DOCKET NOS. SC-2022-0515/SC-2022-0579

IN THE SUPREME COURT OF ALABAMA

James LePage and Emily LePage, as Parents and next friend of two deceased LePage embryos - Embryo A & Embryo B; William Tripp Fonde and Caroline Fonde, as Parents and next friend of two deceased Fonde embryos - Embryo C & Embryo D; Felicia Burdick-Aysenne and Scott Aysenne, in their individual capacities and as parents and next friend of Baby Aysenne, deceased embryo/minor;

Appellants,

v.

Mobile Infirmary Association d/b/a/ Mobile Infirmary Medical Center, and The Center for Reproductive Medicine, P.C.

Appellees.

APPEAL FROM THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA
CASE NO. 02-CV-2021-901607 – LePage/Fonde
CASE NO. 02-CV-2021-901940 – Burdick-Aysenne

OPPOSITION TO APPLICATION FOR REHEARING

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INTRODUCTION

> "We're here advocating on behalf of the 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. **What we're advocating is, if you're in the business of helping create embryonic children, you better also be in the business of safeguarding them and protecting them, locking the doors.**"

Transcript of September 19, 2023 oral argument ("Tr.")(App., Exh. A), p. 6, lines 10-19.[1]

ARGUMENT

Plaintiffs/Appellants, LePages, Fondes and Burdick-Asyennes, respectfully oppose rehearing for each of the following reasons:

First, this Court's February 16, 2024 majority opinion is eminently correct. The Court respected the will of the people (Ala. Const. of 1901, Art. I, §36.06), the legislature (Ala. Code §26-22-2(a) ("unborn child" is "an individual organism of the species *homo sapiens* from fertilization until live birth"), §26-23A-3(10) ("unborn child" is "the offspring of any human person from conception until birth"), §26-23H-3(7) and §13A-6-

[1] Plaintiffs' claims are straightforward and are not affiliated with any political or special interest groups or associations.

1(a)(3)), just as this Court respected its own precedents including *Mack v. Carmack*, 79 So.3d 597 (Ala. 2011), *Hamilton v. Scott*, 97 So.3d 728 (Ala. 2012), *Ex parte Ankrom*, 152 So.3d 397 (Ala. 2013), *Stinnett v. Kennedy*, 232 So.3d 202 (Ala. 2016), and *Ex parte Z.W.E.*, 335 So.3d 650 (Ala. 2021).

There were and are no "points of law" or "facts" – from the certified record on appeal in this case – that this Court "overlooked" or "misapprehended" as would be required before rehearing may be granted. Ala. R. App. P. 40(b).

Second, contrary to the public hue and cry and clamor, present Alabama law already ensures there is no criminal liability for healthcare workers employed in the IVF profession. Ala. Code §13A-6-1(b) states:

> (b) Article 1 (Homicide) or Article 2 (Assaults) shall not apply to the death or injury to an unborn child alleged to be caused by medication or medical care or treatment provided to a pregnant woman when performed by a physician or other licensed health care provider.
>
> Mistake, or unintentional error on the part of a licensed physician or other licensed health care provider or his or her employee or agent or any person acting on behalf of the patient shall not subject the licensed physician or other licensed health care provider or person acting on behalf of the patient to any criminal liability under this section.

> Medical care or treatment includes, but is not limited to, ordering, dispensation or administration of prescribed medications and medical procedures.

Id. It is regrettable in the extreme that CRM, MIMC, The Medical Association or their friends would cause IVF healthcare workers to believe for one second that criminal prosecution is even a possibility in Alabama when engaged in ordinary care concerning infertility treatment and storage of embryos.

Third, present Alabama law likewise forbids prosecution of "any woman with respect to her unborn child." Ala. Code §13A-6-1(d) states:

> (d) Nothing in Article 1 (Homicide) or Article 2 (Assaults) shall permit the prosecution of (1) any person for conduct relating to an abortion for which the consent of the pregnant woman or a person authorized by law to act on her behalf has been obtained or for which consent is implied by law or **(2) any woman with respect to her unborn child.**

Id. (emphasis added).

The notion that CRM, MIMC, or their friends would exploit the raw emotions of hopeful mothers and frightened IVF doctors, nurses, and technicians in the face of §§ 13A-6-1(b) and (d) is reprehensible.

Of course, §§ 13A-6-1(b) and (d) were unmentioned in the earlier proceedings because they were *irrelevant to Plaintiffs' claims*. It is simply tragic that *anyone* would prey upon fear while silently permitting

– if not actively encouraging – uninformed policy makers, legislators and journalists to whip up an inaccurate frenzy about what this case is not about.

Fourth, contrary to their representations on rehearing, CRM, MIMC (which jointly presented their defense in the trial court and on appeal) and The Medical Association did in fact expressly agree that life in Alabama begins at fertilization or conception:

> JUSTICE COOK: So, is it your position that these were lives?
>
> MR. MULHERIN: It is, Justice Cook. I think that the embryos – the embryo is a life, but the issue today is whether an embryo is a child protected under the Wrongful Death of a Minor Act. Did the legislature extend that protection to an in vitro embryo?
>
> JUSTICE COOK: That's an awfully narrow gap you're trying to navigate there. It's a life, but it's not protected by the wrongful death statute.
>
> MR. MULHERIN: Well, I think that's what the legislature did.

Ex. A, Tr. 49:9-20.

> CHIEF JUSTICE PARKER: Mr. Keene, way back in 1916, an Alabama Court of Appeals quoted a Medical Association of Alabama publication and held that life begins at conception. Has the medical association changed its definition of when life begins?
>
> MR. KEENE: No, but I think this method of creating life has been a change [sic] since 1916.

Ex. A, Tr. 59:23 – 60:4.[2]

A "judicial admission" is "an express waiver made in court…by the party or his attorney conceding [ ] the truth of some alleged fact." *Liberty Nat. Life Ins. Co. v. Daugherty*, 840 So.2d 152, 161 (Ala. 2002), quoting 9 *John Henry Wigmore*, Evidence in Trials at Common Law, § 2588 at 821-22 (Chad Bourn rev. ed. 1981). "[T]he [judicial admission] is conclusive." *Id*. "A party may not induce an error by a [ ] court and then attempt to win a reversal based on that error." *Walker v. Huntsville*, 62 So.3d 474, 500 (Ala. 2010). "One who has stipulated to certain facts is foreclosed from repudiating them on appeal." *Travelers Indemnity Co. of Connecticut v. Worthington*, 252 So. 3d 645, 663 (Ala. 2017).

Because CRM, MIMC, and The Medical Association admitted that embryos were lives, they may not now assert different contentions when

[2] The Court will recall Plaintiffs' amended complaint sought recovery in the alternative: for the wrongful deaths of the embryos or for emotional distress and the values of the embryos. R. 13. Both CRM and MIMC argued to the trial court that Plaintiffs could not recover compensatory damages "because the only damages a civil jury may assess for the 'wrongful' taking of '**a life**' are punitive damages." R. 51. The trial court accepted that argument and dismissed Plaintiffs' claims. In other words, CRM and MIMC took the position the embryos were "lives" because that allowed them to argue they could not be held accountable for their negligence. CRM, MIMC, and The Medical Association then doubled down on that contention during the appellate oral argument.

requesting rehearing.

Fifth, none of the policy implications argued on rehearing by CRM/MIMC, The Medical Association, The Alabama Hospital Association, The American Society for Reproductive Medicine ("ASRM"), or AAAA/Resolve may, under the standard of appellate review for consideration of dismissal orders, appropriately be considered by this Court. As explained in *Ex parte Ankrom*, *supra*:

> "Policy cannot be the determining factor in our decision; public policy arguments should be directed to the legislature, not to this Court. As [the Court] stated in *Boles v. Parris*, 952 So.2d 364, 367 (Ala. 2006): '[I]t is well established that the legislature, and not this Court, has the exclusive domain to formulate public policy in Alabama.'… 'matters of public policy are for the Legislature and, whether wise or unwise, legislative policies are of no concern to the courts.'"

Id., 152 So.2d at 420. The Court is therefore requested to disregard all such new policy-based arguments.

Sixth, remarkably, none of the amicus briefs filed by The Medical Association, The Hospital Association, ASRM, AAAA/Resolve, or UAB make a single citation to the record on appeal. It is long settled in Alabama that "[t]his Court will not decide a question presented by *amicus curiae* which was not presented by the parties to the cause and will leave the question for decision when properly raised and presented."

State ex rel. Baxley v. Johnson, 300 So.2d 106 (Ala. 1974); *Courtaulds Fibers, Inc. v. Long*, 779 So.2d 198, n. 1 (Ala. 2000). This is because "[a]n amicus curiae is limited to the issues made by the parties to a suit, and issues not made in proceedings below, nor raised in [the] brief of appellant, cannot be injected into a review by any action on the part of the amicus curiae." *Morgan Cnty. Comm'n v. Powell*, 293 So. 2d 830, 840 (Ala. 1974). Accordingly, "the brief of an amicus curiae, or attachments thereto, cannot be used as a vehicle to present additional evidence or new evidence to an appellate court, or to raise new facts." 4 Am. Jur. 2d Amicus Curiae, § 8 (citation omitted). "[A]n amicus curiae will not be permitted to present additional evidence on appeal which was not before the trial court." *Id*. "An appellate court cannot properly consider evidence in an amicus brief that was never made part of the official record." 4 Am. Jur. 2d Amicus Curiae, § 7 (Nov. 2022 Update) (citations omitted). *Accord*, Ed Haden, Alabama Appellate Practice, §18.07[2] (2023 ed.) ("An appellate court will not consider an argument raised by amicus only.")

Put differently, because this Court is an appellate court with jurisdiction defined by separation of powers principles and Ala. Code §12-1-7, the Court is constrained to review only what was contained within the trial court's certified record at the time the trial court ruled. *Frye v.*

Smith, 67 So.3d 882, 892 (Ala. 2011); *Cowen v. M.S. Enterprises, Inc.*, 642 So.2d 453, 454 (Ala. 1994) ("this Court can consider only the evidence that was before the trial court when it made its ruling.").

Accordingly, the Court is likewise requested to disregard all the extraneous new evidentiary submissions from the *amici*.

Seventh, to the extent the Court entertains any of the new arguments concerning policy implications or non-record evidentiary submissions, the Court should also know that all IVF professionals have carefully been monitoring claims and lawsuits concerning destruction and deaths of frozen embryos *for years*. *See, e.g.*, Gerard Letterie, M.D. and Dov Fox, J.D., D. Phil., Lawsuit frequency and claims basis over lost, damaged, and destroyed frozen embryos over a 10-year period. *Fertil Steril Rep. Vol. 1, No. 2, Sept. 2020 2666-3341* (analyzing 133 cases from 2009 through 2019 involving destruction/deaths of thousands of embryos from freezer tank failures and other incidences of negligence and noting that 98% of such cases were settled out of court) (attached as Exhibit B); Judith Dear, J.D., Legal Liability Landscape and the Person/Property Divide, F S Rep. 2020 ("the legal liability landscape surrounding mishandled cryopreserved gametes and embryos reveals the struggle that courts and lawmakers confront in attempting to bring justice when

a patient's dreams of biologic parenthood are shattered by professional wrongdoing.") (attached as Exhibit C); Gerard Letterie, M.D. and Dov Fox, J.D., D. Phil., Legal Personhood and Frozen Embryos: Implications for Fertility Patients and Providers in Post-Roe America, Oxford Journal of Law and The Biosciences, 1-13 (2023) (attached as Exhibit D).

Unfortunately, claims such as those advanced by the Plaintiffs/ Appellants in this case are nothing new. Medical mistakes happen. People suffer grievously when they do.

Because IVF professionals know the harm they can cause, they look for ways to limit their liability. In response to this Court's opinion, they have gone further, seeking absolute legislative immunity from civil liability.

The legislature has now conferred immunity from civil liability (though with no regard to the consequences to future victims and no acknowledgment of the fields of operation of §§13-A-6-1(b) and/or (d)), through promulgation of SB-159; but, again, those are public policy matters, not issues properly considered by an appellate court when reviewing dismissal orders.[3]

[3] Of course the IVF profession *should* want to minimize liability, but it should do so by insisting upon adherence to safety standards rather

Eighth, as for UAB's contention that this Court's majority opinion was not faithful to principles of textualism, the plain language of the opinion belies any such notion. The Court followed *to the letter* the admonitions spelled out in *Gulf Shores City Bd. of Education v. Mackey*, [Ms. 1210353, Dec. 22, 2022], 2022 WL 17843037, ___ So.3d ___ (Ala. 2022) when the Court strove to "understand '[w]hat was the most plausible meaning of the words of the Constitution to the society that adopted it.'" *Id*. at *17, Parker, C.J., concurring, quoting Antonin Scalia, Scalia Speaks, 183 (Crown Forum 2017). The Court's focus was properly on what was before the People of Alabama when in 2018 they elected to amend our Declaration of Rights with what is now Art. I, §36.06. The manuscript opinion engaged in "understanding the words in the context in which they were ratified." *Id*. The words "unborn child" and "unborn children" were best understood by reference to §§26-22-2(a), 26-23A-

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than preying upon the fears of couples pursuing IVF and line and scope healthcare workers.

See John McCormack, Alabama's Mad Dash to Offer IVF Clinics Blanket Immunity, The Dispatch, March 4, 2024 (attached as Exhibit E) quoting Notre Dame law professor Carter Snead (former general counsel to President George W. Bush's Council on Bioethics), who explains that conferring blanket immunity is "a shocking error in judgment that will have catastrophic results."

3(10), 26-23H-3(7), and 13A-6-1(a)(3) such that, per the command of *Gulf Shores City Bd. of Edu.*, this Court should *and did* "give [those] words the meaning they had at the time the law [Art. 1 § 36.06] was adopted."

This is the embodiment of textualism:

> "We look to the plain and commonly understood meaning of the terms used in [a constitutional] provision to discern its meaning. … The object of all construction is to ascertain and effectuate the intention of the people in the adoption of the constitution. The intention is collected from the words of the instrument, read and interpreted in the light of its history."

Justice J. Mitchell, Textualism in Alabama, 74 Ala. L. Rev., 1089, 1100, n. 55 quoting *Barber v. Cornerstone Cmty. Outreach, Inc.*, 42 So.3d 65, 79 (Ala. 2009).

Ninth, not to be lost among the parties' contentions is our paramount duty to *justice*. Sure, emotions are aroused, but that never excuses an attorney's duties "of complete candor and primary loyalty to the court before which they practice." *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1546-7 (11th Cir. 1993):

> "All attorneys, as 'officers of the court,' owe duties of complete candor and primary loyalty to the court before which they practice. An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly. This concept is as old as common law jurisprudence itself. In England, the first licensed practitioners were called 'Servants at Law of Our Lord, the King' and were absolutely forbidden to 'decei[ve] or beguile the Court.' In the United

> States, the first Code of Ethics in 1887, included one canon providing that 'the attorney's office does not destroy … accountability to the Creator,' and another entitled 'Client is not the Keeper of the Attorney's Conscience.'
>
> Unfortunately, the American Bar Association's current Model Rules of Professional Conduct underscore the duty to advocate zealously while neglecting the corresponding duty to advocate within the bounds of the law. As a result, too many attorneys have forgotten the exhortations of the century-old canons. Too many attorneys, like defense counsel in this case, have allowed the objectives of the client to override their ancient duties as officers of the court. In short, they have sold out to the client.
>
> We must return to the original principle that, as officers of the court, attorneys are servants of the law rather than servants of the highest bidder. We must discover the old values of our profession. The integrity of our justice system depends on it."

Id. This Court is not a super-legislature – it is an appellate court charged with reviewing for error rulings of lower inferior courts. Those behind the legislative and media frenzies lost sight of this Court's proper role in the administration of civil justice. The vitriolic attacks on the Justices have no place and must be disregarded. The Court performed as required by settled law. Nothing more could be asked of the Court, and nothing less should be expected of it.

Tenth, as we argued during the September 19, 2023 oral argument, should any party disagree with this Court's holding, its remedy was to seek relief from the Alabama legislature. That is the way our law is

supposed to work. That is the way it has in fact worked in this instance. To the extent any policy issues remain, it is the province of the legislature to sort them out.

CONCLUSION

Every Alabama lawyer swears an oath to support the Constitution of the State of Alabama and of the United States. Ala. Code §34-3-15.

Plaintiffs'/Appellants' counsel in this case were faithful to their oaths and presented arguments supportive of the Constitution of the State of Alabama and of the United States.

The Justices of this Court likewise swore an oath to support the Constitution of the State of Alabama and of the United States. Alabama Constitution of 1901, Art. XVI, Sec. 279. This Court's opinion, including the dissents, is in keeping with these sworn oaths as well.

That parties, *amici*, members of the public, uninformed pundits, politicians, and others might resort to *ad hominem* and other misguided attacks cannot matter to those committed to honoring theirs oaths while dedicated to ensuring justice under the rule of law.

In summary, nothing has properly been presented by CRM/MIMC or their friends which might warrant rehearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limitation set forth in Ala. R. App. P. 40(f). According to the word-count function of Microsoft Word, the brief contains 2950 words from the Introduction through the Conclusion. I further certify that this brief complies with the font requirements set forth in Ala. R. App. P. 32(a)(7). The brief was prepared in the Century Schoolbook font using 14-point type. *See* Ala. R. App. P. 32(d).

/s/ *David G. Wirtes, Jr.*
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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 7th day of March, 2024, filed the foregoing with the Clerk of the Court via the Alabama Appellate Court Electronic Filing system, and that the following parties have been served a copy of same either by electronic mail and/or by United States mail, first-class postage prepaid:

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/s/ *David G. Wirtes, Jr.*

APPENDIX

Exhibit A - Official Transcript, September 19, 2023 Oral Argument, SC-2022-0579/0515;

Exhibit B - Gerard Letterie, M.D. and Dov Fox, J.D., D. Phil., Lawsuit Frequency and Claims Basis over Lost, Damaged, and Destroyed Frozen Embryos over a 10-year Period *Fertil Steril Rep. Vol. 1, No. 2, Sept. 2020 2666-3341*;

Exhibit C - Judith Dear, J.D., Legal Liability Landscape and the Person/Property Divide, F S Rep. 2020;

Exhibit D - Gerard Letterie, M.D. and Dov Fox, J.D., D. Phil., Legal Personhood and Frozen Embryos: Implications for Fertility Patients and Providers in Post-*Roe* America, Oxford Journal of Law and the Biosciences;

Exhibit E - John McCormack, Alabama's Mad Dash to Offer IVF Clinics Blanket Immunity, The Dispatch, March 4, 2024.

EXHIBIT A

STATE OF ALABAMA

IN THE CIRCUIT FOR THE COUNTY OF MOBILE

THIRTEENTH JUDICIAL CIRCUIT

JAMES LEPAGE and EMILY LEPAGE, as Parents and next friend of two deceased LEPAGE embryos - Embryo A & Embryo B; WILLIAM TRIPP FONDE and CAROLINE FONDE as Parents and next friend of two deceased FONDE embryos - Embryo C & Embryo D

Plaintiffs,

VS. **CV 21-901607/SC 22-0515**

Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center, and The Center for Reproductive Medicine, P.C.,

Defendants.

FELICIA BURDICK-AYSENNE and SCOTT AYSENNE, in their individual capacities and as parents and next friend of BABY AYSENNE, deceased embryo/minor,

Plaintiffs,

VS. **CV 21-901640/SC 22-0579**

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.

THE REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

BY:

The Supreme Court of Alabama
Chief Justice Tom Parker
Justice Greg Shaw
Justice Kelli Wise
Justice Tommy Bryan
Justice William B. Sellers
Justice Brady E. Mendheim, Jr.
Justice Sarah H. Stewart
Justice Jay Mitchell
Justice Greg Cook

ORAL ARGUMENTS- September 19, 2023
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* * * * *

(Counsel for the parties present, the following occurred before the Supreme Court of Alabama:)

(September 19, 2023.)

CLERK MEGHAN RHODEBECK: Case number SC-2022-0515, James LePage and Emily LePage, as parents and next friend of two deceased LePage embryos - Embryo A and Embryo B; William Tripp Fonde and Caroline Fonde, as parents and next friend of two deceased Fonde embryos - Embryo C and Embryo D v. Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center, and The Center for Reproductive Medicine, P.C. 10:49:32 10:49:38 10:49:40 10:49:47 10:49:51 10:49:56 10:50:02 10:50:08

And, in case number SC-2022-0579, Felicia Burdick-Aysenne and Scott Aysenne, in their individual capacities as parents and next friend of Baby Aysenne, deceased embryo v. The Center For Reproductive Medicine, P.C., and Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center. 10:50:09 10:50:18 10:50:21 10:50:25 10:50:31 10:50:36

Arguing for the appellants, the Honorable David Wirtes and the Honorable Trip Smalley. And arguing for the appellees, the Honorable Christian Hines, the Honorable Austin Mulherin, and the Honorable Tommy Keene. 10:50:36 10:50:42 10:50:48 10:50:52 10:50:57

CHIEF JUSTICE PARKER: And, just a word to the audience before we get started, we have two cases 10:51:38 10:51:56

consolidated for this oral argument. That's why you have so many attorneys here. And they will be dividing their time. There are lights on the rostrum that will indicate their time limits and, with the help of our clerk, we'll make sure that we're able to marshal this accordingly. 10:52:09 10:52:15 10:52:17 10:52:22 10:52:25 10:52:28

So, Mr. Wirtes, you may begin. 10:52:29

MR. WIRTES: Chief Justice Parker, associate justices, good morning, and if it please the Court. Plaintiffs appear before the Court this morning seeking reversal of an order from the Mobile Circuit Court dismissing Plaintiffs' complaint as amended and, ostensibly, the dismissal order was entered under Rules 12(b)1 for want of standing and 12(b)6 for failure to state a claim. Because we are before the Court on a dismissal order, the Court's review is limited and constrained. The standard of review is de novo. The dismissal order has no presumption of correctness, and the record, because, again, it's a dismissal, is a very limited record: 367 pages in the clerk's record, 94 pages in the transcript from the hearing on the motion to dismiss. So, you have a very limited body of materials to work with. 10:52:33 10:52:43 10:52:45 10:52:48 10:52:52 10:52:54 10:52:58 10:53:02 10:53:06 10:53:10 10:53:14 10:53:20 10:53:22 10:53:28 10:53:30 10:53:34

And you won't be hearing us arguing today about the political repercussions, philosophical implications 10:53:36 10:53:38

of when life begins, public policy arguments about what the consequences of this Court's judgment might be. Those would be wholly inappropriate for a party on a motion to dismiss under this standard of review to try to persuade this Court with. The remedy, of course, is, after the Court does what the law requires the Court to do under our settled law, if there's some disagreement, the parties can approach the legislature and try and make a change from whatever the Court's judgment is. 10:53:45 10:53:49 10:53:52 10:53:56 10:54:01 10:54:05 10:54:09 10:54:12 10:54:15

But, today, we're here advocating on behalf of the 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. What we're advocating is if you're in the business of helping create embryonic children, you better also be in the business of safeguarding and protecting them, locking the doors. When you go to the Infirmary and you see babies in the maternity ward, you see them with grandma and grandpa and the children waving, they're behind a locked door and protected glass. The same should happen with unborn embryonic children. 10:54:18 10:54:22 10:54:27 10:54:31 10:54:37 10:54:41 10:54:46 10:54:49 10:54:56 10:54:58 10:55:04 10:55:07 10:55:11 10:55:14 10:55:19

Now, how do we begin? The first issue for the 10:55:21

Court is whether the word "child" in 6-5-391, the Wrongful Death Act, encompasses unborn embryonic children. And, for the benefit of the audience -- the Court doesn't need to hear this -- but the wrongful death statute reads as follows, "When the death of a minor child is caused by the wrongful act, omission, or negligence of any person or persons, corporation, or their servants or agents of either, the father or mother, or if the father and mother are both dead or if they decline to commence the action or failed to do so within six months of the death of the minor, the personal representative of the minor may commence an action." 10:55:26 10:55:30 10:55:34 10:55:37 10:55:39 10:55:44 10:55:50 10:55:52 10:55:57 10:56:00 10:56:04 10:56:06 10:56:09

