

Case No. SC-2022-0515
IN THE SUPREME COURT OF ALABAMA

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,

Plaintiffs/Appellants,

vs.

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

Defendants/Appellees.

On Appeal from Mobile County Circuit Court
Civil Action No. CV-2021-901607

BRIEF OF AMICUS CURIAE
ALABAMA MEDICAL ASSOCIATION

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STATEMENT REGARDING ORAL ARGUMENT

The Alabama Medical Association does not consider oral argument necessary for the reasons set forth in the Brief of the Appellees. However, should this Court enter an Order for oral argument, the Alabama Medical Association would move for leave to participate due to the critical and potentially devastating implications for reproductive medicine should this Court reverse the trial court's order of dismissal.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Medical Association of the State of Alabama (“Medical Association”) began in 1873 and is the oldest professional medical organization in Alabama. Today, it has more than 7,000 members practicing across a broad spectrum of medical specialties. The Medical Association is the advocate for physicians and patients in Alabama, representing the interests of physicians and protecting the quality of patient care. The Medical Association works tirelessly to protect the practice of medicine from efforts that would undermine a physician’s ability to care for his or her patients.

The outcome of this Appeal will have a profound impact on fertility medicine providers and their patients who seek fertility treatment because they are unable to conceive children naturally. Attaching wrongful death liability to the destruction of *in vitro* embryos would disrupt the practice of safe and increasingly successful IVF treatment, substantially increase costs of IVF treatment, and threaten access to IVF treatment in Alabama.

STATEMENT OF THE CASE AND RELEVANT FACTS

The Alabama Medical Association adopts the Statement of the Case and Relevant Facts as set forth in the Brief of the Appellees.

STATEMENT OF THE ISSUE

Whether this Court should create a wrongful death cause of action for the destruction of an *in vitro* embryo in cryogenic storage that has not been implanted in the uterus even though there is no statute or opinion articulated by this Court to support such an outcome.

STANDARD OF REVIEW

The Alabama Medical Association adopts the Standard of Review as set forth in the Brief of the Appellees.

SUMMARY OF THE ARGUMENT

Many couples across America, including Alabama, struggle with infertility due to various causes. Fortunately, the medical and scientific advancements in *vitro* fertilization (hereinafter “IVF”) during the last few decades have provided couples who are unable to conceive naturally with a viable path to parenthood. Millions of women, including thousands of Alabamians, have become pregnant via IVF treatment. *In vitro* fertilization is a triumph of modern science and medicine.

The IVF process involves hormone-induced ovulation to stimulate a woman’s egg production, the surgical removal of a woman’s eggs, the combination of those eggs with the sperm of the woman’s husband, partner, or other donor to create embryos *in vitro*, and the implantation of the embryos in the woman’s uterus. The process is called “*in vitro*” because the embryos are created outside of the uterus.

Typically, not all of the embryos created by IVF are implanted in the woman’s uterus during the first implantation procedure. These remaining embryos are preserved through a freezing process called cryogenic preservation, or cryopreservation. Cryopreserved embryos may be thawed for subsequent implantation procedures should the

couple elect to attempt to become pregnant again. Alternatively, cryopreserved embryos may be donated to other couples trying to become pregnant through IVF or for medical research. There are many benefits to cryopreservation of embryos, including the increased safety of the women participating in IVF and their resulting children. Cryopreservation also increases the chances of pregnancy and childbirth because it provides subsequent opportunities in the event previous IVF cycles are unsuccessful.

Though IVF procedures are increasingly successful, the process carries an inherent risk of failure of at least some of the *in vitro* embryos created *in vitro* in the clinic. Some embryos created *in vitro* simply fail to develop normally and are not suitable for implantation. Additionally, once implanted, the success rate of IVF is only slightly above 50%, meaning nearly half of the implanted embryos will not result in a successful pregnancy. Further, the cryogenic freezing and de-thawing processes, even when done perfectly, may damage the embryos such that they are no longer suitable for implantation.

