instruction to donate these embryos to another couple or individual must be consistent with and in accordance with any and all prior agreements made wlth the gamete donor(s). If anonymous donor

gametes were used, written authorization from the gamete donor must be obtained to use these gametes for anything other than reproduction or destruction of the embryos.

☐ Award for research purposes, including but not United to embryonic stem cell research, which may result in the destruction of the embryos but will not result in the birth of a child.

☐ Destroy the embryos.

☐ Other disposition (please specify):

Default Disposition: I/We understand and agree that in the event none of our elected choices are available, as determined by the clinic, the clinic is authorized, without further notice to us, to destroy and discard our embryos.

Initials: [illegible]/[illegible]

Death of Spouse or Partner

In the event the patient's spouse or partner dies prior to use of all the embryos, we agree that the embryos should be disposed of in the following manner (check one box only):

☑ Award to patient, which gives complete control for any purpose, including implantation, donation for research, or destruction. This may entail maintaining the embryos in storage, and the fees and other payments due the clinic for these cryopreservation services.

☐ Donate to another couple or individual for reproductive purposes. This may entail maintaining the embryos in storage, and the fees and other payments due the clinic for these cryopreservation services, If you wish, you may designate a couple or

individual to receive the embryos. In the event the designated couple or individual is unable or unwilling to accept the embryos, the clinic will control the donation.

Please donate to:

Name _____
Address _____
_____
Telephone _____
Email _____

Special note for embryos created with gamete donors: If your embryos were formed using gametes (eggs or sperm) from a known third party donor, your instruction to donate these embryos to another couple or individual must be consistent with and in accordance with any and all prior agreements made with the gamete donor(s). If anonymous donor gametes were used, written authorization from the gamete donor must be obtained to use these gametes for anything other than reproduction or destruction of the embryos.

☐ Award for research purposes, including but not Limited to embryonic stem cell research, which may result in the destruction of the embryos but will not result in the birth of a child.

☐ Destroy the embryos.

☐ Other disposition (please specify):

Default Disposition: I/We understand and agree that in the event none of our elected choices are available, as determined by the clinic, the clinic is authorized, without further notice to us, to destroy and discard our embryos.

Initials: [illegible]/[illegible]

Simultaneous Death of Patient and Spouse or Partner

In the event the patient and her spouse or partner die at the same time, prior to use of all the embryos, we agree that the embryos should be disposed of in the following manner (check one box only):

☑ Donate to another couple or individual for reproductive purposes. This may entail maintaining the embryos in storage, and the fees and other payments due the clinic for these cryopreservation services. If you wish, you may designate a couple or individual to receive the embryos. In the event the designated couple or individual is unable or unwitting to accept the embryos, the clinic will control the donation.

Please donate to:

Name _____
Address _____
_____
Telephone _____
Email _____

Special note for embryos created with gamete donors: If your embryos were formed using gametes (eggs or sperm) from a known third party donor, your instruction to donate these embryos to another couple or individual must be consistent with and in accordance with any and all prior agreements made with the gamete donor(s). If anonymous donor gametes were used, written authorization from the gamete donor must be obtained to use these gametes for anything other than reproduction or destruction of the embryos.

☐ Award for research purposes, including but not limited to embryonic stem cell research, which may

result in the destruction of the embryos but will not result in the birth of a child.

☐ Destroy the embryos.

☐ Other disposition (please specify):

Default Disposition

I/We understand and agree that in the event none of our elected choices are available, as determined by the clinic, the clinic is authorized, without further notice to us, to destroy and discard our embryos.

Divorce or Dissolution of Relationship

In the event the patient and her spouse are divorced or the patient and her partner dissolve their relationship, we agree that the embryos should be disposed of in the following manner (check one box only):

☑ A court decree and/or settlement agreement will be presented to the Clinic directing use to achieve a pregnancy in one of us or donation to another couple for that purpose.

☐ Award for research purposes, including but not limited to embryonic stem cell research, which may result in the destruction of the embryos but will not result in the birth of a child.

☐ Destroy the embryos.

Initials: [illegible]/[illegible]

Default Disposition

I/We understand and agree that in the event none of our elected choices are available, as determined by the clinic, the clinic is authorized, without further notice to us, to destroy and discard our embryos.

Discontinuation of IVF Treatment

In the event the patient and her spouse or partner mutually agree to discontinue IVF treatment, we agree that any embryos should be disposed of in the following manner (check one box only):

☑ Award to patient, which gives complete control for any purpose, including implantation, donation for research, or destruction. This may entail maintaining the embryos in storage, and the fees and other payments due the clinic for these cryopreservation services.