So, what does the word "child" in 6-5-391 mean and how do we help the Court construe that word to encompass or bring within its scope unborn embryonic children? We believe the starting point is where the citizens, in 2018, amended our Constitution and its Declaration of Rights by what is now found at Section 36.06. And, again, for the benefit of the audience, as part of the Declaration of Rights, we exempt from the operation of government the rights voted on by the people, and the language in the preamble to 36.06 reads as follows: "To guard against any encroachments on the rights herein retained, we declare that everything in this Declaration 10:56:09 10:56:15 10:56:19 10:56:25 10:56:28 10:56:35 10:56:39 10:56:43 10:56:46 10:56:50 10:56:56 10:56:59

of Rights is excepted out of the general powers that govern it and shall forever remain inviolate." 10:57:03 10:59:11

So, what did the people decide? In subsection (a), this is now the law in our Declaration of Rights: "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." In subsection (b), "The 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." 10:59:14 10:59:17 10:59:21 10:59:25 10:59:29 10:59:33 10:59:40 10:59:42 10:59:45 10:59:49 10:59:53

So, when the people voted and chose to use the words "unborn children" and "unborn child," how do we inform whether that goes so far as to apply to 6-5-391 and the legislature's use of the word "child" in that statute? 10:59:57 10:59:59 11:00:03 11:00:08 11:00:11

JUSTICE COOK: Not to stop you, but the wrongful death statute here was passed in 1872, right? 11:05:46 11:06:15

MR. WIRTES: A version of it, yes, sir. 11:06:19

JUSTICE COOK: Yeah, and it's not been amended -- the word "minor child," that language has not been changed since 1872, right? 11:06:21 11:06:24 11:06:28

MR. WIRTES: Right. 11:06:30

JUSTICE COOK: And, before the Brody Act, the one that amended the Homicide Act, before that act, we, as a Court, had repeatedly ruled that an unborn child and the fetus was not a minor child under the Wrongful Death Act, correct? 11:06:31 11:06:33 11:06:37 11:06:45 11:06:48

MR. WIRTES: Well, until 2011 when that changed in Mack v. Carmack. 11:06:50 11:06:53

JUSTICE COOK: Because of the Brody Act? 11:06:55

MR. WIRTES: Not just because of the Brody Act, no. On the contrary -- 11:06:56 11:06:58

JUSTICE COOK: Help me why that was not just because of the Brody Act. 11:07:23 11:07:26

MR. WIRTES: Well, the Hamilton decision -- 11:07:27

JUSTICE COOK: Uh-huh. 11:07:27

MR. WIRTES: -- to expand on your definition, says the Wrongful Death Act applies to any unborn child, not just fetuses and, certainly, not just in utero children. It's very curious in the order of dismissal. The circuit judge writes, "This Court visited this issue on two occasions," and it cites Mack v. Carmack and it cites Stinnett, but it doesn't cite Hamilton. And why? Because the order prepared by our friends representing the Defendants can't -- can't defend or fight against Hamilton. Hamilton explicitly states any unborn child. And that's why I'm building -- 11:07:30 11:07:33 11:07:38 11:07:45 11:07:48 11:07:51 11:07:55 11:07:58 11:08:01 11:08:05 11:08:10

JUSTICE COOK: That's kind of circular, though. I mean, that doesn't answer the question of what a child is, right? 11:08:12 11:08:14 11:08:16

MR. WIRTES: Well, that's why I'm in the process of talking about what was -- 11:08:17 11:08:19

JUSTICE COOK: Good -- 11:08:21

MR. WIRTES: -- before the citizens when we voted in 2018. 11:08:22 11:08:28

JUSTICE COOK: But they didn't amend -- the constitutional change in 2018 didn't amend the statute from 1872, right? 11:08:29 11:08:31 11:11:42

MR. WIRTES: Did not amend the statute. That was not put to the citizens for a vote. But, Justice Cook, at that time, there were a number of statutes that were part of the warp and woof of what the citizens voted on and could have understood the word "unborn child" and "unborn children" to mean at the time they voted. And so, you must pay deference to what the legislature defined, and I'll give you a list of five statutes. 11:11:44 11:11:46 11:11:52 11:11:54 11:11:58 11:12:02 11:12:05 11:12:11

Let's start with the chemical endangerment statute, 26-15-3.2(a), child. This Court construed the word "child" in Ex parte Ankrom, a 2013 opinion, to mean unborn children and extended the reach of this criminal statute with a higher burden of proof than a civil wrongful death statute to unborn children. It did so by 11:12:19 11:12:21 11:12:30 11:12:36 11:12:40 11:12:44

reference to dictionary definitions. 11:12:48

JUSTICE COOK: Uh-huh. 11:12:51

MR. WIRTES: The Abortion of Viable Unborn Child Act from 1997, which is now codified at Section 26-22-1 and 26-22-2, the legislature defines unborn child and fetus as an individual organism of the species Homo Sapiens from fertilization until live birth. 11:12:53 11:12:56 11:13:02 11:13:09 11:13:15

So, the citizens, as of the vote in 2018, knew just from that one statute -- and there are more that I'm about to talk about -- that we defined unborn children in our law as from fertilization until live birth. 11:13:18 11:13:22 11:13:26 11:13:29 11:13:33

JUSTICE COOK: The abortion statute covers in utero children, though, right? That's the language in the abortion statute. 11:13:35 11:13:39 11:14:23

MR. WIRTES: By definition, of course. You can't have abortion unless there's gestation and pregnancy. But it's a related statute. It defines children, unborn children. 11:14:23 11:14:26 11:14:29 11:14:32

JUSTICE COOK: I'm sorry. Go ahead. I apologize. 11:14:34

MR. WIRTES: Under the Woman's Right to Know Act from 2002 now codified at 26-23A-10, unborn child is defined as the offspring of any human person from conception until birth. Again, that was before the citizens at the time of adoption of 36.06. The Brody 11:14:36 11:14:38 11:14:46 11:14:50 11:14:54

Act that Your Honor referred to, that was a 2006 amendment to the criminal statute defining what constitutes homicide, and it defined, as we say in the briefs -- I want to get the language just right -- the term when referring to the victim of a criminal homicide or assault means a human being, including an unborn child in utero at any stage of development, regardless of viability. And we'll come back to the rule of construction about the use of the word "including" in legislation -- 11:15:00 11:15:04 11:15:06 11:15:11 11:15:16 11:15:19 11:15:23 11:15:28 11:15:32 11:15:37

CHIEF JUSTICE PARKER: Yes, Mr. Wirtes, your red light is on, but because this case has so many issues, go ahead and finish your list that you are proposing in response to this question. And, Madam Clerk, let's make sure that we give a comparable amount of time to the other side. 11:15:37 11:15:39 11:15:45 11:15:48 11:15:53 11:15:56

MR. WIRTES: Thank you, Chief Justice. The last statute I wanted to mention in this part of the argument is the Alabama Human Life Protection Act. Of course, it was promulgated in 2019, a year after the constitutional vote, but it borrowed the language from the Brody Act and now reads, "unborn child, child or person, a human being, specifically including an unborn child in utero at any stage of development regardless of viability." So, we had these statutes in law at the time the 11:15:56 11:15:59 11:16:02 11:16:06 11:16:10 11:16:14 11:16:19 11:16:22 11:16:26

citizens voted to except from government the enshrined protections of all Alabama law for unborn children. 11:16:32 11:16:37

We have more to talk about. I know my time is up temporarily. We'll talk about this Court's decisions that had been rendered before the 2018 vote as well. Thank you. 11:16:41 11:16:44 11:16:48 11:16:52

CHIEF JUSTICE PARKER: Thank you, Mr. Wirtes. 11:16:53

Mr. Smalley, you are next. 11:17:18

MR. SMALLEY: Good morning, Mr. Chief Justice, associate justices. I want to talk more specifically about the Trial Court's order because, Justice Cook, you mentioned circularity, and the circularity in this case is the Defendant's argument that these embryos can be both human beings on the one hand, but not be minor children on the other, and that's what we can't -- When we got this Trial Court's order, we read it and we read it, and we couldn't make sense of it. And, finally, what came to us is that it's got this -- this catch-22. Well, these embryos are the only things that are living that aren't protected under some aspect of Alabama law. 11:17:27 11:17:30 11:17:32 11:17:35 11:17:38 11:17:41 11:17:44 11:17:47 11:17:50 11:17:53 11:17:58 11:18:02

My family owns a cattle farm up in Gadsden. We grow cattle. We grow corn. We grow timber. My grandfather loved that farm so much, he's buried on it. Under Alabama law, if you come and you kill my cattle, if you take down my corn, if you wrongfully cut my 11:18:06 11:18:10 11:18:13 11:18:16 11:18:19

timber, if you go and you denigrate my grandfather's grave, I have a claim. I have a claim for all of those things. But, under the Trial Court's order, under the Defendant's argument, these IVF embryos that are human lives that are no different than any other embryos in the world other than their location would have complete civil immunity. There would be no claim under Alabama's tort laws for the wrongful death or destruction of these embryos. And that word "wrongful" is key to understanding this case. 11:18:21 11:18:26 11:18:29 11:18:32 11:18:37 11:18:40 11:18:44 11:18:48 11:18:52 11:19:39

As Mr. Wirtes talked about in his opening, this is one of the most blatant, glaring acts of negligent security that I have ever seen. They didn't lock their doors. They didn't do the most basic of things that were asked of them in this case. And, to allow that type of wrongful act to be -- to lead to a situation where there are no civil remedies just cannot be the law of this state. 11:19:41 11:19:45 11:19:49 11:19:52 11:19:54 11:19:59 11:20:05 11:20:10

JUSTICE COOK: And I'll have to say I'm very attracted by your catch-22 argument. I mean, the idea that you cannot have any liability, it means there's going to be no incentive to protect it. Help me out, though. Like what's the measure of damages here? 11:20:11 11:20:14 11:20:17 11:20:20 11:20:23

MR. SMALLEY: That's an excellent question, Justice Cook. And, if we go under the wrongful death 11:20:28 11:20:31

claim, then it would be our usual punitive damages that we have in any type of wrongful death action. However, if the Court were to rule that there is a line of demarcation such that embryos that are in utero are going to be treated separately than embryos that are in vitro, I would say that we would treat them just like any other claim, and the juries of Alabama certainly can put a value on this. And, to your point, this exact issue was tried in California, in San Francisco in 2020 and the jury came back and rendered a 15 million dollar verdict for five families that went through exactly what our clients did. And I will say this: It's my opinion that if the good folks of San Francisco can do it, the good folks of Mobile County can do it as well. 11:20:34 11:20:36 11:20:39 11:20:42 11:20:45 11:20:55 11:21:01 11:21:05 11:21:07 11:21:11 11:21:23 11:21:56 11:21:59 11:22:03

JUSTICE COOK: I'll say I'm not -- I was aware of that case, but I'm not particularly attracted by the California case law, but I am very attracted by the idea that -- this catch-22 argument. It just -- it really bothers me, and I'm going to definitely ask the Defendants about it on argument. And I'll have to say that the Raley case that y'all cited dealing with dismissal at 12(b)6 stage for lack of damages is a real problem for me. And I noted that they did not notice that case, but I'm still -- Tell me what would happen if your cattle was killed. What's the measure of damages? 11:22:06 11:22:07 11:22:09 11:22:14 11:22:18 11:22:20 11:22:23 11:22:26 11:22:31 11:22:34 11:22:37

MR. SMALLEY: The measure of damages in that case is that you would go and you would look at what -- what a cattle is worth, so to say. And I will agree that this would be a difficult case to value, absolutely, to the extent that we want to view this like the Jeter case in Arizona did in the early '90s and say we're going to call it a special type of property. I absolutely think that's a difficult decision. 11:22:41 11:22:43 11:22:45 11:22:51 11:22:53 11:22:56 11:22:59 11:23:01

JUSTICE COOK: And the word "property" is a problem, I think. It just -- it's talismanic. It's a third rail kind of word that I don't think we want to use. 11:23:39 11:23:41 11:23:44 11:23:47

MR. SMALLEY: And we one hundred percent agree. The issue that we have is, under Alabama law, the way that we separate things is you have two items in all of existence. You have human lives and you have everything else. 11:23:48 11:23:51 11:23:53 11:23:56 11:23:58

JUSTICE COOK: Yeah. 11:23:59

MR. SMALLEY: So, what we are faced with is this decision are we going to have this be considered a human life or something else. And the manner by which we title it I don't think is, necessarily, as important as reversing the Trial Court's decision that there are no tort remedies. That's the fundamental issue that we have before this Court. 11:24:01 11:24:03 11:24:06 11:24:08 11:24:10 11:24:13 11:24:16

JUSTICE SELLERS: So, I hate to interrupt you, but your time is limited. What you're arguing is there's no remedy whatsoever under Alabama tort law for these embryos or for these parents. I mean, it's wrongful death. That may be the issue here, but is there something less than wrongful death that the families could recover under? 11:24:45 11:24:47 11:25:38 11:25:41 11:25:43 11:25:46 11:25:48

MR. SMALLEY: And, to your point, Justice Sellers, when we filed our First Amended Complaint, we specifically said, look, to the extent that the Wrongful Death Act doesn't apply, we have a negligence and wantonness claim. And the Defendants implicitly conceded that point at the Trial Court on the Aysenne case because their motion to dismiss was titled "Motion to Dismiss Certain Claims." They didn't seek to dismiss the negligence claim. They didn't seek to dismiss the wantonness claim. All that they sought to dismiss was the wrongful death claim. 11:25:49 11:25:51 11:25:53 11:25:56 11:25:58 11:26:01 11:26:05 11:26:08 11:26:12 11:26:14 11:26:17

And so, to your point, I do think that we would have a negligence or wantonness claim. We would just -- You know, the way that we titled it, I certainly think, to Justice Cook's point, we would need to be respectful of this -- It's a difficult issue to -- 11:26:19 11:26:22 11:26:25 11:26:28 11:26:30

JUSTICE COOK: Yeah. 11:26:33

MR. SMALLEY: -- call these embryos property. I 11:26:34

don't think that's correct. 11:26:36

Yes, ma'am? 11:27:14

JUSTICE WISE: Is it the job of the judiciary to determine what the value of life is or is that a legislative issue? 11:27:14 11:27:18 11:27:28

MR. SMALLEY: That's a great -- The question becomes to the extent -- The legislature has, to some extent, left this to the court's decision as to how we're going to define this particular area of life. And what Alabama law has developed over the years is, in many ways, the science has surpassed the law, and it's time that the law catches up to that. And other states have come up with a remedy. We just, certainly, can't be the only state by which there is no remedy at all. 11:27:30 11:27:32 11:27:37 11:27:42 11:27:46 11:27:48 11:27:52 11:27:54 11:27:58

And so, whether it be under our wrongful death statute, which, I think, Mr. Wirtes has eloquently stated, we think that's the proper remedy. We don't think there's any reason to separate in vitro embryos from in utero embryos. But to the extent we are, we think that having our usual property remedies, providing the jury with some measure of damages to the extent we would look at what's the value to the Plaintiffs. That's how we normally value property, to your point, Justice Cook, and I think that there would be a remedy here. 11:28:01 11:28:03 11:28:06 11:28:08 11:28:11 11:28:15 11:28:17 11:28:20 11:28:22 11:28:26 11:28:27

JUSTICE BRYAN: Have there been other jurisdictions similar to Alabama's Wrongful Death Act that's covered frozen embryos before? 11:29:45 11:29:47 11:29:51

MR. SMALLEY: Not under a specific wrongful death statutory scheme, but, Justice Bryan, the issue -- When you look at other states, the problem you have is -- and this is something that Mr. Wirtes talked about in his briefing. When you do a survey of this, you have to have such an understanding of each individual state's viability requirements in a wrongful death case. I'll give you just a quick example. I know my time is up. 11:30:52 11:30:54 11:30:57 11:30:59 11:31:01 11:31:05 11:31:08 11:31:12

MR. BRYAN: You're good. 11:31:14

MR. SMALLEY: Okay. In Ohio, for example, they have a viability requirement. So, would this case overrule that requirement -- excuse me, or this Court overrule that requirement in Mack? Ohio didn't. Other states haven't as well. And so, when you look at those other states, to Justice Cook's point about California not being, maybe, the leader here when it comes to how we're going to claim it -- I'm just looking at them as to say if they can have a remedy, we can, too -- 11:31:15 11:31:17 11:31:20 11:31:23 11:31:26 11:31:29 11:31:32 11:33:23 11:33:25

JUSTICE BRYAN: I understand. 11:33:25

MR. SMALLEY: -- I do think that it's difficult just to look at other states because we are one of the few states that has a constitutional provision that says 11:33:29 11:33:30 11:33:32

we're going to protect all right to life from the unborn. We're going to make that a key aspect of our fundamental beliefs. It's in our statutory scheme. It's been a big part of this Court's decision-making really since Mack in 2011 on, which overruled those cases from the early 1990s that I really think fundamentally got it wrong. 11:33:34 11:33:38 11:33:40 11:33:44 11:33:48 11:34:35 11:34:38

And so, it's hard to just -- to look at other states and see how they've done it. But Arizona, New York, New Jersey, Rhode Island, California, just to name a few off the top of my head, do have some type of judicially-created remedy, which is the fundamental question we're asking is this -- Let our folks have their day in court, whether it be under a wrongful death came claim or some other claim that we judicially create. We've been doing that for, literally, hundreds of years. It's the bedrock of our common law system. 11:34:40 11:34:43 11:34:46 11:34:48 11:34:52 11:34:56 11:34:59 11:35:01 11:35:05 11:35:07

JUSTICE COOK: We don't have the power under -- If it's a statute, I can't decide, well, the public policy should be this. The statute is what the statute is. But if it's a common law claim, I think we have a lot more leeway to say, well, you know, okay, we'll look at the public policy in making that determination. I just struggle with what that measure of damages is. Maybe that's for the summary judgment stage instead of the 11:35:21 11:35:50 11:35:53 11:35:56 11:35:59 11:36:04 11:36:07 11:36:11

12(b)6 stage. I don't know. 11:36:14

MR. SMALLEY: It could be, and where -- When I talked to the folks in California, one of the things they talked about is this idea that it's unique; that only exists a single solitary time in the universe. But they also talked about -- That was a troublesome aspect, but they thought the jury got it right. I mean, the jury awarded a very large verdict for five people. 11:36:16 11:36:17 11:36:19 11:36:22 11:36:26 11:36:30 11:36:33

JUSTICE COOK: Uh-huh. 11:36:33

MR. SMALLEY: Fundamentally, what we're talking about was something that could never be replaced, was taken from them from the wrongful acts of someone else. And I really think that our juries -- I mean, I know you know, Justice Stewart. You were on the bench for several years and many of y'all were as well. Juries have a weird way of getting it right, and I would really trust that they could fundamentally come up with some valuation, whether it be under a mental anguish scheme, under some type of -- 11:36:36 11:36:37 11:36:40 11:36:42 11:36:46 11:36:47 11:36:50 11:36:53 11:36:55 11:36:58

JUSTICE COOK: Who this belongs to as well. I mean, whether or not you're bringing the claim on behalf of the parents as next friends for the infant -- for the embryos or whether you're bringing it on their behalf themselves. Your complaint brought it on both behalves; is that right? 11:37:00 11:37:02 11:37:05 11:37:09 11:37:12 11:37:15

MR. SMALLEY: Yes, sir. So, we brought it as a wrongful death claim under 6-5-391 as next -- as the parents and we also brought it in their individual capacities to the extent the embryos were not considered human lives. 11:37:16 11:37:17 11:37:21 11:37:23 11:37:27

JUSTICE COOK: Are both cases brought that way? 11:37:27

MR. SMALLEY: Yes, sir. Well, thank you for your time. 11:37:30 11:37:32

CHIEF JUSTICE PARKER: Mr. Smalley, thank you. And, before we start with the other side, Madam Clerk, this ran quite a bit over and, so, Counsel, there are three of you that are going to argue. Who does the extra time go to? Everybody is pointing to one. Okay. So, we've got the road map ahead of us, then. 11:37:33 11:37:34 11:37:38 11:37:46 11:37:48 11:37:56

Please, Mr. Hines. 11:38:02

MR. HINES: May it please -- 11:38:42

JUSTICE WISE: Make sure your ringer is off. 11:38:58

MR. HINES: It is. It is. Everything is off. I'm on airplane mode, Justice Wise. I've double-checked everything. 11:39:30 11:39:31 11:39:34

And may it please the Court. Welcome to Mobile. And, Justice Stewart, in your case, welcome home. I'm Christian Hines for the Mobile Infirmary. For the purpose of this oral argument, we thought it might assist the Court if we sorta divided the arguments 11:39:35 11:39:36 11:39:40 11:39:43 11:39:44

somewhat. So, I'll be addressing all the wrongful death issues, and that's why I would have the extra time. And Mr. Austin Mulherin for The Center of Reproductive Medicine will be addressing the alternate claims, the tort claims, the negligence claims, et cetera. And then, finally, Mr. Tommy Keene will be arguing for the amicus, the Medical Association of the State of Alabama. 11:39:47 11:39:49 11:39:53 11:40:17 11:40:20 11:40:23 11:40:26

JUSTICE SHAW: Mr. Hines, before you get started -- 11:41:47 11:41:49

MR. HINES: Yes, sir. 11:41:49

JUSTICE SHAW: -- let me lay just a couple of things down as a foundation for you to think about as you proceed. 11:41:51 11:41:52 11:41:55

MR. HINES: Yes, sir. 11:41:55

JUSTICE SHAW: You know, normally, the doctrine of separation of powers precludes us from rewriting statutes. We don't make public policy in Alabama. That's the job of the legislature. At times, we have to try to discover what that policy may be when we have an ambiguity in a statute and the doctrine of separation of powers allows us, then, to step in and try to figure out what the legislature was trying to accomplish. 11:41:57 11:42:01 11:42:05 11:42:08 11:42:11 11:42:16 11:42:21 11:42:26

Normally, when we do that, we try to identify that ambiguity, and sometimes it's patent. Sometimes it's latent. Patent meaning we've got an inconsistency on 11:42:28 11:42:32 11:42:36

the face of the statute. Latent meaning we may have an inconsistency generated from other statutes or something else. At that point, you know, we would, then, engage -- if it is ambiguous, we would engage in construction. And, until that point, our authority, basically, is to apply the statute as it is clearly written. We only know what the legislature intends by what the legislature says. 11:42:39 11:42:42 11:42:45 11:42:49 11:42:54 11:42:58 11:43:03 11:43:07

So, with that -- with that framework in place and the fact that this Court has in at least two cases looked to the Homicide Act to inform us as to what the definition of minor child is in the Wrongful Death Act, I wondered if, at some point during your argument, if you can go specifically to the language in that Homicide Act and tell us what did the legislature do when it put that new definition in that Homicide Act and how does that inform us as to what the Wrongful Death Act should mean. 11:43:09 11:43:15 11:43:22 11:43:25 11:43:31 11:43:35 11:43:39 11:43:43 11:43:47 11:43:52

MR. HINES: Yes, sir. Well, then, I will start there, Justice Shaw, because I think if we -- if we remember what -- what the debate was through the years as the line of demarcation, is it birth, is it viability, is it pre-viability. And so, I think what the legislature -- what they were doing when they say they amended the Brody Act to say a human being, 11:54:23 11:54:25 11:54:28 11:54:32 11:54:35 11:54:38 11:54:41

including an unborn child in utero at any stage of development, regardless of viability, they were trying to settle that argument, settle the fact that we were talking about in utero. All in utero was protected, regardless of any viability, regardless of any development or any stage. So, I think that was the intent of settling that question with the Brody Act. 11:54:43 11:54:48 11:54:50 11:54:53 11:54:57 11:54:58 11:55:01

CHIEF JUSTICE PARKER: Mr. Hines, I want to follow up with another aspect of what Justice Shaw asked you about. In your brief, you raised a claim that the Plaintiffs did not make a statutory construction argument before the Trial Court that they're making in their brief. You're not trying to say that this Court is limited in its role of statutory interpretation to only the statutory rules of construction that are argued by the parties? 11:55:04 11:55:06 11:55:09 11:55:14 11:55:16 11:55:20 11:55:24 11:55:29 11:55:33

MR. HINES: Well, Chief Justice Parker, what I am saying is this sort of black letter -- that if an issue is not presented to the Trial Court, then it cannot be raised for the first time on appeal. And what I mean by that -- 11:55:36 11:55:38 11:55:43 11:55:46 11:55:49

CHIEF JUSTICE PARKER: Well, that would not limit this Court from using standard statutory rules of construction, would it? 11:55:50 11:55:51 11:55:53

MR. HINES: Well, I think if I could go back, and 11:55:55

then I'll answer your question directly, Chief Justice, I promise. At the Trial Court level, the Plaintiff Appellants conceded, made a concession that the Homicide Act and the Human Life Protection Act only protects in utero embryos. I'm referring to the record on appeal at 204, the reply brief of the Fondes and LePages to our motion to dismiss. They made this sentence: "Defendants cite to the Alabama Criminal Homicide Statute and the Alabama Human Protection Act, the anti-abortion law, for the proposition that a child must be in utero for a wrongdoer to face criminal prosecution for homicide." And, at the Trial Court level, they followed this sentence by "this is true." 11:55:57 11:56:00 11:56:03 11:56:06 11:56:10 11:56:12 11:56:16 11:56:18 11:56:22 11:56:25 11:56:28 11:57:20 11:57:25

Now, on appeal, they cite that sentence almost verbatim, but they followed up with the sentence "this may be true." And I think the reason that concession was critical -- And then, they go on to make this new statutory construction argument. And I think the reason that concession was made and why it was withdrawn because the Mack and the Stinnet cases that you discussed, Justice Shaw, because Mack stressed "the need for congruence between criminal law and our civil wrongful death statutes and there should not be different standards in wrongful death in the homicide statute because they share a given purpose." And then, 11:57:27 11:57:30 11:57:33 11:57:35 11:57:39 11:57:41 11:57:43 11:57:46 11:57:49 11:57:53 11:57:57 11:57:58

in Stinnet, it said, "Borrowing the definition of a person from the Brody Homicide Act makes sense to inform us from who is protected under the civil statute." 11:58:37 11:58:40 11:58:43

So, conceding the Homicide Act's definition of a person at the Trial Court level was devastating to their argument on appeal because -- And, Chief Justice Parker, you make the statement in Ex parte Z.W.E. when discussing interpreting statutes, "We also try to interpret the statute harmoniously with other statutes that address related subjects." And time and time again, the Alabama legislature and some of the most pro-life legislation passed anywhere in this country has differentiated between embryos inside the uterus and outside the uterus. 11:58:46 11:59:47 11:59:51 11:59:54 11:59:58 12:00:02 12:00:05 12:00:09 12:00:12 12:00:17 12:00:21

For example, in the Unborn Infants Dignity of Life Act, this was a statute specifically created with the legislative intent because "the dignity and value of life, especially the lives of children born and unborn, has been and continues to be a public policy and often sacred concern of the highest order of the people of this state." Yet, despite that powerful statement of legislative intent, when it came time to define protections, they defined unborn infant as "a human being in utero at any stage of development, regardless of viability." So, nothing in there about cryopreserved 12:00:24 12:00:29 12:00:33 12:00:36 12:00:39 12:00:41 12:00:44 12:00:47 12:00:51 12:00:55 12:00:57

embryos outside -- that are not developing outside the uterus despite that powerful statement of legislative intent. 12:01:02 12:01:05 12:01:08

CHIEF JUSTICE PARKER: Mr. Hines -- 12:01:09

MR. HINES: Yes, sir. 12:01:09

CHIEF JUSTICE PARKER: -- can you walk me through what that particular act was aimed at? Was this an abortion statute? 12:01:11 12:01:12 12:01:15

MR. HINES: It was preserving the dignity of life of child -- of children that might be deceased or might be -- It was pre the 2019 Abortion Act. But, again, it defines who is protected. I guess it's to the point that there should be no difference between inside and outside because they define -- they define and treat differently embryos that are outside the uterus when they exclude from the scope of protection ectopic pregnancy, which is "any pregnancy resulting from a fertilized egg that is implanted outside the uterus." 12:01:16 12:01:19 12:01:21 12:01:29 12:01:32 12:01:34 12:01:38 12:01:41 12:01:44 12:01:47

JUSTICE WISE: But that's not a viable pregnancy. An ectopic pregnancy is not viable. 12:01:53 12:01:58

MR. HINES: Well, it is a fertilized egg. 12:02:05

JUSTICE WISE: It is, but it's not viable. 12:02:20

MR. HINES: Just like an in vitro -- Well, an in vitro egg is not viable either. We don't even move down the path of viability until we're placed in utero. So, 12:03:30 12:03:33 12:03:38

I think that's a connection. 12:03:42

In the Alabama Human Life Protection Act, the wide -- the sweeping Alabama anti-abortion statute passed in 2019, it does the same thing. It excludes fertilized eggs outside the uterus. So, both these statutes were passed in the spirit of this 2018 constitutional amendment recognizing Alabama's support for the sanctity of unborn life and the rights of unborn children. 12:03:47 12:03:50 12:03:53 12:03:58 12:04:02 12:04:05 12:04:07 12:04:11

JUSTICE WISE: Can you also -- 12:04:11

MR. HINES: Yet, both specifically exclude and treat differently embryos outside the uterus. 12:04:13 12:04:14

Yes, Justice wise? 12:04:20

JUSTICE WISE: Can you touch on -- Your colleague on the other side mentioned the Hamilton Act. Can you touch on that? 12:04:22 12:04:28 12:04:31

MR. HINES: Yes. And I -- With all due respect, I'm not following the point on Hamilton. Hamilton was passed after the Brody Act. I mean, it had two issues. One, could a parent recover if they were outside the zone of danger. That's not at issue here. And then, they were, simply, furthering Mack vs. Carmack with you can recover for the death of a non-viable fetus. Again, the Brody Act amended it to say at any stage -- in utero at any stage of development, regardless of viability. 12:04:33 12:04:35 12:04:38 12:04:41 12:04:44 12:04:48 12:04:53 12:04:56 12:05:07

And that was just -- That's Hamilton vs. Scott. That's what it says. 12:05:09 12:05:12

I think the more -- the reason that the order is -- quotes Mack and Stinnet is, again, they're more analogous to the issue before the Court, and what they're stressing -- What the Mack Court stressed is the need for congruence between the criminal law and the Alabama civil wrongful death statutes. 12:05:13 12:05:18 12:05:21 12:05:23 12:05:26 12:05:29

It also expressed concerns over these sort of bizarre comparative outcomes. If you have one definition for the criminal Homicide Act, which is what the definition -- what the appellant's position was at the trial court, then you could have a bizarre comparative outcome in that application where plaintiffs like the Fondes and LePages who have six remaining embryos at CRM, they could be prosecuting a civil case for wrongful death against a clinic and, during the pendency of that litigation, they could instruct that same clinic to remove those eggs from cryopreservation with no companion criminal consequences. So, we would have this incongruency here in the application of the two acts, which this Court said should not be happening in Mack vs. Carmack because of the same intent and purpose of the two statutes. 12:05:31 12:05:34 12:05:42 12:05:48 12:05:53 12:05:55 12:06:18 12:06:21 12:06:48 12:06:52 12:06:55 12:06:59 12:07:03 12:07:08 12:07:10 12:07:13

CHIEF JUSTICE PARKER: Mr. Hines -- 12:07:14

MR. HINES: Yes, sir? 12:07:14

CHIEF JUSTICE PARKER: -- don't some of those statutes make an exception for doctors and medical processes? And that's not what we're dealing with here. 12:07:16 12:07:17 12:07:19

MR. HINES: Yes, sir. I think you're -- There will never be perfect synchronization between the criminal Homicide Act and the civil wrongful death statute because there is different burdens. And there can be an exception, and that was one of the issues that was carved out in Stinnet. There was an exception in the criminal Homicide Act for doctors and physicians that excluded them from criminal negligence that was held not to apply in the civil. 12:07:24 12:07:28 12:07:30 12:07:33 12:07:36 12:07:38 12:07:41 12:07:43 12:07:45

But the key point is the harmonization of that definition of who a person is. Time and time again, this Court has said that there should be harmony between the protections of who is protected under that act, the definition because of the same intent to preserve life. And -- 12:07:47 12:07:50 12:07:54 12:07:57 12:08:02 12:08:05

JUSTICE SHAW: Mr. Hines -- 12:08:05

MR. HINES: Yes, sir? 12:08:08

JUSTICE SHAW: -- forgive me for having my phone out, but I make a lot of notes. 12:08:50 12:08:53

JUSTICE WISE: Is your ringer off? 12:10:32

JUSTICE SHAW: My ringer is off. 12:11:05

MR. HINES: Equal protection under the law. 12:11:07

JUSTICE WISE: Yes, no disparate treatment. 12:11:17

JUSTICE SHAW: Yeah, I just didn't want you to think that I was not paying attention. I want to go back to the language. There was a lot of argument made in your brief about the modification of the Homicide Act. I think it's the Brody Act? 12:11:25 12:11:27 12:11:32 12:11:37 12:11:42

MR. HINES: Yes, sir. 12:11:46

JUSTICE SHAW: And the language that was added at that point in time and what effect did that have. I'm looking at -- Before the Brody Act, 13A-6-1(2) says that the definition of a person, such term 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. That was the previous statute. 12:11:47 12:11:49 12:11:55 12:12:02 12:12:05 12:12:08 12:12:12

Now, it limits the definition of person to a human being who "has been born." That limitation would indicate that there were -- that there are other human beings, those not born to whom the definition of person would not apply. One thing I want to point out there is that human beings there are not defined as those who had been born. Persons was defined as including human beings who have the characteristic of previously being born. So, in other words, there may be human beings that may have not been born and those are excluded from 12:12:19 12:12:22 12:12:27 12:12:30 12:12:33 12:12:40 12:12:43 12:12:49 12:12:52 12:12:58

the definition of person, but not from the definition of human being. 12:13:01 12:13:04

I'm getting to my question here in just a minute. After the Brody Act, it says, definition of person: The term when referring to the victim of a criminal homicide or assault means a human being comma including an unborn child in utero at any stage of development, regardless of viability. That, in my opinion, is probably the very heart of what we're being asked to figure out here. 12:13:08 12:13:12 12:13:17 12:13:20 12:13:27 12:13:30 12:13:37

If the Court has -- is going, in this case, to do what it has done in previous cases and that is to look at the Homicide Act to glean or to inform the intent of the legislature as to what the Wrongful Death Act means, we're going to have to understand what did the legislature -- what was it trying to do when it says a person means a human being comma including an unborn child in utero at any stage of development, regardless of viability. They, obviously, took the viability consideration completely out. We did that in those other cases. So, a person is now defined as a human being. 12:13:42 12:13:45 12:13:48 12:13:52 12:13:56 12:13:58 12:14:04 12:14:12 12:14:15 12:15:09 12:15:13 12:15:17

So, what I'm wondering -- I've got some other questions here, but I don't want -- I don't want to get too involved in this. Could you take it from there and tell me has the legislature given me an example of what 12:15:18 12:15:20 12:15:22 12:15:26

a human being is, a non-exclusive example of what a human being is or has it specifically limited what a human being is in this language? 12:15:33 12:15:37 12:15:42

MR. HINES: And I think I'll begin with addressing something Justice Cook -- 12:15:49 12:15:51

JUSTICE WISE: Can I add also does this turn on in utero? 12:15:54 12:16:02

MR. HINES: I believe it does. And, again, despite Alabama's pronouncement on the sanctity of life, et cetera, there were times, like you say, when even the criminal Homicide Act did not extend to in utero and it wasn't until the legislature specifically changed that definition that it was extended to in utero. But I -- And it's similar to the question what the Court asked in Ex parte Z.W.E. when it said that the task here was not interpreting the word "child" generally, but what did the legislature -- what was the legislature's definition of the word "child" that's set forth in the statute. 12:16:02 12:16:39 12:16:42 12:16:45 12:16:48 12:16:50 12:16:53 12:17:01 12:17:08 12:17:11 12:17:13

And my point on that is, as I mentioned earlier, that the debate had been viability. We now have a defined term "in utero." If the statutory -- the statutory -- And what we're dealing with here is the term "in vitro." This is a specific known scientific phrase. It has been around for five or six decades, since the 1970s. So, I don't think it can be the 12:17:16 12:17:19 12:17:23 12:17:26 12:17:28 12:17:33 12:17:37

Court's new rule of statutory construction that the legislature purposefully injects some ambiguity into the statute by leaving out a known scientific unique term like in vitro. It was aware of in vitro; yet, it didn't use it. Instead -- And the Appellants quote the Court's rule of statutory construction is this: "We will presume the legislature knew the meaning of the words it used when it enacted the statute." And that's precisely our point. The legislature used another unique scientific precise term, which was in utero. It was aware of in vitro; yet, it never used it. 12:17:40 12:17:42 12:17:48 12:17:55 12:17:59 12:18:06 12:18:09 12:18:13 12:18:16 12:18:19 12:18:23

And, I think, by tracking, again, the legislative history on this issue, there was this issue about viability and they decided that -- 12:18:26 12:18:28 12:18:29

JUSTICE MITCHELL: Mr. Hines, wasn't -- I'm going run off Justice Shaw's question here for a minute. I want to focus you back on the phrase of including, comma including in the homicide statutes. I have a different view of that. It seems to me that the Brody Act, they were -- the legislature was responding to some case law by this Court that it didn't agree with and the way that it interpreted the term "human being." And so, they came along and amended the statute to break out that particular subset of human beings. But it's not your contention that what follows after the word "including" 12:19:45 12:19:49 12:19:51 12:19:55 12:19:58 12:20:01 12:20:04 12:20:07 12:20:10 12:20:12 12:20:15

represents the entire waterfront of an unborn child as it relates to being a human being, right? That would just be a subset of that? 12:20:19 12:20:24 12:20:26

MR. HINES: I think that the answer to that is in terms of that definition, including is that subset. It's defining -- it's trying to settle the question of in utero, regardless of viability. And if the legislature had wanted to extend it outside the womb because they never have -- Again, in all the Homicide Act and the Alabama Human Protection Act, again, they concede that the Homicide Act limits it to in utero -- 12:20:29 12:20:31 12:20:35 12:20:37 12:20:41 12:20:46 12:20:49 12:20:52

CHIEF JUSTICE PARKER: Mr. Hines, stay at the microphone for our recording. 12:20:56 12:20:58

MR. HINES: I'm sorry. I'm sorry. If the Court -- I mean, if the legislature had wanted to extend it to these in vitro embryos outside the womb, they could've -- 12:21:00 12:21:01 12:21:04 12:23:03

JUSTICE COOK: I think Justice Mitchell's point is human being comes before the word -- before the comma. And so, his point is, is including there supposed to be an example of what comes before the comma, which is human being, or is it supposed to be an extension? 12:23:03 12:23:07 12:23:17 12:23:23 12:23:26

MR. HINES: I think it's just including -- it is within that subset of in utero because they -- again, they could have used in vitro if they wanted to, and 12:24:39 12:24:42 12:24:46

this court has said the judiciary will not add that which your legislature chose to omit. They've said -- You've said it is not the office of the judiciary to insert into a statute that which has been omitted. What the legislature omits the court cannot supply. And, again, this is a known scientific term. 12:24:49 12:24:52 12:24:56 12:25:00 12:25:38 12:25:42

And we even quote Senator Clyde Chambliss, and we quote -- 12:25:45 12:26:30

JUSTICE COOK: We don't want to hear that. But what we do want to hear -- Tell me why the Brody Act was passed. Does it say so in the act? 12:26:33 12:26:35 12:26:40

MR. HINES: It does not say so in the act. I do agree it was a response to this Court's ruling about the question about is it viability or no viability. No statute has ever extended protections in Alabama to outside the womb to in vitro. So, that was a response to clarify the debate over whether viability comes into play. And, again, I don't -- In utero, we don't even come into the -- the realm of viability until they're placed in utero. These embryos may never, ever get to that point. Most -- many of them don't, if not most of them don't. There has to be an affirmative act that they are placed in a womb. 12:26:46 12:26:47 12:26:50 12:26:54 12:26:58 12:27:01 12:27:07 12:27:12 12:27:17 12:27:21 12:27:24 12:27:27

We don't -- would never get down a debate on whether it's pre-viable or viable until that embryo is 12:27:29 12:27:34

placed in the womb. So, we're in a different classification. Again, this is a very specific scientific term that the legislature was aware of and could have used to extend. And, again, if this Court holds that these are children under the act, then there will be tremendous ramifications for this. 12:27:38 12:27:44 12:27:47 12:27:49 12:27:53 12:27:58

JUSTICE SHAW: Mr. Hines, let me stop you there. 12:28:09

MR. HINES: Yes, sir. 12:28:11

JUSTICE SHAW: I mean, I think we're very much aware of what the ramifications are here. Y'all did a good job of setting that out on your brief. But, again, when we talk about ramifications here, I think we need to talk about what the legislature is doing. This is the -- this is within the realm of legislative action. You know, this Court is trying its best to figure out what the legislature is doing here and, you know, if the legislature screws something up, you know, that's one thing. But what we're trying to do is figure out what the legislature did. 12:28:15 12:28:21 12:28:27 12:28:30 12:28:33 12:28:36 12:28:41 12:28:44 12:28:50 12:28:53 12:28:57

Did I just hear you say that the language including -- a person is a human being comma including, et cetera, et cetera, non-viable fetuses in utero, did I hear you say you thought that was just a subset or an example of a human being that was given protection as a victim of homicide? 12:28:59 12:29:05 12:29:10 12:29:14 12:29:18 12:29:22

MR. HINES: No, sir, I think it is just limiting the definition of human being to anything in the realm of in utero. That's -- that is our position, anything within the realm of in utero because they could have extended it to in vitro because there has been different classifications. Again, even if there is a pronouncement that life begins at conception, the Human Life Protection Act of the abortion statute excludes all -- even fertilized eggs found outside the womb. They're not within that scope of protection. So, there's nothing that is consistent reading harmoniously with the other definitions of other acts where they have differentiated between inside and outside the womb. 12:29:25 12:29:28 12:29:31 12:29:36 12:29:39 12:29:43 12:29:46 12:30:34 12:30:48 12:30:51 12:30:53 12:31:15 12:31:18

JUSTICE SHAW: Is there a rule of construction that you can refer us to that specifically talks about that? The word -- the definition actually says person shall mean human being comma including a non-viable fetus in utero. Does the word "mean" or the word "including," is there a rule of construction that would inform us as to what the legislature is trying to do there? 12:31:24 12:31:25 12:31:28 12:32:37 12:32:44 12:32:49 12:32:53 12:32:57

MR. HINES: Well, I guess I would go back to the rule of legislative construction that the judiciary will not add that which the legislature chose to omit. And, again, being aware of in vitro fertilization since the 12:32:58 12:33:00 12:33:04 12:33:11

1970s, they could have easily extended it to those -- those -- that class of persons. So, I think that's the -- I think we would be going onto a speculative journey to try to go outside the womb when there has been -- no statute has gone outside the womb. And the lead-up to this Brody amendment, what they're trying to do is resolve that dispute over viability versus pre-viability. 12:33:18 12:33:22 12:33:27 12:33:31 12:33:35 12:33:40 12:33:43 12:33:48

JUSTICE SHAW: When we're looking at that Brody Act, the Homicide Act, do we have to view that as just a completely brand new stand-alone definition? Can we look at how it was previously written -- 12:34:00 12:34:03 12:34:05 12:34:08

MR. HINES: Well -- 12:34:11

JUSTICE SHAW: -- to figure out what they -- You know, the way it was previously written I read while ago, you know, talking about having been born and alive at the time. 12:34:14 12:34:15 12:34:17 12:34:23

MR. HINES: I just think it informs us that, again, despite a sentiment that life begins at conception, there have been exclusions through the years on various -- on various groups within that. And, again, our reading of this, is, simply, it's defining in utero and that lead-up to it. So, I think the Court can look to that and what was preceding it to say this is what they were trying to decide and try to 12:34:27 12:34:29 12:34:33 12:34:36 12:34:40 12:34:47 12:34:49 12:34:53

differentiate.

JUSTICE SHAW: Okay. I have to ask you one more question, and I promise I'll leave you alone. Does your interpretation of that language in the Brody Act require us to say that other than -- Let me word it this way: I'm gonna read you my notes so I don't mess this up. If the definition in the Brody Act is a completely new definition of the word "person" replacing the prior definition and it would appear that human being is undefined, except that it includes an unborn child in utero. That was -- You're saying that is not correct. You're saying that that language is a specific limitation.

Now, here's my -- If we assume that the unborn are not human beings, then the addition of "an unborn child in utero" adds only those types of unborn children to the definition of human being. So, my question to you is if we accept your definition, what, then, would be a human being?