☐ Award to spouse or partner, which gives complete control for any purpose, including implantation, donation for research, or destruction. This may entail maintaining the embryos in storage, and the fees and other payments due the clinic for these cryopreservation services.

☐ Donate to another couple or individual for reproductive purposes. If you wish, you may designate a couple or individual to receive the embryos. In the event the designated couple or individual is unable or unwilling to accept the frozen embryos, the clinic will control the donation.

Please donate to:

Name _____
Address _____
_____
Telephone _____
Email _____

Special note for embryos created with gamete donors: If your embryos were formed using gametes (eggs or sperm) from a known third party donor, your instruction to donate these embryos to another couple or individual must be consistent with and in

accordance with any and all prior agreements made with the gamete donor(s). If anonymous donor gametes were used, written authorization from the gamete donor must be obtained to use these gametes for anything other than reproduction or destruction of the embryos.

☐ Award for research purposes, including but not limited to embryonic stem cell research, which may result in the destruction of the embryos but will not result in the birth of a child.

☐ Destroy the embryos.

☐ Other disposition (please specify): _____

Default Disposition

I/We understand and agree that in the event none of our elected choices are available, as determined by the Clinic, the clinic is authorized, without further notice to us, to destroy and discard our embryos.

Initials: [illegible]/[illegible]

Nonpayment of Cryopreservation Storage Fees

Maintaining embryo(s) in a frozen state is labor intensive and expensive. There are fees associated with freezing and maintaining cryopreserved embryo(s). Patients/couples who have frozen embryo(s) must remain in contact with the clinic on an annual. basis in order to inform the clinic of their wishes as well as to pay fees associated with the storage of their embryo(s). In situations where there is no contact with the clinic for a period of 5 years or fees associated with embryo storage have not been paid for a period of 5 years and the clinic is unable to contact the patient after reasonable efforts have been made (via registered mail at last known address), the embryo(s) may be

destroyed by the clinic in accordance with normal laboratory procedures and applicable law.

If I/we fail to pay the overdue storage fees within 30 days from the date of said mailing, such failure to pay constitutes my/our express authorization to the clinic to follow the disposition instructions we have elected below without further communications to or from us (check one box only):

☐ Award for research purposes, including but not limited to embryonic stem cell research, which may result in the destruction of the frozen embryos but will not result in the birth of a child.

☑Destroy the frozen embryos.

Default Disposition

I/We understand and agree that in the event none of our elected choices are available, as determined by the clinic, the clinic is authorized, without further notice to us, to destroy and discard our frozen embryos.

Time-Limited Storage of Embryos

The Clinic will only maintain cryopreserved embryos for a period of 5 years. After that time, we elect (check one box only):

☐ Award for research purposes, including but not limited to embryonic stem cell research, which may result in the destruction of the frozen embryos but will not result in the birth of a child.

☑ Destroy the frozen embryos.

☐Transfer to a storage facility at our expense.

Default Disposition

I/We understand and agree that in the event none of our elected choices are available, as determined by the

clinic, the clinic is authorized, without further notice to us, to destroy and discard our frozen embryos.

Initials: [illegible]/[illegible]

Age-Limited Storage of Embryos

I/We understand that the Clinic will not transfer embryos to produce a pregnancy after I reach age years of age (DATE _/_/_). After this age, I/we elect (check one box only):

☑ A court decree and/or settlement agreement will be presented directing use to achieve a pregnancy in the one of us that has not reached this age limit.

☐ Award for research purposes, including but not limited to embryonic stem cell research, which may result in the destruction of the frozen embryos but wilt not result in the birth of a child.

☐ Destroy the frozen embryos.

☐ Transfer to a storage facility at our expense.

☐ Donate the cryopreserved embryos to another couple for reproductive purposes.

Default Disposition

I/We understand and agree that in the event none of our elected choices are available, as determined by the clinic, the clinic is authorized, without further notice to us, to destroy and discard our frozen embryos.

Donation of Frozen Embryos For Research Purposes

If you selected the option "award for research purposes" under any of the preceding circumstances, as a donor of human embryos to research, including but not limited to stem cell research, you should be aware of the following:

- Donating embryo(s) for research or to another couple may not be possible or may be restricted by law. While efforts will be made to abide by your wishes, no guarantees can be given that embryo(s) will be used for research or donated to another couple. In these instances, if after 5 years no recipient or research project can be found, or your embryos are not eligible, your embryo(s) will be destroyed and discarded by the lab in accordance with laboratory procedures and applicable laws.
- The embryos may be used to derive human pluripotent stem cells for research and the cells may be used, at some future time, for human transplantation research.
- All identifiers associated with the embryos will be removed prior to the derivation of human pluripotent stem cells.
- Donors to research will not receive any information about subsequent testing on the embryo or the derived human pluripotent cells,
- Derived cells or cell Lines, with all identifiers removed, may be kept for many years. It is possible the donated material may have commercial potential, but the donor will receive no financial or other benefit from any future commercial development.
- Human pluripotent stem cell research is not intended to provide direct medical benefit to the embryo donor.

Initials: [illegible]/[illegible]

- Donated embryos will not be transferred to a woman's uterus, nor will the embryos survive

the human pluripotent stem cell derivation process. Embryos will be handled respectfully, as is appropriate for all human tissue used in research.

- If the donated embryos were formed with gametes (eggs or sperm) from someone other than the patient and her spouse or partner (those who are signators to this document), the gamete donor(s) may be required to provide a signed, written consent for use of the resulting embryos for research purposes.

Initials: [illegible]/[illegible]

Legal Considerations and Legal Counsel

The Law regarding embryo cryopreservation. subsequent thaw and use, and parent-child status of any resulting child(ren) is, or may be, unsettled in the state in which either the patient, spouse, partner, or any donor currently or in the future lives, or the state in which the ART Program is located. We acknowledge that the ART Program has not given us Legal advice, that we are not relying on the ART Program to give us any legal advice, and that we have been informed that we may wish to consult a lawyer who is experienced in the areas of reproductive law and embryo cryopreservation and disposition if we have any questions or concerns about the present or future status of our embryos, our individual or joint access to them, our individual or joint parental status as to any resulting child, or about any other aspect of this consent and agreement.

Our signatures below certify the disposition selections we have made above. We understand that we can change our selections in the future, but need mutual and written agreement as outlined above. We also

understand that in the event that none of our elected choices is available, the clinic is authorized, without further notice from us, to destroy and discard our frozen embryos.

/s/ Felicia Aysenne	1/29/13
Patient Signature	Date
Felicia Burdick	
Patient Name	Date of Birth
/s/ Scott Aysenne	1/29/13
Spouse / Partner Signature	Date
Scott Aysenne	
Spouse/Partner Name	Date of Birth
/s/ Sofia Z. Roe	2-12-13
Witness	Date

CENTER FOR REPRODUCTIVE MEDICINE
Three Mobile Infirmary Circle, Ste 213
Mobile, AL 36607
(251) 438-4200
crmal@bellsouth.net

AUTHORIZATION REGARDING EGGS, SPERM, AND EMBRYOS FOR IN VITRO FERTILIZATION (IVF)

Name of Patient Felicia Burdick-Aysenne Date 1/29/13

Patient's social security no

Your medical doctor, Dr. [illegible] has authorized The Center for Reproductive Medicine to undertake the laboratory work necessary for your in vitro fertilization (IVF) and/or gamete intrafallopian transfer (GIFT) cycle.

* * * *

In order to undertake the proper procedure in accordance with your wishes, we must Know your preferences concerning the number of embryos to culture, what to do with excess eggs and embryos, what to do in case of poor sperm quality, and how to proceed if no eggs or embryos are obtained. Please clearly mark your choices below. If you have any further questions about these options, please consult your physician.

1. If no eggs are obtained from my surgery:

   ☐ We would like to use eggs from a donor.

   ☑ We do not want donor eggs.

2. If no embryos are obtained after IVF:

   ☑ We would like to receive excess embryos donated by another couple

   ☐ We do not want donor embryos.

3. If my husband's semen sample appears inadequate on the day of IVF or GIFT:

   ☑ We want to consider donor semen as a backup.

   ☐ We do not want to use donor sperm.

4. If more eggs are retrieved than are optimal for IVF or GIFT:

   ☐ Fertilize only _____ eggs and discard the unfertilized eggs.

   ☐ Fertilize only _____ eggs and donate the excess unfertilized eggs to another woman.

   ☐ Fertilize all eggs and transfer all viable embryos into my uterus during this cycle.

☑ Fertilize all eggs and cryopreserve (freeze) any excess embryos. IF YOU SELECT THIS OPTION, YOU MUST EXECUTE A SEPARATE "CONSENT FOR CRYOPRESERVATION" FORM.