MR. HINES: Well, I don't think -- and I think Mr. Wirtes even echoed this -- we're tasked here with defining when life begins. It's the definition of minor child under the civil wrongful death statute, and we've outlined how the Human Life Protection Act, even though we have this constitutional amendment and statement in

support of the sanctity of life, it excludes fertilized eggs outside the womb. Just like -- And I think the Brody Act is consistent with that. The Infants Dignity of Life Act excludes fertilized eggs outside the womb. 12:36:41 12:36:45 12:36:49 12:36:53

So, it's -- again, it's not determining what is a human being or when life begins. It's does this legislature -- Because they created this statute of wrongful death out of whole cloth, did this legislature -- Are these frozen embryos, these in vitro embryos, are they included within the definition of a minor child under the Wrongful Death Act? 12:36:57 12:37:00 12:37:03 12:37:06 12:37:11 12:37:18 12:37:22

On the Uniform Parentage Act at Section 26-17-707, it begins with this phrase: "If a spouse dies before placement of eggs, sperm, or embryo, the deceased spouse is not a parent of the resulting child." So, again, if a spouse dies before placement of the embryo, the deceased spouse is not a parent of the child. So, if that's Alabama's default position that neither spouse is a -- considered a parent until the embryo is placed in utero, then how can that same embryo be considered a minor child before it is placed in utero? 12:37:26 12:37:33 12:37:35 12:37:39 12:37:41 12:37:45 12:37:47 12:37:50 12:37:54 12:37:57

I just do not think that we can overlook the distinctions between these permanently cryopreserved embryos that may never become in utero, may never become viable, may never stay anywhere other than that state of 12:37:59 12:38:03 12:38:07 12:38:10

perpetuity. That's a big distinction between in utero, and I think that's what the legislature was trying to define, that known scientific womb of in utero. 12:38:15 12:38:17 12:38:20

JUSTICE SHAW: But you do understand, you know, my concern here. The position that we find ourselves in is that when I look -- when I look at this and my natural inclination when I see that definition, a person is a human being comma including, that sounds to me like they're defining person as a human being and they're saying comma, and that will include this non-viable unborn fetus because that's our target in this legislation. Now, that could very easily leave open the universe of whatever else, you know, is out there. 12:38:25 12:38:27 12:38:35 12:38:42 12:38:46 12:38:50 12:38:54 12:38:58 12:39:02 12:39:05

And so, for me to get past that construction there, I have to assume that the unborn are not human beings. If you look at this from a purely analytical standpoint to get to your position, at least, unless you can get me off of how that rule of construction works, it leads me down the path that I have to say that the unborn are not human beings and, therefore, when the legislature came in, it came in and defined this as a human being and then defined human being as a non-viable fetus in utero. 12:39:13 12:39:17 12:39:24 12:39:28 12:39:32 12:39:37 12:39:40 12:39:43 12:39:48

That may be confusing to you. Trust me. It's confusing to me. And I'll stand corrected by my colleagues or by attorneys here. I'll stand corrected. 12:39:58 12:40:00 12:40:03

I will get you back to the point that the only way I understand what the legislature is doing is what they tell me. I don't care what Senator Chambliss said on the floor. There are many, many legislators in that body. All I know is what they put down, and what they vote on, and what they pass, and what they write, and what they give me and that's what -- that is where I am right now is on that language in the Homicide Act and what the legislature thought it was doing. Did it mess up? Did it word it wrong? You know, we don't rewrite statutes. 12:40:08 12:40:12 12:40:14 12:40:18 12:40:23 12:40:28 12:40:30 12:40:34 12:40:39 12:40:42 12:40:51

We already -- By this very argument, we've already jumped over the hurdle of there's an ambiguity. So, now, we're into construction. And, because this Court, on several occasions previously, has zeroed in on the Homicide Act, my interest is the Homicide Act. I know we've got a lot of other statutes in the abortion context and everywhere else. My interest is the Homicide Act. So, I hope Mr. Wirtes will help me with that as well. But at least -- I don't know about my colleagues, but, as far as I'm concerned, we need to get to the bottom of what the legislature is doing with person is defined as a human being comma including a non-viable fetus in utero. Are they telling me that that is the only thing that they are recognizing or are 12:40:51 12:40:55 12:40:59 12:41:04 12:41:08 12:41:10 12:41:13 12:41:19 12:41:23 12:41:35 12:41:37 12:41:42 12:41:47 12:41:53

they just giving me an example of what a human being would be and, therefore, the universe of human beings is a person? 12:41:59 12:42:03 12:42:07

And that takes us down to the question of, well, is an embryo in vitro a human being? Is it a being in existence is, essentially, what the definition is, a being in existence? Is that what it is? So, I apologize, but that is -- that's, at least, my mindset at this point. 12:42:09 12:42:12 12:42:18 12:42:20 12:42:23 12:42:29

MR. HINES: Sure. And, I guess, if we go down your path on the including, that that's -- Again, my suggestion would be after we get to that point, if you're -- if you're going into statutory construction, we have this known term "in vitro." They could have easily extended that protection well outside the womb with two words, "in vitro." It's a known scientific, unique term. So, I guess, if we're going down that path. 12:42:31 12:42:33 12:42:37 12:42:40 12:42:43 12:42:47 12:42:50 12:42:53 12:42:56

And then, if we look to the other statutes, I do think, as Chief Justice Parker said, we also try to interpret the statute harmoniously with other statutes that address related subjects. And we've -- we've talked about how the Human Life Protection Act, a sweeping anti-abortion, one of the boldest in the country, in furtherance of this constitutional amendment 12:42:56 12:42:59 12:43:03 12:43:19 12:43:25 12:43:29 12:43:32

which supports the sanctity of unborn life and the rights of unborn children; yet, that statute treats and excludes from protection embryos, fertilized eggs outside the womb. 12:43:36 12:43:38 12:43:42 12:43:47

CHIEF JUSTICE PARKER: Well, I have difficulty following your argument because that act that you're referring to -- and we've had some quoting of statements by an author or a drafter, that it doesn't refer to in vitro fertilization or in vitro embryos, but that is a statute dealing with abortion, which is the termination of a pregnancy. And so, by definition, a pre-transferred embryo, there's -- there's no pregnancies. I don't understand the application of that act to what we have before us today. 12:43:49 12:43:50 12:43:52 12:43:56 12:44:03 12:44:07 12:44:10 12:44:16 12:44:19 12:44:22

MR. HINES: The application is the definition of an ectopic pregnancy. Do we have a fertilized egg -- fertilized embryo, which is, you know, if life begins at conception, we have that fertilized egg and it's an ectopic pregnancy meaning it's implanted outside the uterus, then the anti-abortion statute says that there is no criminal penalty for that. So, it is outside -- it is not just exclusive in utero. It's -- it excludes from that implanted eggs which are outside the uterus, which would be in the same classification as these frozen embryos. 12:44:29 12:44:33 12:44:41 12:44:50 12:44:55 12:44:58 12:45:02 12:45:05 12:45:08 12:45:13 12:45:16

CHIEF JUSTICE PARKER: Well, going back to the language that Justice Shaw was asking you about, we have adopted a standard of statutory interpretation that we put forth in the case of Bon Harbor vs. United Bank back in 2010 that says the word "including" is not a word of limitation; rather, it is a word of enlargement. Now, you haven't asked us to overturn that standard. Sounds to me like you're just trying to talk around it. 12:45:18 12:45:19 12:45:22 12:45:27 12:45:32 12:45:38 12:45:43 12:45:47

MR. HINES: No, sir, I'm not trying to talk around it, with all due respect. I'm saying if we look at the history of what was going on and surrounding that act with this debate over viability, pre-viability, the legislature is just very clearly saying we are defining in utero. That's protected. That womb is protected. Anything outside that is not. And I think that's a very simple and straightforward reading of it without engaging in statutory construction. 12:45:50 12:45:52 12:45:56 12:45:59 12:46:02 12:46:06 12:46:10 12:46:14 12:46:16

But if we want to get engaged in statutory construction, we presented you with the examples where Alabama, despite this strong pronouncement of the sanctity of life, has excluded from protection fertilized eggs outside the womb. So -- 12:46:19 12:46:24 12:46:28 12:46:34 12:46:36

CHIEF JUSTICE PARKER: Well, Mr. Hines, thank you. We gave you even more time than your colleagues did. 12:46:41 12:46:43

Madam Clerk? 12:46:52

CLERK RHODEBECK: Chief, he used all but one-and-a-half minutes of his full 30 plus the extra six-and-a-half. How would you like me to divide the remaining time? 12:46:53 12:46:55 12:46:58 12:47:01

CHIEF JUSTICE PARKER: Well, they already had their time division established. Let's maintain that and give the overflow time back to the appellants. 12:47:02 12:47:03 12:47:08

MR. WIRTES: Can we have a lunch break? 12:47:08

CHIEF JUSTICE PARKER: Mr. Mulherin? 12:47:22

MR. MULHERIN: Thank you. May it please the Court. In addition to dismissing the Plaintiffs' statutory wrongful death claims in this case, the Trial Court also dismissed the individual Plaintiff's common law wrongful death claims. As this Court's probably well aware, there is no common law tort claim for the wrongful taking of a life under Alabama law. There's only a statutory wrongful death claim. And, for this reason, the Trial Court correctly dismissed the individual Plaintiff's common law negligence claims for compensatory damages stemming from the loss of the in vitro embryos. I'd like to discuss that in a second in a little more detail, but I'm going to probably make a mistake here and get off target and try to also address some questions, Justice Shaw, that you were asking and then address a point, perhaps, if I can, Justice 12:47:24 12:47:27 12:47:33 12:47:37 12:47:41 12:47:46 12:47:48 12:47:51 12:47:55 12:47:58 12:48:02 12:48:06 12:48:09 12:48:13 12:48:17 12:48:21

Mitchell, that you addressed.

I'd like to start, again, back to the point that there is only a statutory wrongful death claim in Alabama. So, the death of a minor statute, death of a minor statute, which gives the cause of death to an estate when a child is wrong -- when a child's life is wrongfully taken has been in existence for decades, a lot longer than I've been alive --

JUSTICE COOK: So, is it your position that these were lives?

MR. MULHERIN: It is, Justice Cook. I think that the embryos -- the embryo is a life, but the issue today is whether an embryo is a child protected under the Wrongful Death of a Minor Act. Did the legislature extend that protection to an in vitro embryo?

JUSTICE COOK: That's an awfully narrow gap you're trying to navigate there. It's a life, but it's not protected by the wrongful death statute.

MR. MULHERIN: Well, I think that's what the legislature did. They --

JUSTICE COOK: You think our legislature in 1872 was thinking about in vitro embryos?

MR. MULHERIN: No, I do not. I do not, Justice Cook. Or in 1993, necessarily, because I think that's where -- that's where we need to go next is the death of

a minor statute existed before I was born. Born in 1966. It was already in existence. It said what it said. It hasn't really changed. But, in 1993, this Court considered two cases, Gentry vs. Gilmore and Lollar vs. Tankersley, two cases in which the baby, the life died in utero because of alleged medical malpractice on the part of an OB-GYN. And, in both those cases, the Trial Court dismissed the wrongful death cases and ruled that there is no claim under the death of a minor statute. 12:50:02 12:50:08 12:50:11 12:50:17 12:50:24 12:50:30 12:50:36 12:50:40 12:50:47 12:50:53

CHIEF JUSTICE PARKER: Mr. Mulherin, that was during the age of Roe v. Wade, and the Court specifically said that they made their ruling in light of Roe v. Wade and decisions in other jurisdictions. They did not engage in statutory interpretation. 12:50:57 12:50:58 12:51:01 12:51:05 12:51:13

MR. MULHERIN: They -- In those cases, there was reference to viability. 12:51:26 12:51:28

CHIEF JUSTICE PARKER: Which is the point of Roe v. Wade. 12:51:30 12:51:34

MR. MULHERIN: Right. Yes, Chief Justice Parker. So, that was in 1993. And so, then, our legislature came back in 2006 and changed the criminal Homicide Act to say or to provide that a person now is the term -- when referring to the victim of a criminal homicide or assault means a human being, including an unborn child 12:51:34 12:51:37 12:51:41 12:51:50 12:51:58 12:52:01

in utero at any stage of development, regardless of viability. 12:52:06 12:52:10

So, after that -- That was in 2006. After that, in 2011, this Court addressed Mack v. Carmack, same type case as Lollar vs. Tankersley and Gentry vs. Gilmore that we had in '93. But, now, with the new statute, with the change to the Homicide Act, this Court, in Mack v. Carmack, in 2011, ruled that that same baby in utero now has a wrongful death claim. And so, it looked to this statute. But -- And so, that's the timeline we have, and it was in utero. 12:52:11 12:52:18 12:52:26 12:52:30 12:52:35 12:52:40 12:52:49 12:52:55 12:53:01

And then, Justice Shaw, to get back to what you were asking, if I may, you know, we were talking about -- or you were asking about, okay, we have human being and then you said including unborn child. But if we -- when we read what the statute says in full, it says, "means a human being, including an unborn child in utero at any stage of development, regardless of viability." So, it's -- there's -- there are more words to it. 12:53:05 12:53:09 12:53:12 12:53:15 12:53:23 12:53:28 12:53:38 12:53:40 12:53:46

And I discussed Gentry and Lollar for the point that that's what the legislature was addressing, that in some criminal cases where individuals were killed -- women were killed with babies in the uterus and there was the feeling that we're powerless to charge the 12:53:49 12:53:53 12:54:02 12:54:05 12:54:12

assailant with the death of the baby in utero.

JUSTICE COOK: Isn't -- doesn't the Brody Act say it's passed in memory of a situation where a baby was killed at eight-and-a-half -- eight-and-a-half weeks -- months of pregnancy?

MR. MULHERIN: Yes, yes, Justice Cook. And so, it -- and so, that Brody Act then allows -- allows us and allowed this Court, in 2011, to do what it did in Mack vs. Carmack, to undo the Tankersley and Gilmore holdings and to say we're no longer going to look and engage in all this science about whether the -- whether the fetus was viable. It's if -- if the OB-GYN takes any alleged action that wrongfully terminates or extinguishes the life at any stage, there's a claim.

And so -- and my whole point is that this -- this was passed to address the criminal situation, but we also, then, in Mack vs. Carmack saw that we've always looked, always with the Wrongful Death of a Minor Act. In 1993, we looked at what the Homicide Act said, and it was more restrictive. It was viability. And so, we didn't -- we did not give the fetus a wrongful death claim. But then, after this definition was changed in the wrongful -- in the Homicide Act in 2011, in the Mack vs. Carmack opinion, we looked at it and did give the fetus a cause of action.

And that's the point I'm trying to make -- I don't think I'm making it well -- is that to do that, to do that, the legislature amended the statute, as this Court said, in Mack vs. Carmack, to include. That's what this Court said in 2011 that the legislature did, amended the Homicide Act to include a human being, including an unborn child in utero at any stage of development, regardless of viability. So, in Mack vs. Carmack, when this Court looked at this statute to, then, give the non-viable fetus a cause of action for wrongful death, this Court said, okay, what the legislature did was amend the Homicide Act now to include a fetus in utero at any stage of viability. So, that's significant. 12:56:26 12:56:29 12:56:33 12:56:41 12:56:45 12:56:50 12:56:58 12:57:02 12:57:08 12:57:15 12:57:19 12:57:24 12:57:34

And that, then, gets us back to what the Trial Court looked at in this case. The Trial Court literally held in her hands two code books, section six -- Title 6, Title 13, and then held this Court's opinion in Mack vs. Carmack. And the Trial Court said I'm going to follow the road map that this Court gave us in 2011 in deciding whether that first cause of action contains a cognizable claim under Alabama law. 12:57:42 12:57:45 12:57:48 12:58:00 12:58:10 12:58:12 12:58:18 12:58:26

CHIEF JUSTICE PARKER: Mr. Mulherin, your time has expired, but we have another question up here on the bench. 12:58:29 12:58:30 12:58:33

MR. MULHERIN: Yes, sir. 12:58:34

JUSTICE SHAW: I can, honestly, tell you and Mr. Hines I have not made up my mind in this case. I'm merely searching for information, searching for a logical way to navigate through all this. If we were to rule in your favor, would it be accurate to say that the Alabama legislature, as a matter of public policy, has taken the position that ten seconds before an in vitro procedure, ten seconds before that embryo is inserted into a woman's uterus, it has zero protection as a human being; but, once implanted in the woman, it has all the protections of the law and could be a victim of a homicide? So, what I'm asking is, is that -- that would be a public policy determination by the legislature? 12:58:36 12:58:39 12:58:43 12:58:46 12:58:52 12:58:59 12:59:06 12:59:19 12:59:22 12:59:29 12:59:39 12:59:44 12:59:48

MR. MULHERIN: Yes, I think that's right, Justice Shaw. 12:59:52 12:59:57

JUSTICE COOK: Let me ask a question because I previewed this when the other side was up. I am deeply troubled about dismissing at the pleading stage a case for lack of damages, and I understand your argument here that, well, it's a life, so you can't recover anything for a life. If we said, well, we're not not -- we can't make that determination of whether it's a life or not; we're -- we have black robes, but we're -- we're not beyond that. So, how do I not send this -- how do we not send this case back if it's a 12(b)6 on damages? 01:00:00 01:00:02 01:00:05 01:00:07 01:00:11 01:00:14 01:00:19 01:00:22 01:00:27 01:00:33

Isn't the Raley case right on point? I mean, y'all didn't respond to that case. 01:00:36 01:00:39

MR. MULHERIN: Justice Cook, you asked how do we send it back. The Burdick-Aysenne case is still pending in the Circuit Court of Mobile County and the Burdick-Aysenne case is still pending with the -- 01:00:42 01:00:45 01:00:49 01:00:53

JUSTICE COOK: The contract claim. 01:00:57

MR. MULHERIN: With the contract and bailment, which can be pled in tort or contract. It's sort of a strange -- 01:00:58 01:00:59 01:01:03

JUSTICE COOK: But that's not a claim against the Infirmary. That's only a claim against the center. 01:01:04 01:01:06

MR. MULHERIN: That's only a claim against my client, and so it's still pending. And I think that's where we get to the Section 13 argument and -- of the Constitution where we say, well, Section 13 of the Alabama Constitution affords an individual to a remedy for his or her injuries, but, significantly, in 2007, in the Poff vs. Merit Energy Company case, this Court specifically held there is no constitutional guarantee to a tort remedy or to a particular type of damages, and that's what this case -- that's what this appeal is all about. 01:01:08 01:01:09 01:01:11 01:01:15 01:01:19 01:01:23 01:01:29 01:01:34 01:01:40 01:01:47 01:01:50

The Plaintiffs don't want a bailment claim or a breach of contract claim. They want a wrongful death 01:01:52 01:01:55

claim with punitive damages, and that's what this court addressed in the Poff vs. Merit Energy Company and said, no, there's no constitutional guarantee to a specific tort remedy. 01:01:58 01:02:03 01:02:07 01:02:10

JUSTICE COOK: Well, I mean, there is a negligence claim here. You know, I think it's fair to say that there is probably a breach of the duty -- I'm not making a conclusion here -- probably a breach of the duty here and the dismissal is either there are no damages -- no damages at all, right? I mean, that's the reason for the dismissal here of the common law claims because there were no damages at all. That's what the judge held, right? 01:02:13 01:02:15 01:02:19 01:02:22 01:02:27 01:02:30 01:02:32 01:02:35 01:02:37

MR. MULHERIN: I don't think that's right, Justice Cook. The Trial Court dismissed the second cause of action in both complaints because the Trial Court determined that the Plaintiffs were making a claim for wrongful death in that -- in that -- in that cause of action. In essence, they -- in listening to their presentations, they say that we've lost the value of the embryonic lives. We've lost Baby Aysenne. And so, that -- 01:07:34 01:07:37 01:07:40 01:07:42 01:07:49 01:07:56 01:07:59 01:08:04 01:08:10

JUSTICE COOK: It's something, right? I mean -- 01:08:10

MR. MULHERIN: Well, yes. But what the Trial Court said with respect to the second cause of action 01:08:12 01:08:15

is, wait, wait, you've either got a statutory wrongful death claim or you don't have a wrongful death claim, as there is no wrongful death claim at common law. 01:08:17 01:08:20 01:08:25

And so, if Austin -- I go out here and I get run over by a student looking at his or her phone, my estate can file a wrongful death claim, but my wife, under Alabama law, cannot maintain a negligence claim, common law negligence claim against the driver for the loss of the value of my life or for emotional distress. 01:08:27 01:08:30 01:08:36 01:08:40 01:08:46 01:08:49

JUSTICE COOK: But, here, the woman has had to go through a painful procedure to have these eggs harvested, right, and it's cost lots of money to go through that procedure. It's more than $10,000 a pop, isn't it? 01:08:54 01:08:57 01:09:00 01:09:03 01:09:07

MR. MULHERIN: I don't know the cost. 01:09:07

JUSTICE COOK: And so, you're saying they get nothing for that, right? 01:09:09 01:09:10

MR. MULHERIN: That's not what I'm saying, Justice Cook. And, more importantly, that's not what the Trial Court said. The Trial Court -- Simply, once the Rule 12(b) motion was filed, the Trial Court, simply, went through a very methodical step, a very methodical process and asked is there a wrongful death claim under the Death of a Minor Act. The Trial Court ruled no. 01:09:11 01:09:14 01:09:16 01:09:22 01:09:26 01:09:31 01:09:34

Then, the Trial Court looked at the second claim 01:09:37

and asked, okay, is there a common law tort claim under Alabama law for the wrongful taking of a life, and the answer to that is no. And so, that, then, eliminated those two causes of action, but the Trial Court did not dismiss the alternative claims made by the Burdick-Aysennes. The Fonde/LePage Plaintiffs did not make those alternative claims. The Burdick-Aysennes did, and the Trial Court left those in place and that case is still pending. 01:09:40 01:09:46 01:09:50 01:09:54 01:09:57 01:10:06 01:10:08 01:10:11 01:10:15

And then, that goes back, I think, again to this Court's Poffenbarger case which just says that, look, there's no guarantee of a right to a tort. And so, are we today going to say, well, wait, there is? And we may. 01:10:16 01:10:19 01:10:22 01:10:29 01:10:32

JUSTICE COOK: Oh, no, I'm not saying that. I'm just -- There is a negligence claim in Alabama, so -- 01:10:33 01:10:35

MR. MULHERIN: There is a negligence claim, just not in this situation. There's no negligence claim for the wrongful taking of a -- Well, you can -- It's statutory, and then you can prove the negligence to get the statutory recovery, but there -- You cannot -- As I said, my wife can't sue just for straight negligence and then claim I want to be compensated for the loss of Austin's life and I want to get my emotional distress damages that I've suffered due to the loss of his life. 01:10:38 01:10:41 01:10:45 01:10:50 01:10:54 01:10:58 01:11:02 01:11:07 01:11:11

You just have the wrongful death claim. And this Court has said life's of unlimited value, so you get punitive damages, not any other. 01:11:18 01:11:21 01:11:28

CHIEF JUSTICE PARKER: Mr. Mulherin -- 01:11:31

MR. MULHERIN: Yes, sir. 01:11:31

CHIEF JUSTICE PARKER: -- we have allowed you to go beyond your time. Justice Cook, are you finished with that question? 01:11:32 01:11:33 01:11:36

JUSTICE COOK: I am. Thank you. 01:11:37

CHIEF JUSTICE PARKER: Okay. Well, thank you, Mr. Mulherin. 01:11:38 01:11:39

MR. MULHERIN: Thank y'all. 01:11:40

CHIEF JUSTICE PARKER: So, next is Mr. Keene. 01:11:43

MR. KEENE: Mr. Justice Parker, associate justices, may it please the Court. I'm Tommy Keene, and I'm happy to be here on behalf of the Medical Association of the State of Alabama. 01:13:36 01:13:40 01:13:42 01:13:46

I, first, want to say on behalf of the association, thank you for letting us express our opinion about this matter. It is our opinion that the effort to classify these extrauterine embryo as persons under the wrongful death statute should be rejected. 01:13:47 01:13:49 01:13:52 01:13:56 01:14:03

CHIEF JUSTICE PARKER: Mr. Keene, way back in 1916, an Alabama Court of Appeals quoted a Medical Association of Alabama publication and held that life 01:14:10 01:14:11 01:14:16

begins at conception. Has the medical association changed its definition of when life begins? 01:14:20 01:14:27

MR. KEENE: No, but I think this method of creating life has been a change since 1916. It has been going on for some 40 years and it has had great advantages to afford persons the ability to become biological parents, to bring new life into the world, and also to, importantly, assist people, mothers, expectant mothers who are being treated for conditions such as cancer. It allows them to time pregnancies and still be biological pregnant -- parents after receiving chemotherapy surgeries, surgeries to address dysfunctions that they may incur. 01:14:31 01:14:33 01:14:39 01:14:43 01:14:46 01:14:50 01:14:55 01:14:57 01:15:01 01:15:06 01:15:12

This -- this process has been brought about long after 1916, and I say this: We can talk about conception, but you have, yourself, made this point. I think it's a very good one. There can be no abortion when there's no pregnancy. And an extrauterine embryo is not a pregnancy. It doesn't become one until implanted and it doesn't even become one then until a placenta is formed and then life starts evolving. And that's why -- 01:15:16 01:15:18 01:15:24 01:15:28 01:15:31 01:15:35 01:15:39 01:15:43 01:15:49

CHIEF JUSTICE PARKER: Mr. Keene, how has the practice changed since the Dobbs decision overruled Roe v. Wade? Prior to that, multiple embryos were implanted 01:15:50 01:15:52 01:15:59

and then they were selectively reduced. 01:16:02

MR. KEENE: No, no, not after implantation. 01:16:08

Before implantation, they were reduced. And it's 01:16:10

inherent in the process, Justice Parker, that there are 01:16:13

going to be excessive embryo because, to protect the 01:16:18

mother and put her on -- through only one procedure to 01:16:21

harvest her eggs, she has to be under anesthesia, 01:16:24

conscious sedation or general anesthesia. To protect 01:16:29

her, we harvest as many eggs as possible. We create 01:16:31

more embryo than are ever going to be needed. So, 01:16:36

inherent in the process are going to be excessive 01:16:39

embryo. 01:16:42

And, in this process, all participants have known 01:16:42

from the beginning that these embryo are not going to be 01:16:46

treated as human beings or persons, the two terms I've 01:16:50

been hearing all day today, because they enter an 01:16:56

agreement and they say when there are excessive embryos, 01:16:59

they can be transferred, they can be donated for medical 01:17:03

research, they can be discarded. That is not the 01:17:07

treatment of a person. 01:17:11

JUSTICE WISE: They can be donated to other 01:17:13

families as well. 01:17:15

MR. KEENE: Yes, donated to other families, 01:17:16

correct, hoping to create another pregnancy. So, that 01:17:19

is not the treatment of a person. I think that is the 01:17:22

real crux here. Before implantation, the embryos have a value, there's no doubt about that. I'm not here to address that question, Justice Cook. I think you've posed a good one. But, prior to implantation, prior to pregnancy, we don't have a human being. We don't have a beating heart. We don't have any form of a human being. We have an embryo. It's a cellular structure. 01:17:25 01:17:31 01:17:34 01:17:38 01:17:43 01:17:48 01:17:52