☐ Fertilize all eggs, transfer only _____ embryos, and cryopreserve any excess embryos. IF YOU SELECT THIS OPTION, YOU MUST EXECUTE A SEPARATE "CONSENT FOR CRYOPRESERVATION" FORM.

☐ Fertilize all eggs, transfer only _____ embryos, and discard all excess.

☐ Fertilize all eggs and discard all excess.

☐ Fertilize all eggs and donate all excess embryos,

PLEASE READ CAREFULLY AND COMPLETE THE SECTION BELOW IF YOU HAVE AUTHORIZED CRYOPRESERVATION OF FERTILIZED EMBRYOS.

I understand that there may be unforeseen risks to myself or to a fetus or child resulting from this treatment. Although it is difficult to anticipate any such risks, I acknowledge that I have been notified of this possibility, and release Center for Reproductive Medicine, its agents and employees, from liability for any such unforeseen consequences.

The initial fee which you pay to Center for Reproductive Medicine for the cryopreservation of fertilized embryos will include the storage of such embryos for a period of up to 6 months only. Although it cannot be predicted exactly how long embryos may remain viable, it is expected that they can be successfully stored indefinitely. Therefore, if you do not choose to have the embryos implanted at a later cycle or to attempt a subsequent pregnancy within 6 months

from the date of this document, we must know how you wish to proceed.

Please check the appropriate box below.

☑ We understand that 6 months from the date of this document, we will be responsible to Center for Reproductive Medicine for semi-annual storage fees for the storage of those embryos, or we will make arrangements to have such embryos transferred to another facility for long term storage.

☐ Discard all cryopreserved embryos.

* * *

Due to new Food and Drug Administration regulations donation of embryos requires additional blood testing prior to freezing of your embryos. In order to consider embryo donation in the future you must consent to donation prior to Egg Retrieval so that The Center for Reproductive Medicine can be prepared to perform the appropriate blood testing required by the FDA. Embryo donation is a needed and graciously accepted means for an infertile couple to become pregnant. There are very few patients who consent to embryo donation (less than 1%). If this is an option for you please check the box below:

☐ We consent to donation of Cryopreserved embryos. We understand that prior to the time of embryo donation we are responsible to The Center for Reproductive Medicine for semi-annual storage fees for the storage of those embryos. At the time we opt to donate our Cryopreserved embryos we understand that we are no longer have rights or claims to these embryos (More

consent forms will need to be signed when consent to donate is given).

By signing this form, I acknowledge that I have carefully read and understand the above statements, and have freely made the choices indicated.

Felicia Burdick-Aysenne
Print Patient Name

/s/ Felicia Burdick-Aysenne — 1/29/13
Signature of Patient — Date

/s/ Sofia Z. Roe — 2-12-13
Signature of Witness — Date

I, Scott Aysenne, husband of Felicia Burdick-Aysenne have read the above statements regarding cryopreservation of embryos. I agree that embryos produced by my wife's eggs and sperm provided by either me or a donor should be treated by this method. I understand and have freely taken part in the choices indicated.

Scott Aysenne
Print Husband Name

/s/ Scott Aysenne — 1/29/13
Signature of Husband — Date

/s/ Sofia Z. Roe — 2-12-13
Signature of Witness — Date

CONSENT FOR CRYOPRESERVED EMBRYO TRANSFER

I, Felicia Aysenne (wife) and I, Scott Aysenne (husband), consent to the thawing and replacement of a selected number of our frozen stored embryos into the woman's uterus for the purpose of establishing a pregnancy. We understand that many embryos do not

survive the freezing and thawing and that this can only be determined after thawing.

/s/ Felicia Aysenne	1/28/15
Signature (wife)	Date
/s/ Scott Aysenne	1/28/15
Signature (husband)	Date
/s/ Sofia Z. Roe	1/28/15
Witness	Date

(Signature verification form must be signed or you must sign this form in the presence the office manager)

CONSENT FOR CRYOPRESERVED EMBRYO TRANSFER

I, Felicia Burdick-Aysenne (wife) and I, Scott Aysenne (husband), consent to the thawing and replacement of a selected number of our frozen stored embryos into the woman's uterus for the purpose of establishing a pregnancy. We understand that many embryos do not survive the freezing and thawing and that this can only be determined after thawing.

/s/ Felicia Aysenne	4/30/13
Signature (wife)	Date
/s/ Scott Aysenne	4/30/13
Signature (husband)	Date
/s/ [illegible]	4/30/13
Witness	Date

(Signature verification form must be signed or you must sign this form in the presence the office manager)