CHIEF JUSTICE PARKER: Well, one of the contracts refers to them as human embryos. 01:17:59 01:18:00

MR. KEENE: They are human embryos, but they're not human beings. They're not persons. They don't have a beating heart. They don't have limbs. They don't have eyes, ears, and noses. They begin the process -- 01:18:05 01:18:06 01:18:09 01:18:11

JUSTICE MITCHELL: So, what are they, Mr. Keene? 01:18:38

MR. KEENE: What are they? 01:18:44

JUSTICE MITCHELL: Yeah. 01:18:49

MR. KEENE: They're embryo. They're embryo that are harvested to become implanted and, hopefully, begin a pregnancy. If the pregnancy takes, if the implantation works, then a pregnancy begins and a human being is formed. 01:18:55 01:18:58 01:19:03 01:19:08 01:19:13

My time is up. I thank you for yours. 01:19:18

CHIEF JUSTICE PARKER: Thank you. And, before Mr. Wirtes comes back to the rostrum, how much extra time does he get? 01:19:22 01:19:24 01:19:29

THE CLERK: Let's do 20 extra minutes. 01:19:30

MR. WIRTES: Plaintiffs are on record this is a motion to dismiss that's under review. We have moved to strike the contract documents. But, curiously, in light of the questions and some of the comments and concessions, listen to this language in the contract with the Fondes: At Clerk's record 75 Page 17 of the informed consent for assisted reproduction, the technique of in vitro fertilization involves the creation of human embryos outside the body. Now, how can you take the position in litigation that they're pre-embryos and then get the parties to sign a document characterizing them as human embryos? 01:19:58 01:20:04 01:20:07 01:20:11 01:20:13 01:20:16 01:20:23 01:20:27 01:20:29 01:20:35 01:20:38 01:20:44

And, at the same time, this agreement at Clerk's record 69, Page 11 uses the phrase "death of the embryo" as one of the risks associated with assisted reproductive technology. What is the opposite of death? It's life. So, they must be alive to die, according to the documents that they got our clients to sign. 01:20:46 01:20:49 01:20:55 01:20:59 01:21:03 01:21:07

This is not appropriate at the motion to dismiss stage. We were prohibited from conducting discovery. We could have expert testimony that we could offer the Court with these troubling, difficult questions. So, as a threshold matter, we renew our motion to strike. We ask the Court to disregard. We move ore tenus to strike 01:21:11 01:21:14 01:21:17 01:21:21 01:21:25 01:21:30

and disregard the comments construing the contract documents. They're just not appropriate before the Court at this -- at this time. 01:21:34 01:21:36 01:21:39

Justice Mitchell, you wrote a terrific law review article textualism in Alabama, and the point I was trying to make in my opening comments, we have all these statutes on the books and they are to be read in pari materia. They don't have to be identical. They don't have to be associated with identical subject matter. The quotation from your law review article uses this phrase, "The principle of in pari materia does not require that the statutes being analyzed share an identical subject matter. To the contrary, this Court has indicated that the subject matter of the statutes being analyzed need only be related, similar, or same generally." And you're quoting Ex parte Terex. 01:21:43 01:21:46 01:21:49 01:21:52 01:21:57 01:21:59 01:22:02 01:22:06 01:22:13 01:22:17 01:22:20 01:22:22 01:22:28

So, my point of bringing up the related statutes earlier, we have two statutes defining unborn child as from the moment of fertilization, the moment of conception. And the Court need look no further after what you decided in Ex parte Ankrom, with the assistance of a dictionary, to conclude to construct child in 6-5-391 as the beginning of life, conception, fertilization. And you're within the bounds of statutory construction. 01:22:32 01:22:34 01:22:40 01:22:44 01:22:47 01:22:51 01:22:55 01:23:00 01:23:03

Next point: The canon, the including canon. Bear with me for a moment. Justice Mitchell, your law review article discusses a number of canons in an appendix. One of the ones we cited in the blue brief was the presumption of non-exclusive include canon. Chief Justice Parker, you talked about it when you were examining Mr. Keene. The word "including" is not to be regarded as limitational or restrictive, but merely as a particular specification of something to be included or to constitute a part of some other thing. So, with reference to the 2006 amendment to the Brody Act, Justice Shaw, we can't look at that amendment without the historical understanding we were living in the era of Roe v. Wade and Casey vs. Planned Parenthood. And so, our legislature was reacting to the command from the federal government. 01:23:07 01:23:13 01:23:23 01:23:27 01:23:30 01:23:35 01:23:37 01:23:41 01:23:45 01:23:49 01:23:53 01:23:59 01:24:00 01:24:04 01:24:08 01:24:11

In that historical context, there could be no protection other. We could not do something with first trimester fetuses or, before that, embryos. So, it did -- They wouldn't have been taking that up because of the command from the U.S. Supreme Court in Roe. It just wasn't an issue that was appropriate for legislative consideration in Alabama or anywhere. 01:24:13 01:24:16 01:24:21 01:24:26 01:24:28 01:24:32 01:24:35

Same thing, the suggestion that the babies are disposable or embryos can be discarded. Again, Dobbs 01:24:39 01:24:42

was decided in December of last year and, for the first time, this state was given the freedom. It was unbridled to determine what to do with unborn life. And so, it's a case of first impression. We understand there are challenging issues, but this is the first court with this opportunity to address these issues. 01:24:45 01:24:50 01:24:53 01:24:58 01:25:01 01:25:04

JUSTICE MITCHELL: Mr. Wirtes, let me ask you, if you win today, could the state appoint a guardian ad litem to protect the interests of your client's remaining embryos? 01:25:27 01:25:29 01:25:36 01:25:44

MR. WIRTES: Always. The guardian ad litem statute is available to protect children in need, adults in need, you know, certainly. But, again, in the context of a motion to dismiss, we think, principally, the Wrongful Death Act of a minor should be construed to afford the remedy here. 01:25:46 01:25:48 01:25:52 01:25:57 01:26:01 01:26:04

We haven't yet talked about our second cause of action. Our second cause of action is a general negligence cause of action claiming property loss, and under Rule 8 -- 01:26:05 01:26:09 01:26:11 01:26:16

JUSTICE COOK: I don't mean to interrupt you because I want you to go there. You can see that I want you to go there. But if we agreed with your construction of the Brody Act -- 01:26:18 01:26:20 01:26:21 01:26:25

MR. WIRTES: Yes, sir. 01:26:25

JUSTICE COOK: -- then the destruction to the embryos would be a homicide, wouldn't it? 01:26:28 01:26:30

MR. WIRTES: Not necessarily because they quoted in a reply brief for the first time an Attorney General opinion from Tennessee, and the Attorney General of Tennessee has determined with a Human Life Protection Act similar to Alabama's that the only way you get to homicide is if the embryo is implanted and there is a pregnancy with gestation. That's the only way you can invoke the statute. And so -- 01:26:32 01:26:35 01:26:39 01:26:42 01:26:47 01:26:50 01:26:54 01:26:57

JUSTICE COOK: But you're running the wrongful death statute through the Brody Act, which is the Homicide Act. How do -- 01:26:59 01:27:01 01:27:04

MR. WIRTES: You are running the Wrongful Death Act through the Brody. I say it's just one consideration of many, including learned treatises, where we have developed in science, the other cases from this court, including Hamilton, which has already decided this issue, any unborn child. 01:27:06 01:27:09 01:27:11 01:27:14 01:27:17 01:27:19

JUSTICE COOK: I'm going to go back and re-read Hamilton. I didn't get that, but that's -- 01:27:22 01:27:24

MR. WIRTES: I'll give you the spots -- 01:27:24

JUSTICE COOK: I'll definitely appreciate re-reading that. 01:27:26 01:27:28

MR. WIRTES: So, you don't go through Brody 01:27:30

exclusively. And I understand Justice Shaw's focus on Brody. That's what you used and invoked in Carmack, but the law has now changed. 01:27:32 01:27:35 01:27:38

JUSTICE COOK: But if we construed the Brody Act to be the deciding factor here -- 01:27:39 01:27:42

MR. WIRTES: Yes, sir. 01:27:44

JUSTICE COOK: -- then the destruction of the embryo would be a homicide? 01:27:45 01:27:46

MR. WIRTES: I disagree because there has to be implantation and there has to be pregnancy. If you follow the reasoning -- and, again, it's in the reply brief. We didn't respond to it. We didn't have an opportunity. But Tennessee -- If we, in Alabama, were to construe it that same way, it would have to be a pregnancy and a homicide through a gestational period, not an embryo before implantation. 01:27:48 01:27:51 01:27:55 01:27:57 01:27:59 01:28:04 01:28:08 01:28:12

JUSTICE COOK: I'm not following that logic, but that's all right. I wanted you to get to your other part, the common law claims because I'm very interested in those, so -- 01:28:16 01:28:18 01:28:21 01:28:24

MR. WIRTES: The common law recognized the tort of sepulcher. We haven't talked about that today, but it's been around since the 1850s. 01:28:26 01:28:30 01:28:32

JUSTICE COOK: Repeat that again, the tort of -- 01:28:35

MR. WIRTES: S-e-p-u-l-c-h-e-r. I'll cite Your 01:28:37

Honor a case. Wadley vs. St. Vincent's Hospital is where Jefferson County Circuit Judge Bob Vance did a very good job outlining the law in this area and, for any of the law clerks or staff attorneys, the citation is 2006 WL2061785. 01:28:41 01:28:51 01:28:56 01:29:00 01:29:03

JUSTICE COOK: 206 -- 01:29:12

MR. WIRTES: 1785. 01:29:13

JUSTICE COOK: -- 1785. And one more time, the name of the tort is? 01:29:15 01:29:17

MR. WIRTES: Sepulcher. And here is a quote from Deavors vs. Southern Express Company, Alabama 1917: "Whatever the law of England once was, it is now well-settled in the law of this state that there is at least a quasi legal right in, to, or concerning dead bodies, which the courts will recognize and protect by proper action. In an action of trespass, quare clausum fregit, to recover damages for the unlawful disturbance of the body of a child, our Supreme Court has held that the parent can recover damages for injury to the feelings occasioned thereby." 01:29:19 01:29:22 01:29:26 01:29:30 01:29:34 01:29:39 01:29:42 01:29:42 01:29:53 01:29:54 01:29:56

So, it's a common law tort. It's protected by Section 13. It existed at the time the Constitution was ratified in 1901 and again in 2022. We have the right, at the pleading stage, to proceed and, if, after discovery, we've got damages that justify proceeding on 01:29:59 01:30:04 01:30:07 01:30:13 01:30:17

that theory, we should be able to do so. Again, we're at a motion to dismiss state. I can't cite the Court a case where a motion to dismiss was granted on a damages theory and upheld by this Court. 01:30:21 01:30:24 01:30:28 01:30:34

JUSTICE COOK: I can't either. I agree with you. 01:30:36

MR. WIRTES: So, the appropriate remedy, as a threshold matter, would be to send us back, develop the record, if the Court's inclined for us to do that. 01:30:38 01:30:41 01:30:43

JUSTICE SHAW: Mr. Wirtes, what's wrong with the appellee's argument that the definition in the Brody Act was intended as a limitation? What's wrong with that argument? Is it an absurd argument? 01:30:51 01:30:55 01:31:05 01:31:08

MR. WIRTES: I don't know that I would use the pejorative "absurd." I think it may be an illogical argument because if we adhere, as this Court traditionally has, to the canon of construction about the use of the word "including," then you must treat that phrase just as a representative example of types of humans that can be victims of homicides, but not to the exclusion of other types of humans like the human beings that their documents characterize these embryos as. 01:31:14 01:31:17 01:31:21 01:31:23 01:31:27 01:31:30 01:31:35 01:31:39 01:31:43

JUSTICE SHAW: So, do you think, if that's true, what you have -- what you're left with is a person is a human being. So, what was the legislature trying to say there? If they're giving an example of one of -- a 01:31:48 01:31:50 01:31:56 01:32:02

subset, they, obviously, envision something more than the non-viable fetus in utero, so they say a person is a human being. What were they trying -- what were they trying to accomplish there? 01:32:09 01:32:14 01:32:19 01:32:23

MR. WIRTES: And I don't -- We can't resort to legislative history. Again, the rule is we don't consider what individual legislators may have thought or committees of the legislature may have professed, but, historically, we know that this state has never reacted well to the limitations imposed by Roe v. Wade. And my suggestion to this Court is, if anything, you might infer the legislature in the amendment to the Brody Act was saying we don't care what you say about Roe; we're going to do it our way, and that's why we have the language that's so expansive. 01:32:25 01:32:27 01:32:31 01:32:34 01:32:38 01:32:42 01:32:47 01:32:50 01:32:53 01:32:58 01:33:01

JUSTICE SHAW: What if I -- what if I apply that canon of judicial construction that you're talking about and look at it and say, well, okay, it's only an example? What do I do from that point on? Do you have a suggestion how I -- If there's still a troubling question as to what does it mean a person is a human being, do we still have an ambiguity there that I have to now go forward and try to figure out, you know, was the legislature -- Did they -- perhaps, inartfully, maybe. Were they trying to zero in and make an 01:33:04 01:33:07 01:33:11 01:33:19 01:33:23 01:33:31 01:33:36 01:33:40 01:33:46 01:33:51

exception in that one situation, a non-viable in utero fetus, they were trying to point out we're making an exception that is now a person; that is now -- we'll recognize that as a human being and that is now a person for purposes of protection? 01:33:53 01:34:00 01:34:03 01:34:08 01:34:10

In other words, does that -- does that one canon of judicial construction end it all even if I don't understand what the legislature is trying to accomplish there? 01:34:13 01:34:15 01:34:20 01:34:24

MR. WIRTES: I don't think it, necessarily, ends it all or answers all the questions, but, I think, in some of Chief Justice Parker's separate writings in which you've concurred, Justice Wise has concurred, you have to look at other things like the evolution of the science and the history of embryology and even the developments in the past ten years. And the contracts that were signed here were 2014, 2017, and the law has now changed with Dobbs. So, all of this is unfolding, and it's evolutionary. 01:34:25 01:34:26 01:34:29 01:34:33 01:34:36 01:34:38 01:34:41 01:34:45 01:34:49 01:34:51

I don't pretend to stand before the Court and suggest when life begins. I'm not that smart. I'm here taking the cases that are on our books, the reported comments, as much study as we've been able to put into our preparation and presentation today to argue precedent requires, especially in light of the state 01:34:53 01:34:55 01:34:59 01:35:04 01:35:09 01:35:11

constitutional amendment, that the people of Alabama have decided for us this is what we're going to do in Alabama. And, if the legislature has a problem with that, they take it up next term. But, based on what we know, what the precedents are, what the canons are, what the existing statutes are, to me, the outcome is pre-determined. 01:35:15 01:35:17 01:35:21 01:35:25 01:35:29 01:35:32 01:35:36

I'll quit. I've got more, but I'll quit. 01:35:39

JUSTICE WISE: I have a hypothetical here. If we take your colleagues on the other side position that the threshold is in utero, with the advancements in science, if a pregnancy -- if there are complications with the pregnancy and the embryo is taken outside of the uterus for some type of medical surgery to save the life of that child pre-birth, is that child no longer protected? 01:35:47 01:35:49 01:35:52 01:36:01 01:36:04 01:36:11 01:36:14

MR. WIRTES: Under their scenario, yes, if it's not an active pregnancy. You know, there are limitations to that. And I think the best way to do it, again, is the summary judgment stage. There are a parade of horribles that both sides could throw out there with no evidentiary development, no expertise from experts. We could have brought an embryologist to the court. We could have brought a legal scholar to the court, trying to bring all of these authorities together in one cohesive package. We're at the motion to dismiss 01:36:20 01:36:23 01:36:25 01:36:28 01:36:30 01:36:32 01:36:38 01:36:41 01:36:44 01:36:47

stage. All we did was allege a cause of action under the wrongful death of a minor statute. We alleged, in the alternative, a property damage claim. We, ordinarily, are permitted, under Rule 8, to make those generic allegations and then, in the course of discovery, ferret out the issues and the court takes it up at the summary judgment stage or the JML stage. But I agree with you, at present, based on their argument, there's no protection. 01:36:51 01:36:54 01:36:58 01:37:01 01:37:04 01:37:07 01:37:10 01:37:14 01:37:17

One last point. Justice Cook, you talked about the damages. It's a wrongful death case. You put on your best evidence. The jury is charged under Pattern Jury Instruction 11.28 and then they decide what's necessary. It's not about valuing the embryo in the wrongful death context. Let's not lose sight of the focus in Mack v. Carmack. The issue is duty, breach, proximate cause, damages. What was the conduct? And, under our wrongful death remedy, we're focused on the conduct. What duty was breached? How reprehensible was the conduct, and how much is necessary to punish and deter? And, if it's too much, we have the Hammond/Green Oil 6-11-23 procedures to ensure there's not too much punishment. 01:37:21 01:37:23 01:37:27 01:37:32 01:37:34 01:37:39 01:37:42 01:37:47 01:37:51 01:37:54 01:37:59 01:38:03 01:38:08 01:38:12

JUSTICE COOK: Well, if we decide the case under the common law claims, the negligence and the 01:38:15 01:38:16

wantonness, then the trial judge -- if we agreed with you and sent it back on those claims, a trial judge would have to figure out how to charge the jury because they couldn't use the pattern jury instructions for wrongful death. I'm not trying to pre-judge it here. I'm just trying to understand what the possible damages are under negligence and wantonness claims. 01:38:19 01:38:23 01:38:25 01:38:29 01:38:32 01:38:50 01:38:53

MR. WIRTES: Well, we have help there, too, and precedent. The George Lanier Memorial Hospital vs. Andrews case, 901 So.2d 714. Justice Harwood wrote this opinion. You may remember the facts. It was a 12-year-old child who went to a hospital. He had a reaction and died at the hospital and they harvested his corneas without permission from the parents. 01:38:56 01:38:58 01:39:01 01:39:08 01:39:10 01:39:13 01:39:17

So, the issue there was whether, with the mishandling of the deceased child's remains, was there a claim for emotional distress damages. Justice Harwood writing for the Court, "It is well-settled that a plaintiff may recover compensatory damages for mental anguish even when mental anguish is the only injury visited upon the plaintiff." Now, that's at headnotes 15 through 19. There are nine cases cited in Westlaw's key cite for that proposition of law. 01:39:20 01:39:23 01:39:28 01:39:32 01:39:34 01:39:38 01:39:41 01:39:44 01:39:48

"Once plaintiff has presented some evidence of mental anguish, the question whether he should recover 01:39:51 01:39:53

such mental anguish and, if so, how much is a question reserved for the jury." So, it's simple. It's a property damage claim. We use common law principles for the damages and the jury decides. If it's excessive, if it's not supported by substantial evidence, there are remedies for that. But we don't decide that at the motion to dismiss stage. 01:39:56 01:39:59 01:40:04 01:40:06 01:40:10 01:40:12 01:40:15

JUSTICE COOK: So, I want to go over to the Brody Act issue one more time. I've got one more follow-up question. 01:40:20 01:40:53 01:40:58

MR. WIRTES: You know I already volunteered to sit down. 01:40:58 01:41:01

JUSTICE COOK: I know you did, and my colleagues are going to get mad at me for asking one more question. The phrase "in utero," do you agree with me that that means in the uterus? 01:41:02 01:41:06 01:41:15 01:41:18

MR. WIRTES: Yes, pregnancy, gestation. 01:41:20

Thank you, Your Honors. 01:41:30

CHIEF JUSTICE PARKER: Thank you, Mr. Wirtes. And we thank all the Counsel. And a word for the students in the audience, you heard probing questions from the bench as we're dealing with this unique issue. We're trying to find out what we're going to do with it based on the law and precedent. So, this was not just dry arguments. This was something to help the bench, and we 01:41:31 01:41:32 01:41:37 01:41:40 01:41:46 01:41:51 01:41:56

thank you for enduring with us through all this process. 01:42:01

So, with that, we will take the case under 01:42:06

advisement. The Court itself will get together and talk 01:42:09

about it immediately after this before we join the rest 01:42:17

of you for lunch. So, with that, we stand adjourned. 01:42:21

(End of Oral Arguments.)

C E R T I F I C A T E

STATE OF ALABAMA)

COUNTY OF MOBILE)

I do hereby certify that the above and foregoing transcript in the matter aforementioned was taken down by me in machine shorthand, and reduced to writing under my personal supervision, and that the foregoing represents a true and correct transcript of the proceedings transcribed from public live video upon said hearing.

I further certify that I am neither of counsel nor related to the parties to the action, nor am I in any wise interested in the result of said cause.

/s/ Jerri Headrick Garside, RPR, RMR, CRR, CCR
ACCR #77 Exp: 9/30/24

EXHIBIT C

EXHIBIT B

Lawsuit frequency and claims basis over lost, damaged, and destroyed frozen embryos over a 10-year period

Gerard Letterie, M.D.[a] and Dov Fox, J.D., D.Phil.[b]

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Objective: To review the claims, claims basis, and frequency of lawsuits over lost or damaged frozen embryos and to estimate their frequency over a 10-year interval.
Design: Retrospective analysis of case law.
Setting: Private in vitro fertilization clinic and school of law.
Patient(s): None.
Intervention(s): Case law identified using Bloomberg Law, Westlaw, and Lexis Nexis databases for coverage of court dockets regarding allegations and claims.
Main Outcome Measure(s): Lawsuits brought and settled in state and federal court, with data extracted included claims basis and location in federal or state courts.
Result(s): We reviewed case law from January 1, 2009, to April 22, 2019, using the terms frozen, discarded, lost, and damaged embryo/s, and calculated clinical cases using frozen embryos from Centers for Disease Control and Prevention data. We identified 133 cases: 122 and 11 lawsuits in the state and federal court dockets, respectively. Of these, 87 cases involved alleged freezer tank failure in California and Ohio in 2018–2019. In the remaining 44 cases, the majority (37 cases) were brought for personal injury, breach of contract or warranty, product liability, professional negligence, unfair business practices, and miscellaneous tort. A minority (7 cases) were brought for medical malpractice. During this interval, a total of 398,256 embryo-thaw procedures were reported nationally.
Conclusion(s): Allegations range from business practices to product liability and are seldom for medical malpractice. Our results suggest that best practices in storage of frozen embryos should include not only improvements in hardware and monitoring of storage conditions of specimens but also setting standards for communications among patients, providers, and embryology laboratories regarding disposition of embryos. (Fertil Steril Rep® 2020;1:78–82. ©2020 by American Society for Reproductive Medicine.)
Key Words: Lost embryos, lawsuits over cryopreserved and damaged embryos

Cryopreservation techniques have dramatically improved since their introduction into reproductive medicine in 1949 (1). Storage and transportation of frozen specimens are essential to assisted reproductive technology (ART) such as in vitro fertilization (IVF) and preimplantation genetic testing (2). Two recent catastrophic losses affected thousands of cryopreserved embryos (3). These events spotlighted the legal, ethical, and regulatory challenges to current practice patterns and professional liability, and they attracted substantial media attention.

The considerable attention garnered in the press aside, the frequency and causes for such losses remain largely unexplored. Liability for gametes and embryos in cryostorage will increase alongside the expanding indications such as fertility preservation and embryo creation for long-term family building. The increasing number of specimens will also increase the need for reliable techniques and tools to create a haven for them. Case reports have yielded the best available insights into the causes of these and similar accidents and may enable root cause analysis and offer options on how improve care. We studied the facts, merit, and outcome of claims for lost, damaged, or destroyed embryos in U.S. courts over a 10-year period.

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G.L. has nothing to disclose. D.F. has nothing to disclose.
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MATERIALS AND METHODS

Case collection

Relevant embryo loss cases were identified using the court dockets on

Bloomberg Law, Lexis, and Westlaw Edge. The case search was limited to cases filed between January 1, 2009 and July 1, 2019. An additional search was run on Westlaw's function for "Jury Verdicts and Settlements" and Lexis Advance's "Jury and Settlement Analyzer." Database coverage ran from January 1, 2009 to July 1, 2019. These results were carefully reviewed for relevant claims of negligent embryo damage or destruction. This analysis yielded a total of 133 cases: 122 in state court and 11 in federal. Access to the cases was gained through a variety of search engines of public records. Bloomberg, Lexis, and Westlaw databases were used in combination to cover the state court dockets. Federal court dockets were accessed through Bloomberg. These data are a matter of public record, do not involve any risk of disclosure of identity, and do not include any human subject experimentation. The study is a description and classification of publicly available data and as such was deemed exempt from institutional review board process.

Review of cases

The cases were divided between federal and state, and between open and closed. Case status was derived from the dockets available on Bloomberg, Westlaw, or Lexis. Open cases, those still in the process of being resolved, were set aside with a brief description of facts and status. Closed cases were recorded with a summary of the allegations, claims, outcome, damages, judicial reasoning, and other relevant facts. Allegations and claims were based on the plaintiff's complaint.

There were two broad reference sources for reviewing outcomes, damages, and reasoning: dismissed and adjudicated. For cases that were dismissed, this came from court orders and stipulations for dismissal. For cases that were adjudicated, by contrast, these dimensions came from opinions issued by the court. This analysis resulted in 133 cases for consideration. These 133 cases were analyzed in detail and sorted into one of five incident categories, based on the fact patterns of embryo outcomes: lost or misplaced in laboratory; lost or misplaced in transit; damaged or destroyed through mishandling; damaged or destroyed through miscommunication; and damaged or destroyed through storage tank failure.

The 90 closed cases were analyzed for trends in legal claims, outcomes, and damages. The number and outcomes of frozen embryo transfers were compiled from the most recent annual report published by the Centers for Disease Control and Prevention (CDC), Division of Reproductive Health. This number provided a denominator to gain insight into the approximate frequency (percentage of cases) of these events.

RESULTS

One-hundred and thirty-three cases were filed from January 2009 through June 2019 that credibly alleged the negligent destruction of cryopreserved embryos. Of those 133 cases, 11 cases (8.3%) were filed in federal court, and the remaining 122 cases (91.7%) were filed in state court. We sorted the cases into five incident categories (Fig. 1). Of the 133 total lawsuits, the vast majority of 111 cases (84.1%) involved damage or destruction due to storage tank failure in two clinics in two states. Just three (2.3%) involved damage or destruction from other forms of mishandling; eight (6%) involved embryos lost or misplaced in the laboratory; five (3.8%) involved embryos lost or destroyed in transit; and six cases (4.5%) involved damage or destruction due to miscommunication or other human error.

Most of the 111 cases originated from two separate incidents that occurred in early March of 2018, one in California and the other in Ohio. In both situations, the nitrogen level in a storage tank dropped, causing the frozen embryos to possibly warm and lose viability. In the California incident, the drop in liquid nitrogen and subsequent warming did not trigger any alarm. Thirty-three consolidated cases currently remain open from this incident. In the Ohio incident, the drop in liquid nitrogen triggered an on-site alarm, but no employees were present to respond, and a remote alarm system had been silenced. Seventy-eight cases were filed as a result of the Ohio incident, most of which had been settled by late September 2018 although 12 consolidated cases remain open.

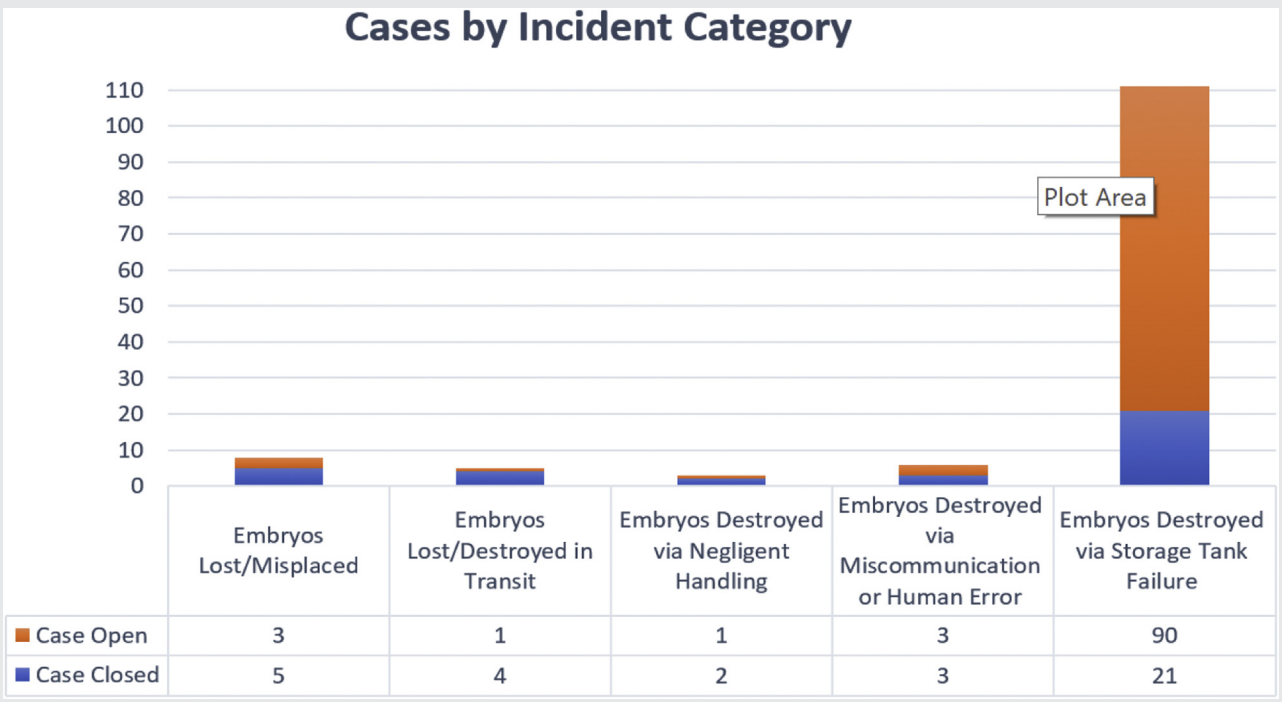
Of the 133 embryo-loss lawsuits, 90 cases were closed. These cases resolved 25 different legal claims in total (Fig. 2). Most claims included breach of contract, bailment (improper property transfer), and negligence (failure to meet the standard of care). Just two other claims appeared in a substantial minority of cases: breach of fiduciary duty (37.1%) and conversion of personal property (28.6%). Additional details of the clinical events, bases for claims, and settlements are found in Supplemental Tables 1, 2, and 3 (available online).

The closed cases provide insight into how negligent embryo destruction cases are resolved (Fig. 2). Of the 90 closed cases, all but two (97.8%) were settled out of court. Of the 88 cases that settled, 65 did not mention any details about court cost or attorney fees, whereas 22 ordered the defendant to pay court costs. In the last of these settled cases, each party bore its own attorney fees and costs. The average court cost (i.e., clerk's fees, computer fees, court special projects fund, legal aid, legal news, and legal research) for the 22 cases that required the defendant to pay was US$523.32. The remaining two closed cases that did not settle were outliers. One found that mislabeling did not constitute libelous false statements damaging to the plaintiff's reputation. The other involved federal removal back to state court for lack of jurisdiction, where the case was later settled.

These cases are complex, nuanced, and vary considerably in the details of their claims. Cases studies are presented as supplemental tables (Supplemental Tables 1, 2, and 3), which are intended to give a sense of the facets of these cases and their varied claims. Although they are not exhaustive of all case law, these studies illustrate that the claims extend far beyond a loss of embryos and into the impact on options for family building.

During this time period, a total of 398,256 embryo thaw procedures were reported to the CDC, including frozen transfers of embryos derived from autologous and donor oocytes and donated embryos. A frequency of 131 cases during the observation interval translates to an incidence of much less

FIGURE 1



Lawsuits for lost, damaged, and destroyed frozen embryos: cases by incident category.

Letterie. Lost, damaged, or destroyed frozen embryos. Fertil Steril Rep 2020.

than 1%, making these events very unlikely clinically—but far more impactful on a case by case basis.

DISCUSSION

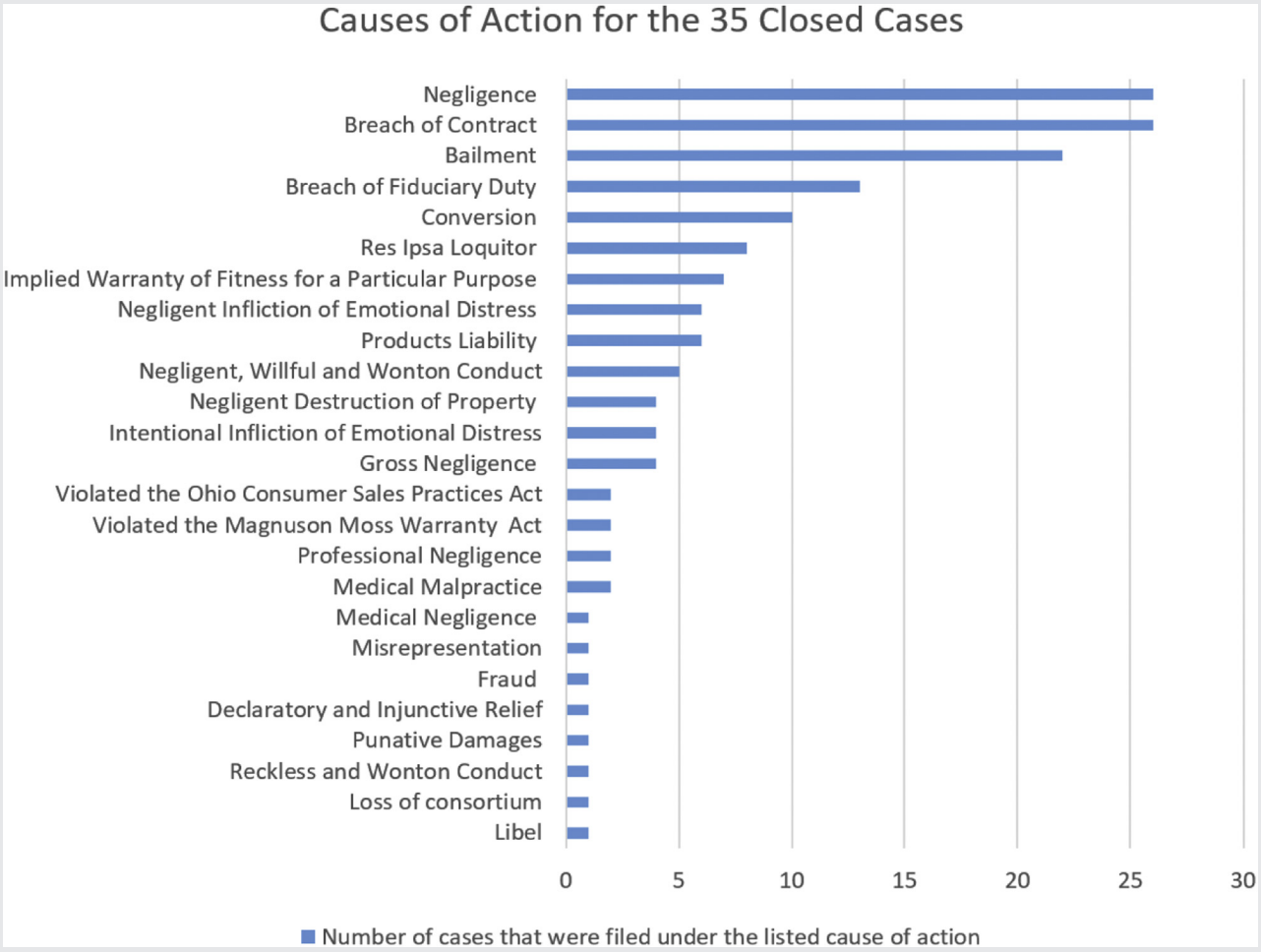
Assisted reproductive technology has undergone dramatic changes in recent years. Cryotechnology has emerged as an integral part of contemporary care for patients seeking options for family building (4). Freezing embryos is now standard care and a hoped-for outcome in the IVF process (5). Patients who use this technology often depend on their frozen embryos for future family building (6). This dependency is predicated on safe storage and on the maintenance of the storage facilities to protect the long-term viability and availability of this inventory. But unique risks attend this implementation. Risk management in the area of gamete and embryo cryopreservation has gained greater urgency, given the recent mass freezer malfunctions in Ohio and California (7, 8). Analysis of these claims could help identify the root causes of adverse events and provide guidance for improved care.

Our data suggest that lost, damaged, or destroyed embryos have a variety of causes but fall outside the scope of generally defined medical malpractice. For purposes of this discussion, we define medical malpractice in a more expansive sense than simply the absence of skill and good judgment that results in injury during clinical care. We use the term and its related legal tenet of negligence to apply broadly to failure of a practitioner to provide equipment and its monitoring and maintenance to ensure optimal outcomes. These claims reach beyond the familiar issues of medical malpractice and breach of professional duty (9).

Most claims relate to hardware, to lapses in monitoring, record keeping, or communication with patients regarding disposition, and in one case to employee relationships with the IVF clinic. Our analysis shows that the failure of liquid nitrogen tanks is by far the more common contributor to loss. These data are influenced by the recent events in Ohio and California, in which thousands of embryos were allegedly lost due to tank breakdowns. Beyond these events, the losses were due to inadvertent events and were very low in frequency. The basis for claims suggests that medical malpractice claims were relatively low on the scale (a value of 5) compared with the most common claims basis of negligence and breach of contract (with values of 26 each). Medical malpractice claims require showing that patients were harmed in physical or economic ways. These showings are hard to make in claims for embryo loss. In terms of liability risks, practitioners may do better to invest and insure against contract and property claims associated with storage malfunctions.

It is notable that the changes in the management of ART that are enabled by freezing embryos occur against a background of intense debate about definitions of unborn life and legal personhood (10). In this respect, one of the claims filed against University Hospitals in Cleveland warrants special mention: in addition to their negligence claim, the plaintiff couple sought a legal declaration that their lost embryos

FIGURE 2



Lawsuits for lost, damaged, and destroyed frozen embryos: causes of action in closed cases.

Letterie. Lost, damaged, or destroyed frozen embryos. Fertil Steril Rep 2020.

should be given legal standing as persons, sufficient to let them sue for wrongful death (11). The Cuyahoga County Court of Common Pleas dismissed their case without giving a reason or explanation about whether any settlement was reached. The couple said they would appeal their claim to Ohio's Supreme Court. This case is noteworthy both for its emotional impact and for touching on a hotly debated issue (*Just what is personhood?*). The ultimate disposition of this case also has the potential to greatly impact options for embryo freezing and the liability risks that clinics and providers face—not just for harm to fertility patients, but also to potential children. However, even in the current climate the chances for a successful claim are very low.

Our study has two main limitations. First is the lack of access to settlements details. The parties are not required to file the terms of their settlements in these cases, which comprised the majority of our sample set. Not knowing which party paid how much or for what reasons limits the robustness and utility of our findings. Nevertheless, we were left with sufficient cases to generate evidence-based insights into root causes, best practices, and insurance liability. The second limit concerns the absence of comprehensive reports or reliable methods into the frequency and cause of adverse events associated with embryo loss.

No public or private body tracks errors or accidents aside from the popular media, and such cases tend to be settled within the legal system without further disclosure. Clinic reporting of success rates and utilization is voluntary (12), and there are no rules to mandate the reporting of errors in handling or processing specimens (13). Adverse events still look rare compared with the total number of cases reported to CDC that involve frozen embryos. The main importance of these events lies in their devastating impact on families and individuals, and the events' prospects for reshaping the legal environment.

CONCLUSION

Our study provides insight into the basis of claims and the clinical and laboratory events that resulted in these losses. We identified no single factor as recurrent, but we did identify

a broad claims basis beyond the more common basis of medical malpractice and breach of professional duty. Our data suggest that these events are infrequent, and the actual number of events when viewed against the practice of ART and management of frozen embryos is quite small, at less than 1%.

A detailed review of contributory factors suggests their avoidance will depend on not just reliable equipment but also effective monitoring systems for managing the storage facilities for frozen embryos (14). The U.S. Food and Drug Administration classifies these tanks as Class II devices, which are not subject to even premarket approval (15). In the absence of federal oversight, the manufacturing and use of cryopreservation tanks could be regulated at the state level to minimize the risk of embryo loss. Our findings suggest that clinics must improve not just their storage hardware and maintenance systems, but also their labeling mechanisms. In addition, clear, verified lines of communication between patients and the laboratory and clinic personnel are strongly recommended.

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EXHIBIT C

LEGAL LIABILITY LANDSCAPE AND THE PERSON/PROPERTY DIVIDE

Judith Dear, J.D.

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The legal liability landscape surrounding mishandled cryopreserved gametes and embryos reveals the struggle that courts and lawmakers confront in attempting to bring justice when a patient's dreams of biologic parenthood are shattered by professional wrongdoing. In their retrospective analysis, Letterie and Fox[1] review the incidence and outcomes of lawsuits alleging embryo loss over a 10-year period. While the number of legal claims is miniscule compared with the total embryo thaw procedures reported during the same period—well less than 1%—the authors are sensitive to the devastation prospective parents experience at the lost opportunity that is perceived to accompany storage mishaps. Their analysis highlights that the vast majority of plaintiffs raise breach of contract and property damage claims, steering clear of seeking redress for the wrongful death of a developing human being. This observation evidences the judiciary's reluctance to address the person/property classification, a reluctance that pervades and hinders the assisted reproductive technology (ART) field as a whole.

Legal strategies that avoid alleging embryo personhood in tort cases are informed by the universal rejection of these claims in prior lawsuits. To date, every court that has considered the wrongful death of an in vitro fertilization (IVF) embryo has rejected that claim on the ground that the term "person" or "human being" does not apply to frozen embryos under the meaning of state law (see, e.g., *Gentry v. Gilmore*, 613 So.2d 1241, 1244 [Ala. 1993]); *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1261–62 [Ariz. Ct. App. 2005]; *McClain v. Univ. of Mich. Bd. of Regents*, 665 N.W.2d 484, 486 [Mich. Ct. App. 2003]; *Miccolis v. Amica Mut. Ins. Co.*, 587 A.2d 67, 71 [R.I. 1991]).[2] Yet patients express a variety of views on the moral status of their frozen embryos. In one survey, one in five patients reported ascribing full moral status to their embryos, a view that informed their decisions about the treatment and retention of unused embryos. The remaining respondents ascribed either no (10%) or some intermediate status to their embryos, combining to reflect a classical wide range of views that Americans generally embrace on embryo status. Given this breadth, it is noteworthy that courts, as well as lawmakers, eschew positions that echo the nuanced diversity of viewpoints on the subject.

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[1] Letterie G., Fox D. Lawsuit Frequency and Claims Basis over Lost, Damaged, and Destroyed Frozen Embryos over a 10-year Period. *Fertil Steril Rep*. Vol. 1, No. 2, Sept. 2020 2666-3341.

[2] Fox D. Oxford University Press; Oxford: 2019. Birth rights and wrongs.

Labeling a frozen embryo as either person or property (or even some intermediate status) can take on deep meaning because of the emotional symbolism attached to such categorization. We have solid knowledge that minds are unlikely to be changed on the matter, making compromise or productive policy making illusive. In law, precise categorization is favored as an assurance that citizens can reasonably predict the consequences of their actions. In clinical ART practice, the practical implications of favoring one construction over the other loom large. On the one hand, deeming embryos full moral persons risks curtailing or eliminating many of the current techniques (including cryopreservation) that enable patients to realize their parental goals. On the other hand, failing to accord embryos their potential for human life under the right clinical circumstances is scientifically unsound and inappropriately untethers gamete providers' expectation of parenthood from their cryopreserved conception.

Today's most pressing clinical dilemma arising from the vexing person/property classification is the large number of embryos in frozen storage without a plan for disposition. Estimates as to the actual number of unclaimed or abandoned embryos varies but given that U.S. doctors have performed over one million IVF cycles in the past 5 years, the volume of supernumerary embryos placed in frozen storage is considerable and growing. Many patients indicate they are unable to decide upon a disposition option, with some opting to freeze the embryos indefinitely, adding to a growing stockpile.[3] Not infrequently, patients fail to pay storage fees and become unreachable by ART clinics and warehousing facilities, shifting the cost of perpetual maintenance to those in possession of the know-how and materials. Caretaking of unclaimed embryos has become a sort of unfunded mandate in reproductive medicine, due in part to concerns over public reaction to a program's unconsented discard of potential human life. The American Society for Reproductive Medicine Ethics Committee has long held that it is ethically acceptable for a program or facility to dispose of unclaimed embryos after the passage of time (5 years is suggested), accompanied by diligent efforts to contact the owners without success.[4] Despite this position of the nation's largest reproductive medicine professional society, practitioners have been reluctant to thaw unclaimed embryos without patient consent. The embryos' perception by some as persons collides with their treatment by others as property.

The import that embryo classification takes on in law and clinical practice invites us to consider a relative, rather than an absolute, approach applied situationally. Strict classification as either person or property has its obvious

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[3] Lyerly A.D., Steinhauser K., Voils C., Narney E., Alexander C., Bankowski B. Fertility patients' views about embryo disposition: results of a multi-institutional U.S. Survey. *Fertil Steril.* 2010;93:499–509.

[4] American Society for Reproductive Medicine Ethics Committee Disposition of abandoned embryos: a committee opinion. *Fertil Steril.* 2013;99:1848–1849.

drawbacks, but so does the intermediate approach where embryos are unclassified (that is, neither person nor property) but given special respect because of their potential for human life. Exactly what does that mean and how should this special respect apply? Few, if any, satisfactory answers have been advanced. Instead, a fluid approach that assesses a host of factors in determining embryo status in context could appeal. Factors such as social policy, likelihood of harm to others, ability to assess nonspeculative damages, and alignment with existing laws could be taken into account when claims arise. The law is accustomed to situational relativism, even when preborn life is involved. For example, in many states the non-abortion-related killing of a fetus is considered homicide at any stage of development, whereas a civil claim for wrongful death will proceed only if the fetus is born alive. The social policy of punishing criminal acts that harm fetuses is strong, whereas concerns over damage calculations in the case of negligence linked to an unborn fetus give some states pause over the merit of such lawsuits.

Applying a balancing approach to claims asserting mishandling of frozen embryos could enable just compensation without imposing language that hijacks the harm into separate and oppositional silos. Professor Fox has penned an elegant and erudite book on this subject that is a must-read for all who contemplate these questions of fairness when machines and mankind go awry in the delivery of reproductive medicine. For now, Fox's suggested remedy that the law recognize a new tort of reproductive negligence may linger on the doorstep of the courthouse as the vast majority of cases asserting harm in the course of IVF and its aftermath are settled or dismissed. Even so, structured settlements could consider a balance of factors in awarding compensation to victims, including an acknowledgement of loss of a potential future child, without stirring the personhood pot. Damages could include the cost of acquiring and storing the lost embryos, fees associated with procuring embryos in the future (whether consanguineous or donated), and emotional distress damages (rarely awarded in breach of contract and damage to property cases). While embryos cannot be replaced, the law can work to make whole those who suffer in their absence. In so doing, the culture wars over embryo classification need not be fueled or smothered by an award that focuses exclusively on the harm to the progenitors. The Letterie and Fox analysis makes clear that judicial refusal to regard embryo loss as compensable wrongful death is linked to the sequelae of resolving the person/property question for all legal intents and purposes. Looking ahead, perhaps justice can see the value of both classifications at the same time, combining to shape a remedy that truly suits the loss.

EXHIBIT D

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Original Article

OXFORD

Legal personhood and frozen embryos: implications for fertility patients and providers in post-*Roe* America

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ABSTRACT

The demise of *Roe v. Wade* has prompted some state lawmakers to try to redefine legal personhood to begin before birth and even before pregnancy. The sweeping abortion bans passed and pending in the wake of *Dobbs* pose a threat to reproductive rights that extends beyond abortion. That threat spills over into in vitro fertilization (IVF) and other assisted reproductive technologies (ART). If legislatures designate embryos as legal persons, fertility clinics will be forced to change how they manage embryos, including current standard practices such as pre-implantation genetic testing, storage of unused embryos, and the disposal of those unlikely to have reproductive potential. This essay examines the many ways in which conferring the status of persons under private and public law is likely to impact patients pursuing IVF and clinics practicing ART.

KEYWORDS: personhood, embryos, *Roe*, *Dobbs*, assisted reproductive technology, in vitro fertilization

INTRODUCTION

On June 24, 2022, the Supreme Court overturned *Roe v. Wade*, which had affirmed a constitutional right to abortion and rejected fetal personhood before birth. In abolishing the abortion right, the Court's decision in *Dobbs v. Jackson Women's Health Organization* also opened up space for states to confer the legal personhood status on

nascent human beings as early as fertilization.[1] Louisiana foreshadows what may be coming in many more states. A Louisiana statute on the books since 1986 defines any embryo outside of the body 'as a juridical person' whose destruction is categorically forbidden—not under the federal Constitution, but state law.[2] *Dobbs* paves the way for states to go even further, prohibiting embryonic stem cell research and other reproductive practices that involve foreseeable damage to embryos.[3] Personhood laws could bar certain uses of frozen embryos, or even their creation for purposes of assisted reproduction in a way that reflects standard-of-care practice in the United States today.[4]

Female fertility patients can avoid additional cycles of painful and risky egg retrieval by enabling providers to create more embryos than they plan to implant all at once, and then freeze the 'spare' embryos for future use, in case the first pregnancy doesn't implant. Closing this option would force women to undergo multiple oocyte retrieval procedures, and could strengthen calls to mandate the 'adoption' of patients' unused embryos. State laws that designate embryos as persons will also make it hard for practitioners to carry out best practices for clinical care or honor prior agreements signed before these state laws were passed. Courts could even appoint a *guardian ad litem* to negotiate fair and equitable decisions on behalf of frozen embryos. The following two scenarios are instructive.

Scenario 1: A couple has six frozen embryos in storage at their local clinic. They have two children at home and decided they no longer want to pay the $500 per month (estimated) to store their six frozen embryos. Before *Dobbs*, in every state but Louisiana, the embryos would be discarded with signed consent and agreement to that effect among the parties. After *Dobbs*, that option may not be available in many more states. Abiding by the patients' clear wishes to discard their embryos could even open the clinic to liability for 'wrongful death.'

Scenario 2: A man and woman divorces with four frozen embryos in storage. They disagree about what to do with them. The woman wants to implant one embryo to create a child. The man wants them destroyed. He does not want genetic parenthood forced on him. Before *Dobbs*, their disagreement could be settled in court as a function of factors including the parties' respective interests in reproducing, or not. Now, states that ascribe personhood status to embryos will increasingly require that the embryos be given to the party who wants them implanted, even if that flies in the face of their clear agreement to the contrary.

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1 I. Glenn Cohen, Judith Daar & Eli Y. Adashi, Opinion, *What the Supreme Court's Abortion Reversal Means for In Vitro Fertilization*, Bos. Globe (June 30, 2022, 3:15 AM), https://www.bostonglobe.com/2022/06/30/opinion/what-supreme-courts-abortion-reversal-means-vitrofertilization/ [https://perma.cc/3KXG-M487].

2 La. Rev. Stat. § 9:121 (West 2021).

3 *See Doe v. Obama*, 631 F.3d 157, 160 (4th Cir. 2011); Sarah Zhang, *Can Lost Embryos Give Rise to a Wrongful-Death Suit?*, Atlantic (Apr. 5, 2018), https://www.theatlantic.com/health/archive/2018/04/fertility-clinicembryos/557258/ [https://perma.cc/VH39-2N88].

4 *See* Steven R. Morrison, *Personhood Amendments After* Whole Woman's Health v. Hellerstedt, 67 Case w. Res. L. Rev. 447, 453–57 (2016).

Other scenarios are easy to imagine: For example, patients and doctors being incentivized to create and transfer multiple embryos in a single treatment, risking high risk multiple births, which are more dangerous. These cases illustrate the practical day-to-day management and decision making for any clinic that delivers assisted reproductive technologies (ART). Since the inception of in vitro fertilization (IVF) and related fertility practices, these decisions have been made according to well-defined medical guidelines that are designed to maximize patient care and outcomes. Now, the state threatens increasingly to tell fertility clinics and patients what can be done, and cannot, imposing punitive penalties for failure to comply. This essay examines the far-reaching implications that designating embryos as persons will have for the practice of ART in post-*Roe* America.[5] We consider these implications from three critical perspectives: (i) patients; (ii) providers; and (iii) the embryo-as-shareholder.

Embryos have been described in various ways since inception of IVF in the 1970s. *Zygote, preembryo, early feto-placental unit* are among a variety of terms used to characterize life in these early stages. The political struggle for legal personhood of human embryos has transformed fetal life from a 'biological entity into a social one' with 'individuality, personhood, and rights.'[6] Before World War II, preserved fetal remains were seen as biological entities for scientific research or public display for educational value.[7] The post-war liberalism of the 1960 and growth of fetal protectionism after *Roe* saw those same fetuses as 'babies' or 'human bodies' more worthy of burial than use.[8] This transformation accompanied anti-abortion efforts by the religious right in the 1980s and 1990s to advance the evils of fetal pain together with photographs of late-stage fetuses.[9] Many pro-life advocates opposed IVF in the late 1970s and early 1980s because the practice, while it aimed at creating new people, often involved the destruction of human life in the form of embryos that for one didn't ultimately get implanted.[10] Much of the religious right saw things differently, accepting IVF because it did not involve fetal pain.[11] These factions came together in the 2000s and 2010s to prioritize legal recognition of fetal personhood as a means to restrict abortion access.[12]

Dobbs emboldens those efforts and gives them new life. The decision does not declare that embryos are constitutional persons with rights to due process and equal protection under the law. But neither does it say that they are not. And it overrules *Roe*, which had rejected such individual, personhood interests on the ground that 'the unborn have never been recognized in the law as 'persons' or 'accord[ed] legal rights.'[13] That an embryo or fetus 'represents only the potentiality of life,' the Court declared, disqualifies that entity from having any individual interests before it is born.[14] Its possible acquisition of such interests in the future, the Court explained, is 'contingent

5 *See* Henry T. Greely, *The Death of Roe and the Future of Ex Vivo Embryos*, 9 J. L. & Biosciences 1 (2022).
6 Sara Dubow, *Ourselves Unborn: A History of the Fetus in Modern America* 41 (2010).
7 *Id.* at 171.
8 *Id.* at 38–44.
9 Sara Dubow, Ourselves Unborn: A History of the Fetus in Modern America 157 (2010).
10 Daniel K. Williams, *Defenders of the Unborn: The Pro-Life Movement Before Roe v. Wade* 266 (2016).
11 *Id.*
12 Mary Ziegler, Abortion and the Law in America 184 (2020).
13 *Roe v. Wade*, 410 U.S. 113, 161–62 (1973).
14 *Id.* at 156.

upon [its] live birth.'[15] Accordingly, not even a fully developed fetus could have any protectable interests of its own, apart from the interest in potential life that the state has in it, like it does in great works of art or endangered species.[16]

Until *Dobbs*, courts entitled frozen embryos to 'special respect,' on account of their '*potential* to become a person.'[17] This intermediate measure of standing—'greater than that accorded to human tissues' like blood or hair, but less than a person—is what the Tennessee Supreme Court said embryos are owed in a 1992 divorce action between Mary Sue and Junior Davis. The former spouses agreed on all terms of the dissolution except what to do with the seven embryos that they had cryopreserved while they were married. She wanted to use them to get pregnant; he wanted them donated to a childless couple.[18] Other states had adopted the 'special respect' status the Tennessee high court assigned to the frozen embryos in disposition disputes elsewhere.[19]

But *Dobbs* enhanced the legal status of potential life to the point that it justifies outright bans on abortion—until then, a fundamental constitutional right—from the moment of conception. By explicitly overruling *Roe*'s holding that abortion is a right, the *Dobbs* majority implicitly opened space to reconsider *Roe*'s separate holding that prenatal life lacks the legal status of personhood. This opening has not gone unnoticed in the states, which have variously enacted measures to '[f]ully recognize the human personhood of an unborn child . . . from the moment of fertilization.'[20] Some lawmakers have suggested that such laws be interpreted to forbid interventions that involve the deliberate loss of nascent life even before pregnancy.[21]

Under current fertility medicine and technology, embryos are created either to initiate a pregnancy or freeze for future use. The availability of sensitive molecular studies has enabled fertility specialists to characterize embryos as being normal genetically or what is referred to as euploid; 1 of 2 categories of genetic abnormalities referred to as mosaicism (high vs low) or aneuploid or abnormal. Previous practices and standards of care have dictated that an abnormal embryo be discarded with essentially no implantation potential. Recent studies show an extremely low but definable likelihood of these genetically abnormal embryos resulting in a healthy live birth.[22] This essentially calls

15 *Id.* at 162.

16 *Id.*

17 *Davis v. Davis*, 842 S.W.2d 588, 602 (Tenn. 1992) (emphasis added).

18 *Id.* at 596–97.

19 *See, eg, Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1266–68 (Ariz. Ct. App. 2005); *McQueen v. Gadberry*, 507 S.W.3d 127, 148–49 (Mo. Ct. App. 2016).

20 *Eg*, H.B. 813, 2022 Leg., Reg. Sess. (La. 2022); H.R. 4327, 58th Leg., 2d Reg. Sess. (2022 Okla.); Utah Code Ann. § 76–7-301 (West 2021); Ky. Rev. Stat. Ann. § 311.715 (West 2022).

21 *See, eg*, Ashton Pittman, *Mississippi Leaders Supported 2011 Initiative Targeting Abortion, Contraception, IVF*, Miss. Free Press (May 16, 2022), https://www.mississippifreepress.org/23762/mississippileaders-supported-2011-initiative-targeting-abortion-contraception-ivf [https://perma.cc/VFN6-ZASD]; Tessa Weinberg, *'Anything's on the Table': Missouri Legislature May Revisit Contraceptive Limits Post-*Roe, MO. Independent (May 20, 2022, 9:00 AM), https://missouriindependent.com/2022/05/20/anythings-on-the-tablemissouri-legislature-may-revisit-contraceptive-limits-post-roe/ [https://perma.cc/4DDZ-HVXH]; Guilia Carbonaro, Roe v. Wade *Being Overturned Could See IVF Banned in at Least 30 States*, Newsweek (June 14, 2022, 9:16 AM), https://www.newsweek.com/roe-v-wade-being-overturned-ivf-banned-30-states-1715576 [https://perma.cc/87MUGGFN].

22 *See* Norbert Gleicher, Pasquale Patrizio & Ali Brivanlou, *Preimplantation Genetic Testing for Aneuploidy – A Castle Built on Sand,* 27 Trends Molecular Med. 731 (2021), https://pubmed.ncbi.nlm.nih.gov/33446425/.

into question the disposition of *any* embryo regardless of its genetics or appearance or predicted likelihood of ending in a healthy live birth.

The ability to freeze embryos with a high likelihood of implantation and survival has revolutionized fertility medicine, and brought with it a complexity of issues about what to do with those frozen embryos.[23] Current technologies have success rates anywhere from 10 to 70 per cent live birth rates depending on the patient population. [24] Not every embryo is biologically capable of implanting and resulting in a live born baby. But it is still practically impossible to distinguish viable embryos from non-viable ones with any scientific certainty.[25] Under all but the most extreme circumstances, the only way to prove that an embryo was non-viable is to transfer and await outcome. Thus any embryo regardless of morphology or genetic complement must be considered under these evolving concepts of personhood as resulting in a live birth.

The rationale behind the need to freeze is straightforward. Fertility medicine today aims to maximize present and future reproductive options. Clinical care seeks to create embryos for immediate use and to have a cohort available to freeze and create an inventory for future use.[26] These future options are enabled through long-term storage facilities. Many individuals or patients who intend to create embryos to initiate a pregnancy immediately also seek to maintain others in their frozen inventory for future use.[27] Maybe a couple is not quite prepared to move ahead with family building but is sensitive to the impact of maternal age. Or an individual woman might seek to pursue career plans, while preserving her likelihood of having children in the future. Both embryo and oocyte freezing offer options to achieve these goals. Advances in clinical care and technology have progressed to the point where embryo freezing is an essential and routine part of ART.[22] Estimates place the number of frozen embryos at >1.5 million.[28] If personhood is granted to embryos, then the laws in many more states than Louisiana are likely to bar patients and clinics from discarding them or using them for valuable medical research and clauses in the laws may preclude transporting to states with more liberal laws.[29] In this setting the question becomes: how to manage this inventory within restrictive laws?

The recent crashes of fertility freezers illustrate the potential liability stakes that could now exist for destroying frozen embryos under the post-*Roe* regime.

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23 *See* P.R. Koninckx & P. Schotsmans, *Frozen Embryos: Too Cold to Touch? Spare Embryos: Symbols of Respect for Humanity and Freezing in the Pronuclear Stage*, 11 Hum. Reprod. 1841 (1996), https://academic.oup.com/humrep/article/11/9/1841/615962.

24 *See* Ctrs. For Disease Control, Art Success Rates, https://www.cdc.gov/art/artdata/index.html [https://perma.cc/8UVE-67L6].

25 *See* David K. Gardner, et al. *Diagnosis of Human Preimplantation Embryo Viability,* 21 Hum. Reprod. Update 727 (2015), https://pubmed.ncbi.nlm.nih.gov/25567750/.

26 *See* Laura Francesca Rienzi, *Perspectives in Gamete and Embryo Cryopreservation,* 36 Seminars in Reprod. Med. 253 (2019), https://pubmed.ncbi.nlm.nih.gov/30947341/.

27 *See* S. Canosa et al., *The Effect of Extended Cryo-Storage Following Vitrification on Embryo Competence: A Systematic Review and Meta-Analysis,* 39 J. Assisted Reprod. Genetics 873, https://pubmed.ncbi.nlm.nih.gov/35119549/.

28 *See* Gerard Letterie, In re: The Disposition of Frozen Embryos: 2022, 177 Fertility & Sterility 477 (2022), https://pubmed.ncbi.nlm.nih.gov/35131103/.

29 *See* David Badash, *'From the Moment of Fertilization': Louisiana Advances Bill Criminalizing Abortion as Homicide – Women, Doctors Could be Jailed,* Alternet (May 6, 2022), https://www.alternet.org/2022/05/louisiana-house-abortion/.

Hundreds of would-be parents had their dreams of biological children crushed in 2018.[30] High-capacity storage containers failed at major medical facilities in Cleveland and San Francisco.[31] These subzero containers are poorly regulated, no better by some accounts than kitchen appliances or farm tools.[32] The bulk vats were developed in the 1960s to store livestock semen for breeding.[33] Now they are used by almost five hundred fertility clinics nationwide to freeze people's eggs and embryos at a constant −196°C. Temperatures began rising on the same unstaffed weekend that March, with remote alarms inactive.[34] By the time lab technicians returned on Monday morning, everything inside had been thawed beyond rescue or repair. Center operators pointed the finger at defective equipment, while manufacturers blamed laboratory staff for 'forget[ting] to refill' the liquid nitrogen chambers in these 'ever-dependable vessels.'[35] After *Dobbs*, personhood laws could authorize states to sue clinics in cases like these for major liability under the doctrine of 'wrongful death,' characteristically but not always reserved for negligent or reckless misconduct that causes the loss of legal person.[36]

Legislatures had initially enacted wrongful death statutes to fill an untenable gap in the early common law. Liability attached only if a plaintiff survived—if he died, defendants went scot free.[37] Wrongful death suits were designed, not to protect the life already lost, but rather to deter misconduct and compensate the victim's survivors. Originally, recovery was allowed only for economic losses, such as funeral expenses and a loved one's lost wages that had provided essential household income for his spouse and children. Most jurisdictions have since allowed wrongful-death plaintiffs to recover for emotional and other non-pecuniary losses of companionship and peace of mind. This allowed parents to seek redress for the wrongful death of relatives or other dependents whose heartbreaking death doesn't set them back financially, including children whose injuries were inflicted on them, while still *in utero*, back before they

30 *See* Ariana Eunjung Cha, *These Would-be Parents' Embryos Were Lost. Now They're Grieving—And Suing*, Wash. Post (Aug. 24, 2018), https://www.washingtonpost.com/national/health-science/these-would-beparents-embryos-were-lost-now-theyre-grieving—and-suing/2018/08/24/57040ab0-733c-11e8-805c4b67019fcfe4_story.html?noredirect=on&utm_term=.80e17d-f7e769.

31 *See* Natalie Lampert, Their Embryos Were Destroyed: Now They Mourn the Children They'll Never Have, The Guardian (May 13, 2018), https://www.theguardian.com/lifeandstyle/2018-/may/-13/their-embryoswere-destroyed-now-they-mourn-the-children-theyll-never-have.

32 *See* Kayla Webley Adler, *When Your Dreams of Motherhood Are Destroyed*, Marie Claire (Oct. 1, 2018), https://www.marieclaire.com/health-fitness/a23327231/egg-freezing-emryos-lack-of-regulation/.

33 *See* Amy Goldstein, *Fertility Clinic Informs Hundreds of Patients Their Eggs May Have Been Damaged*, Wash. Post (Mar. 11, 2018), https://www.washingtonpost.com/national/healthscience/fertility-clinic-informshundreds-of-patients-their-eggs-may-be-damaged/2018/03/11/b605ea82-2536-11e8-b79df3d931db7f68_story.html?utm_term=.1155a73dbbec.

34 *See* Rich Gardella & Erika Edwards, *Heartbreak, anxiety, lawsuits: The egg-freezing disaster a year later*, Nbc News (Mar. 4, 2019), https://www.nbcnews.com/news/all/heartbreak-anxietylawsuits-egg-freezingdisaster-year-later-n978891.

35 Mitchel C. Schiewe et al., *Comprehensive Assessment of Cryogenic Storage Risk and Quality Management Concerns: Best Practice Guidelines for ART Labs*, 36 J. Assisted Reprod. & Genetics 5, 5 (2019); *see also* Zahava P. Michaelson et al., *Early Detection of Cryostorage Tank Failure Using a Weight-based Monitoring System*, 36. Assisted Reprod & Genetics 655 (2019).

36 *See* Gerard Letterie, *In re: The Disposition of Frozen Embryos: 2022,* 177 Fertility & Sterility 477 (2022), https://pubmed.ncbi.nlm.nih.gov/35131103/.

37 *See* Wex S. Malone, *The Genesis of Wrongful Death*, 17 Stan. L. Rev. 1043, 1062–66 (1965).

were born.[38] But this expansion invited another puzzle. 'Wrongful death' now afforded recovery to expecting parents whose fetuses survived a negligent injury, at least until live delivery, but not where a fetus was injured so severely that it died during pregnancy. When it came to prenatal misconduct, damages still seemed inappropriately *lower* in response to a *graver* injury.[39]

To address this apparent paradox, the majority of states expanded the cause of action again, this time to cover stillborn fetuses capable of surviving on their own. Since statutes limit its application to the death of a 'person,' this move required defining fetuses as persons—for the narrowly circumscribed purpose of victims who would have been parents to recover.[40] Compensation for wrongful fetal death does not protect the lost fetus itself, or give it any rights that might be asserted against others. Instead, it speaks to the devastating loss that expectant parents endure when negligence ends their wanted pregnancy. [41] 'Fetal personhood' in this limited context did not entitle a fetus to any interests of its own—so it need not implicate the fetus's ability to inherit property, or a woman's right to abort it.[42] Every court that had considered the 'wrongful death' of IVF embryos before *Dobbs* had rejected such claims on the ground that the term 'person' doesn't apply to frozen embryos under the meaning of state law.[43] Many cancer survivors and older fertility patients whose embryos, oocytes or sperm are negligently destroyed might also be robbed of their last chance to carry and raise a genetic child. Yet judges have so far resisted claims to permit suits for the 'wrongful death' of lost embryos like they have for post-viability fetuses. After *Dobbs*, liability risks could attach for any damage to embryos in transporting or receiving from one clinic to the other, or if spilling culture media in the lab and losing several embryos or if there is active decision making on the part of an individual or couple to discard the embryo. Added to this is the complexity of insurance coverage for everything from medical malpractice to criminal abandonment.[44]

Options that have been considered as possible solutions are embryo donation and restricting the number of eggs, or oocytes, that are inseminated and thus the number of embryos in storage. Donation has been talked about as a win–win (excess embryos "adopted" by those interested in pregnancy) but a relatively low uptake. In a recent survey only 15 per cent of patients are willing to consider embryo donation.[45]

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38 *See* William Prosser & W. Page Keeton, The Law of Torts § 127, at 945 (5th ed. 1984).

39 *See* Dov Fox, Birth Rights and Wrongs 48–49 (2019); Dov Fox, *Reproductive Negligence*, 117 Columbia Law Review 149, 218 (2017).

40 *See* Dov Fox, *Interest Creep*, 82 George Washington Law Review 273, 279 (2014).

41 *See* Dov Fox, *Redressing Future Intangible Losses*, 69 DePaul Law Review 419, 430 (2019).

42 *See, eg*, Carranza v. United States, 267 P.3d 912 (Utah 2011); Summerfield v. Superior Court, 698 P.2d 712, 715, 724 (Ariz. 1985).

43 *See* McClain v. Univ. of Mich. Bd. of Regents, 665 N.W.2d 484, 486 (Mich. Ct. App. 2003); Miccolis v. Amica Mut. Ins. Co., 587 A.2d 67, 71 (1991); Gentry v. Gilmore, 613 So.2d 1241, 1244 (Ala. 1993); Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1261-62 (Ariz. Ct. App. 2005); Miller v. Am. Infertility Grp. of Ill., 897 N.E.2d 837, 839-40 (Ill. App. Ct. 2008).

44 *See* Jennifer F. Kawwass et al., *Embryo Donation: National Trends and Outcomes, 2000–2013,* 215 Amer. J. Obstetrics Gynecology 747.e1, https://pubmed.ncbi.nlm.nih.gov/27393270/.

45 *See* Alison E. Zimon, et al., *Embryo Donation: Survey of In-Vitro Fertilization (IVF) Patients and Randomized Trial of Complimentary Counseling*, 14 Plos One e0221149, https://pubmed.ncbi.nlm.nih.gov/31415660/.

Would-be recipients are generally reluctant to use embryos that were generated from an infertile couple where the embryos' implantation potential is unclear.[46]

Though appealing in concept, the reality of embryo donation is far more complicated. Three perspectives influence this option. From the perspective of patients who are interested in donating embryos, key are issues related to identification and disclosure of the donating families. The term of *anonymous donors* in any context has been replaced by the term *non-identified donors*.[47] This change in language reflects the source of concern among would-be donors and relates to the inability to assure anonymity with the prevalence of nonmedical/direct-to-consumer and social media and networking.[48] Other issues that prompt couples to decline embryo donation relates to the simple fact that many families take a narrow view of having their embryos *at large* with no control over their destiny.

From the standpoint of recipient families, donated embryos are derived from patients undergoing IVF for reasons relating to infertility and thus have attached to them a variable success rate depending on the clinical indications for the IVF cycle.[49] In addition to this, the 'de-selected' embryos that remain in inventory are those of lower implantation potential from the cohort derived from the IVF cycle (the more viable embryos usually have been transferred).[50] This leads to a lower likelihood of success for the recipient family. An urgency and need to move forward quickly usually prompts patients that have exhausted other family building options to move forward with the most expeditious next step.[51]

From the standpoint of providers, many of the patients have not been adequately screened prior to the generation of these stored embryos.[52] These embryos may be 15 years old and frozen at a time prior to the extensive infectious screening now in place. The US Food and Drug Administration (FDA), American Association of Tissue Banks, US Centers for Disease Control and Prevention (CDC), and American Society for Reproductive Medicine (ASRM) have developed extensive safeguards for the optimal and safe storage and donation of any tissue embryos included.[53] A waiver can be attached with the following explicit statement: 'WARNING: NOT EVALUATED FOR INFECTIOUS SUBSTANCES'. The US FDA, American Association of Tissue

46 *See* V. Jadva, et al., *Sperm and Oocyte Donors' Experiences of Anonymous Donation and Subsequent Contact with Their Donor Offspring*, 26 Human Reprod. 638 (2011), https://pubmed.ncbi.nlm.nih.gov/21177310/.

47 *See* Julinda Lee, *Embryo Donation: A Review,* 82 Acta Obstectrica et Gynecologica Scandinavica 991 (2003), https://pubmed.ncbi.nlm.nih.gov/14616271/.

48 *See* Prac. Comm. of the Amer. Soc. for Reprod. Med. and the Prac. Comm. for the Soc. for Assisted Reprod. Tech., *Guidance Regarding Gamete and Embryo Donation*, 115 Fertility & Sterility 1395 (2021), https://pubmed.ncbi.nlm.nih.gov/33838871/ [hereinafter *Gamete and Embryo Donation Guidance*].

49 *See* Guido Pennings, et al., *Attitudes of Sperm Donors Towards Offspring, Identity Release and Extended Genetic Screening*, 43 Reprod. Biomed. Online 700 (2021), https://pubmed.ncbi.nlm.nih.gov/34412975/.

50 *See* K Wånggren, et al., *Attitudes Towards Embryo Donation Among Infertile Couples with Frozen Embryos*, 28 Human Reprod. 2432 (2013), https://pubmed.ncbi.nlm.nih.gov/23756704?.

51 *See* Harry Hatasaka, *An Efficient Infertility Evaluation*, 54 Clinical Obstetrics Gynecology 644 (2011), https://pubmed.ncbi.nlm.nih.gov/22031254/.

52 *See Gamete and Embryo Donation Guidance*, *supra* note 39.

53 *See* Food & Drug Admin., Guidance for Industry: Eligibility Determination for Donors of Human Cells, Tissues, and Cellular and Tissue-Based Products (Hct/Ps) (2007), https://www.fda.gov/media/73072/download [https://perma.cc/5FGB-WJWF].

Banks, US CDC, and ASRM have developed extensive safeguards for the optimal and safe storage and donation of any tissue embryos included.

The second option of restricting the number of oocytes inseminated has been explored particularly in Italy as an example of government regulation of ART gone awry. The passage of Law 40/2004 in Italy, which aims to prevent the 'loss of *any* early human embryo,' dramatically affected the manner assisted reproduction was conducted there.[54] A recent attempt to modify this highly restrictive legislation failed to gain popular support and was defeated in a 2005 referendum. It had the unintended impact of forcing couples to move their care to other countries.[55] The idea that some states are advancing after *Dobbs* is a variation of this theme to restrict the number of oocytes inseminated and thus reduce the number of embryos to contend with. As suggested by the Italian experience, it is a flawed process divorced from the patient's interest of best outcomes in the shortest period with maximum future options.[56] The inefficiency of the process is instructive. IVF seeks to maximize the number of embryos from each cycle to assure optimal present and future outcomes. This need is predicated on the unreliable and unpredictable outcomes regarding sperm-oocyte interaction, fertilization, and embryo development.[57] Added to this is an inability to identify which oocytes will yield quality embryos. Absent that, insemination of all oocytes offers the most informative and efficient path forward. For example, perfect 'looking' oocytes will result in a fertilization rate of only ~80 per cent and embryo development of 30 per cent under the best circumstances.[58] These outcomes can be even lower depending on clinical circumstances such as a maternal age beyond the age of 38 that will markedly decrease the number of oocytes available.[59]

This 'limited insemination' option put forth also frustrates another key element to contemporary IVF practices, namely generating sufficient number of embryos to freeze for future use. Cryotechnology has enabled patients to build an inventory of embryos frequently more than what they will ever use.[60] These well-defined goals and definition of best outcomes may pose one of the greatest conflicts with the *Dobbs* decision: how to manage embryos unused embryos in a system where the option to discard is no longer

54 *See* Giuseppe Benagiano & Luca Gianaroli, *The New Italian IVF Legislation,* 9 Reprod. Biomed. Online 117-118 (2004), https://pubmed.ncbi.nlm.nih.gov/15333237/.

55 *See* Mark V. Sauer, *Italian Law 40/2004: A View from the 'Wild West,'* 12 Reprod. Biomed. Online 8 (2006), https://pubmed.ncbi.nlm.nih.gov/16454924/.

56 *See* Dmitry Nikiforov et al., *Human Oocyte Morphology and Outcomes of Infertility Treatment: a Systematic Review*, Reprod. Sci. (2021), https://pubmed.ncbi.nlm.nih.gov/34816375/.

57 *See* Jose Buratini et al., *Maternal Age Affects the Relationship of Basal FSH and Anti-Müllerian Hormone Concentrations with Post-ICSI/IVF Live Birth*, 42 Reprod. Biomed. Online 748 (2021), https://pubmed.ncbi.nlm.nih.gov/33653653/.

58 *See* Marine Poulain et al., *Impact of Ovarian Yield-Number of Total and Mature Oocytes Per Antral Follicular Count-On Live Birth Occurrence After IVF Treatment*, 8 Frontiers in Med. (2021), https://pubmed.ncbi.nlm.nih.gov/34504852.

59 *See* Natalie M. Crawford & Anne Z. Steiner, *Age-related Infertility*, 42 Obstetrics Gynecology Clinics N. Amer. 15 (2015), https://pubmed.ncbi.nlm.nih.gov/25681837/.

60 *See* Adam S. Cifu, *Long-term Physician-Patient Relationships—Persevering in a Practice*, 179 Jama Internal Med. 141 (2019), https://pubmed.ncbi.nlm.nih.gov/30508031/.

available.[61] The goal of the IVF process sets up a conflict and possible liability if laws restrict the options for management.[62]

The relationship between patients and their providers is fundamental to high-quality care.[63] The patient–provider decision process has been upended where the state grants rights to the embryo that supersede the interests of patients and physician guidance. This insertion of the state runs counter to the cherished relationship providers share with patients. The elements of a healthy provider–patient relationship include (i) evidence-based recommendations for decision making within the doctor–patient relationship; (ii) joint doctor–patient advocacy for best care and clear communication among all parties; and (iii) privacy, confidentiality, trust and a safe zone for planning effective care to reach decisions on best outcomes and patient interests.[64] In the realm of IVF, the decision making, and strategizing is especially complex. It involves embryos with the assumption that decisions regarding the embryos are made with the patients representing their interests in relationship to the embryos.[65] Decision making between patient and provider is an extremely nuanced exchange.[66] Intrinsic to this process is faith on the part of the patient that a provider will make the decision in their best interest based on the best evidence to ensure the best outcome. State mandates about management of reproductive options may force decisions that neither provider nor patient want and are not in the patients' best interest.

The point of the IVF process is to create the circumstances these laws are intended to restrict: namely, to fertilize all oocytes and create as many embryos as clinically safe and effective. These restrictions negatively impact a range of goals beyond treating infertility. These include genetic screening of embryos as a form of very early prenatal diagnosis; fertility preservation and the empowerment of women; oncofertility and the option of cancer patients to preserve future fertility in the face of cytotoxic chemotherapy and its impact on fertility and the fertility infrastructures on which much of the LGBTQIA+ community (LGBTQIA+ is an abbreviation for lesbian, gay, bisexual, transgender, queer or questioning, intersex, asexual, and more.) looks for their family building options.[53] The argument is that the entire delivery of care within the infertility sector will be impossible to execute on if the laws currently in place or proposed are enforced.[54] Enforcement will ignore the inexactitudes at play in defining embryo viability and how to navigate within these restrictions.[55] State laws could bar practitioners from developing a treatment plan that would be in the patient's best interest but constrained by law. *Dobbs* could restrict clinics' ability to treat patients to provide them with quality fertility care.

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61 *See* Selena E. Ortiz & Meredith B. Rosenthal, *Medical Marketing, Trust, and the Patient-Physician Relationship*, 32 Jama 40 (2019), https://pubmed.ncbi.nlm.nih.gov/30620354/.

62 *See id.*

63 *See id.*

64 *See* Jacquelin Forsey et al., *The Basic Science of Patient-Physician Communication: A Critical Scoping Review*, 96 Academic Med. J. Assoc. Amer. Med. Colleges S109 (2021), https://pubmed.ncbi.nlm.nih.gov/34348382/.

65 *See* Catherine A. McMahon & Douglas M. Saunders, *Attitudes of Couples with Stored Frozen Embryos Toward Conditional Embryo Donation*, 91 Fertility Sterility 140 (2009), https://pubmed.ncbi.nlm.nih.gov/18053994/.

66 *See ACOG Committee Opinion No. 587: Effective Patient-physician Communication*, 123 Obstetrics Gynecology 389 (2014), https://pubmed.ncbi.nlm.nih.gov/24451677/.

The threat is two-fold. First, is the erosion of the doctor–patient relationship and impact on trust based on interference with clinical decisions in patients' best interest. The second threat is related: the risk for liability, including possible criminal prosecution for provider and patient alike. When it comes to the liability threat, this could involve not just civil penalties like malpractice but criminal sanctions from fines to prison. This shadow and threat may constrain options considered best treatment for a patient. Providers could be conflicted: risk prosecution or abide by legal constraints and the safety zone that this compliance may render. Lawsuits involving IVF centers are infrequent, but the era post-*Dobbs* may change both the frequency and the penalties paid.[67] The attention post-*Dobbs* has largely centered on its impact on abortion access and penalties to both providers and patients should violations ensue. But state policies could affect everything from how miscarriages are managed and IVF.[68] At issue in the setting of ART is how restrictive laws that ban or severely limit abortion with penalties attached for violators will impact IVF. The definition on which limits for IVF could turn is how the laws define when life begins, and if under state laws, will embryos have legal protections of personhood before transfer. If they do, conducting IVF could become much more complicated in those states. Unresolved questions about the thousands of IVF embryos that are currently sitting in freezers there would loom.[69]

Placing these possibilities in a brief historical context may be of value to gain insight into possible trends ahead. IVF restriction after *Dobbs* could follow a path like the early efforts by anti-abortion legislatures to restrict abortion services. Much of this legislation prior to *Dobbs* while not eliminating abortion services resulted in restrictive rules and regulations intended to make practice of abortion services complicated, expensive and for smaller clinics unattainable.[70] For example, in Texas regulations were passed to require centers performing abortions to meet criteria applied to surgical centers.[71] Fulfillment would mean as examples expanding hallway width and adding expensive anesthesia equipment. Severe penalties were enforced for noncompliance.[72] A similar path could be envisioned at this early stage where regulations may restrict common IVF procedures such as preimplantation genetic testing limiting but not eliminating (at least at this time) options available that would assure best outcomes but not clearly (at this time) eliminating the IVF options.[73] Total bans are unlikely soon. But hastily

67 *See* Gerard Letterie, *Outcomes of Medical Malpractice Claims in Assisted Reproductive Technology over a 10-year Period from a Single Carrier*, 34 J. Assisted Reprod. & Genetics 459 (2017), https://pubmed.ncbi.nlm.nih.gov/28190212/.

68 *See* Aria Bendix, *States Say Abortion Bans Do not Affect IVF. Providers and Lawyers Are Worried Anyway*, Nbc News (June 29, 2002, 9:56 AM), https://www.nbcnews.com/health/health-news/states-say-abortionbans-dont-affect-ivf-providers-lawyers-worry-rcna35556 [https://perma.cc/GLJ5-U9MB].

69 *See* Jan Hoffman, *Infertility Patients and Doctors Fear Abortion Bans Could Restrict I.V.F.,* N.Y. Times, (July 6, 2022), https://www.nytimes.com/2022/07/05/health/ivf-embryos-roe-dobbs.html [https://perma.cc/F6UPQ7WC].

70 *See* Planned Parenthood Action Fund, *What Are TRAP Laws?*, https://www.plannedparenthoodaction.org/issues/abortion/types-attacks/trap-laws [https://perma.cc/5MDB-PCAX].

71 *See* Tex. Health & Safety Code Ann. §§ 245.001–245.025 (West 2021), https://statutes.capitol.texas.gov/Docs/HS/htm/HS.245.htm.

72 *See* James Studnicki et al., *Doctors Who Perform Abortions: Their Characteristics and Patterns of Holding and Using Hospital Privileges*, 6 Health Svcs. Res. & Managerial Epidemiology (2019), https://pubmed.ncbi.nlm.nih.gov/31020009/.

73 *See* Carey Goldberg, *Abortion Ruling Clouds Future for In Vitro Fertility Patients,* Bloomberg (June 29, 2022, 2:00 AM), https://www.bloomberg.com/news/articles/2022-06-29/roe-v-wade-decision-clouds-future-forin-vitro-fertility-patients.

prepared laws with vague language could have unintended consequences for providers and patients alike.

Expanded liability and risks of prosecution are eroding patient centric care and instead shifts provider focus to a defensive posture. Recent events have brought risks of criminal prosecution adding a new and alarming layer to an already complex process. Criminal liability and loss of licensure now add to concerns about medical malpractice.[74] This transition from medical malpractice to criminal charges is increasing in frequency, an unlikely event in the past. In addition to past cases, a recent conviction against a Vanderbilt University nurse of two felonies for a fatal drug error highlights the position that courts are taking for errors that result in fatalities.[75] The prospect of criminal indictment should give pause to any practitioner in the ART space but added to this is possible lack of insurance coverage for these claims. Medical malpractice policies do not cover criminal misconduct.[76] Accidents happen in any clinical setting. In IVF, embryos may be unintentionally damaged or discarded. But the implications for error in this setting post-*Dobbs* changes the calculus and imposes a far greater risk, to say nothing of actual charges that sound in criminal negligence.[77]

The risk of criminality is clear in recent state laws. A North Dakota law currently defines murder as when one '[i]ntentionally or knowingly causes the death of another human being' or when one '[c]auses the death of another human being under circumstances manifesting extreme indifference to the value of human life.' Assuming, then, that life begins at conception, doctors who administer IVF would apparently be acting with the intent or at least with indifference to the lives of the multiple embryos with unknown viability, some which could result in a live birth and others that simply would not survive. These risks could also extend to other staff such as nurse, administrators, hospital staff, and other medical assistants, who could be guilty of accomplice crimes, including conspiracy to murder. Women and men who hope to become parents through IVF could also be criminally liable.

Criminal penalties have not yet been defined, but the language of some bills advanced in state legislature is cause for alarm on the part of practitioners and patients alike. Louisiana lawmakers advanced a bill that would grant constitutional rights to 'all unborn children from the moment of fertilization' and classify abortion as homicide. The bill defines personhood as beginning from the moment of fertilization that would subject people to murder prosecutions, punishable by life without parole, for having abortions.

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74 *See* Julia B. Berman & Guohua Li, *Characteristics of criminal cases against physicians charged with opioid-related offenses reported in the US news media*, 1995–2019, 7 Injury Epidemiology 1 (2020), https://pubmed.ncbi.nlm.nih.gov/32998773/.

75 *See* Brett Kelman, *In Nurse's Trial, Witness Says Hospital Bears 'Heavy' Responsibility for Patient Death*, NPR (Mar. 24, 2022, 5:00 PM), https://www.npr.org/sections/health-shots/2022/03/24/1088397359/innurses-trial-witness-says-hospital-bears-heavy-responsibility-for-patient-dea [https://perma.cc/XYK3-XW8Y].

76 *See* M.M. Reidenberg & O. Willis, *Prosecution of Physicians for Prescribing Opioids to Patients*, 81 Clinical Pharmacology & Therapeutics 903 (2007), https://pubmed.ncbi.nlm.nih.gov/17329989/.

77 *See* Natasha Kay et al., *Should doctors who make clinical errors be charged with manslaughter? A survey of medical professionals and members of the public*, 48 Medicine, Science, and the Law 317 (2008), https://pubmed.ncbi.nlm.nih.gov/19051669/.

A natural end point of these threats to care is this: practitioners may find themselves in a position fraught with liability on two fronts: duty bound to make decisions in a patient's best interest but legally held responsible for a decision that may honor the law but betray a patient trust. Put differently, practitioners may have a conflict between using the highest clinical standards for patient care according to the principles of beneficence and non-malfeasance or abide by strict laws that run counter to these principles. Patients may find themselves accountable to laws that are against their interests; prior commitments and contracts and exacerbate the vulnerability that these patients carry with them. Personhood laws would pull fertility doctors between opposing obligations—their commitment to treat patients with sound care, and their obedience to the law. This crisis of conscience will exact a deep psychological toll on clinicians and diminish the trust patients have in them to put their medical interests first. This conflict threatens to arrest and upend 50 years of bioethics progress for the well-being of patients in fertility science, medicine, and technology.

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CONFLICT OF INTEREST

The authors have no disclosures or conflicts of interest.

EXHIBIT E

THE DISPATCH

Alabama's Mad Dash to Offer IVF Clinics Blanket Immunity

There are risks to lawmaking in a fit of political desperation amid a media firestorm.

By John McCormack

Mar 4, 2024

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Illia Brusianskyi, a senior embryologist at West Coast Fertility Centers, in Fountain Valley, California, adds media to petri dishes containing embryos before freezing the embryos on February 29, 2024. (Photo by Jay L. Clendenin/for The Washington Post via Getty Images)

The Alabama Legislature voted overwhelmingly late last week to provide blanket immunity to IVF clinics from any civil or criminal liability related to the death or damage of a human embryo.

While the legislation has been hailed across the media as a measure protecting IVF access, it accomplished this goal by stripping away legal protections for IVF patients whose embryos are negligently destroyed. "[N]o action, suit, or criminal prosecution for the damage to or death of an embryo shall be brought or maintained against any individual or entity when providing or receiving goods or services related to in vitro fertilization," according to the text of HB 237, a bill that passed the Alabama House 94-6 on Thursday with three abstentions. The Alabama Senate unanimously passed a nearly identical bill that same day, setting up a signature from Alabama Gov. Kay Ivey in the coming days.

Alabama lawmakers passed the bills less than two weeks after the state Supreme Court issued a ruling holding that a fertility clinic could be sued for the negligent destruction of embryos under the state's Wrongful Death of a Minor Act. The speed with which the legislature moved can be attributed to two main factors. First, following the Supreme Court ruling, at least three of the eight IVF clinics in Alabama paused treatment as they evaluated legal risks, placing some IVF patients in limbo. Second, Republicans in Alabama and nationwide are running scared from false accusations that the Alabama ruling is the result of the 2022 *Dobbs* Supreme Court decision and false claims Republicans want to ban IVF, a treatment that enjoys overwhelming popular support. In response to those accusations, on February 23, presumptive GOP presidential nominee Donald Trump urged Alabama's legislature to act "quickly," and lawmakers answered that call by introducing legislation on February 27 and passing it on February 29.

But there are perils to lawmaking at warp speed in a fit of political desperation amid a media firestorm—especially on an ethically complex issue. The immunity granted by the legislation would be sweeping and absolute, as it applies to "any

individual or entity" who damages or kills a human embryo "when providing or receiving goods or services related to in vitro fertilization." The case before the Alabama Supreme Court, for example, involved wildly negligent behavior: Three sets of parents sued a clinic after their embryos were killed when a random hospital patient wandered into a cryogenic nursery through an unsecured door, accessed the stored embryos, and dropped the vials containing the embryos.

The proposed law would apply "retroactively to any act, omission, or course of services which are not the subject of litigation on the effective date of this act." So it would allow those three sets of parents to continue to have their day in court, but it would not provide legal recourse to other IVF patients who experienced similar or worse treatment—no matter how negligent or willful. In an email to *The Dispatch*, Notre Dame law professor Carter Snead warned that the blanket-immunity legislation "will have catastrophic results, including a cascade of unintended harmful consequences for IVF patients." There have been horror stories all around the country in which couples have had their embryos negligently destroyed, and successful lawsuits against those clinics have not threatened the availability of IVF. In 2021, for example, a California jury awarded $15 million in damages to couples whose embryos were destroyed—a decision that did nothing to curtail IVF access in the state.

Snead, who served as general counsel on the President's Council of Bioethics during the George W. Bush administration, urged the Alabama legislature to "slow down and study this highly complex question carefully." But there's no sign of anyone in Alabama hitting the brakes on the legislation, even as state lawmakers across the aisle acknowledged problems with the bill but portrayed it as a stopgap measure that would reopen all IVF clinics as they considered the matter more carefully. "Republican and Democratic lawmakers raised concerns that the 'immunity' offered to medical personnel treating IVF patients was too broad and risked leaving women who are injured or adversely affected during

care without recourse," according to an NBC News report on the legislature's floor debate on the bills. "There are parts that are still missing," Democratic Rep. Adline Clark said. "Major parts." As first introduced, the legislation contained a sunset provision in March 2025 in order to force such a reconsideration, but lawmakers dropped it over concerns it could interrupt treatment for IVF patients.

If there is a way for Alabama GOP lawmakers to thread the needle here—providing some legal recourse for IVF patients while upholding pro-life principles and ensuring all IVF clinics stay open—they certainly haven't found it yet. The national pro-life group Susan B. Anthony Pro-Life America urged Alabama's legislature to copy a 1986 Louisiana law that allows IVF yet prohibits the intentional destruction of viable embryos. But that plea has fallen on deaf ears in Alabama for now. IVF often (but not always) involves the creation of several embryos at once, and those that aren't immediately transferred to be implanted are cryogenically frozen and stored. One Louisiana IVF doctor told the Associated Press he and others get around the state's prohibition by keeping frozen embryos stored out of state and shipped back in if and when they are desired.

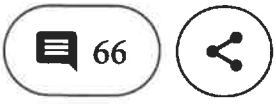
"We find it unacceptable," said SBA's Katie Glenn Daniel, that the Alabama legislation "would create these blanket protections for the IVF industry at the expense of unborn children and of their parents."

Republicans in Alabama and Washington, D.C., and even pro-life groups, were caught flat-footed by the Alabama Supreme Court ruling because there's never really been a serious debate about IVF in this country. That lack of debate has been due to the treatment's overwhelming popularity, as well as the fact that the ethics—not to say the legality—of creating embryos through IVF has always divided the pro-life movement. See, for example, this 2019 debate between two pro-life evangelicals who argue against IVF and one evangelical who argues in favor of it "as long as no human embryos are destroyed in the process," something

that can be accomplished but may ultimately incur greater costs and multiple procedures. While orthodox Catholics believe IVF is ethically wrong, there is an intra-Catholic debate about embryo adoption. One doesn't need to have religious convictions, of course, to be concerned about ethical questions surrounding the treatment of nascent human life: Secular Germany passed the 1990 Embryo Protection Act that limited the number of embryos that may be created and transferred in one treatment (a law that has plenty of critics and its own unintended consequences).

In the United States, pro-life groups have never favored banning the *creation* of human embryos through *in vitro* fertilization. They have, however, always been concerned about the *destruction* of human beings in the earliest stages of development. But the last time there was a serious political debate touching on the issue was the George W. Bush era, and even then the debate in Congress narrowly focused on matters such as banning human cloning and prohibiting taxpayer funding of scientific research that required the destruction of new embryos.

Two weeks after the Alabama Supreme Court forced the issue to the forefront, the Alabama Legislature has found a solution to its political problem but deferred a serious debate about the deeper issues at stake to another day. "My goal this week has been to try to find some compromise that would open our clinics for these families," Republican state Rep. Terri Collins, sponsor of the House bill, said on Thursday. "Do we need to have the longer discussion? Yes, we do."



By John McCormack