The IVF process frequently involves the discarding of unused cryogenically stored embryos. It is common for healthy *in vitro* embryos

to remain in cryogenic storage after a couple has completed all desired IVF treatment cycles. A couple who has utilized IVF treatment may not use all of the preserved embryos for numerous reasons, including health concerns, because they do not desire additional children, divorce, or the death of one of the partners. In such circumstances, the unused pre-implantation embryos are typically discarded or donated. The embryos are usually not stored in perpetuity due to the cost of cryogenic storage and limited capacity. As further discussed below and in the Appellees' Brief, the Appellants acknowledged in their agreements with the Center for Reproductive Medicine that their excess cryogenically preserved embryos would be discarded after a certain time.

If this Court creates a wrongful death cause of action for the destruction of cryopreserved embryos created through IVF, it will threaten the safety, success, and progress of IVF in Alabama. A ruling in favor of the Appellants would create an enormous potential for civil liability for fertility specialists who perform IVF, as embryos may be damaged or become unsuitable to result in a successful pregnancy at any stage in the IVF process. The risk of wrongful death liability in these situations would substantially increase the costs of IVF and deny

many Alabamians access to IVF. Not only would the cost of IVF become prohibitive, but women with a higher risk of failure of IVF or complications from IVF might lose access to IVF treatment entirely.

Likewise, a ruling in favor of the Appellants would require fertility clinics to store embryos in perpetuity at a high cost – regardless of the wishes of IVF patients. Such a result might render cryopreservation out of reach for many patients, who may be unable to afford or unwilling to pay the tens of thousands of dollars for perpetual storage. This result would deprive many Alabamians of a critical aspect of IVF that improves the chances of pregnancy.

Contrary to the Appellants’ argument, there is no statute or precedent in any Opinion articulated by this Court to support the creation of a wrongful death cause of action for the destruction of an *in vitro* embryo. Devoid of any law to support their position, the Appellants’ Brief blatantly attempts to exploit the prominent status that abortion currently occupies in the public sphere in the wake of the U.S. Supreme Court’s holding in Dobbs v. Jackson Women’s Health Organization, 142 S. Ct. 2228 (2022). Despite the Appellants’ attempts to conflate the two issues, abortion is not at issue before this Court.

The issue is whether this Court should declare a wrongful death cause of action for the destruction of an embryo created *in vitro* that has not been implanted in a woman's uterus. Abortion simply has nothing to do with this Appeal.

If this Court creates a cause of action for the wrongful death of an embryo created *in vitro*, the potential detrimental impact on IVF treatment in Alabama will be profound. The increased exposure to wrongful death liability would substantially increase the costs associated with IVF and could result in Alabama fertility clinics shutting down and fertility specialists moving to other states to practice fertility medicine. These consequences would threaten Alabamians' access to IVF and thereby inhibit their ability to become parents to biological children. It is imperative that this Court consider these implications in reaching its holding in this Appeal.

As further discussed below, the Court should affirm the trial court's order dismissing the Appellants' wrongful death claims and thereby avoid the potentially detrimental consequences for IVF treatment in Alabama should this Court permit the Appellants' wrongful death claims to go forward.

ARGUMENT

I. Millions of women have become pregnant and have had children as a result of *in vitro* fertilization.

Having children is integral to the hopes and dreams of millions of people many times over. For parents, the joys and challenges of raising children are central to their own identities and sense of purpose. Studies have even confirmed that parenthood increases happiness.¹

Unfortunately, many couples have difficulty becoming pregnant. Approximately 9% of men and 11% of women of reproductive age experience fertility difficulty.² 12-15% of couples are unable to conceive within one year of attempting, and 10% are unable to have a child after two years.³ There are numerous potential causes of fertility problems, such as fallopian tube damage or blockage, ovulation disorders, endometriosis, uterine fibroids, previous tubal sterilization or removal,

¹ See Ryan Murphy, 10 Hidden Benefits of Having Children, FOX NEWS (Jan. 11, 2016, 8:57 PM), <https://www.foxnews.com/health/10-hidden-benefits-of-having-children> (citing study conducted by the Max Planck Institute for Demographic Research, which surveyed 200,000 parents between 1981 and 2005 and found a “direct correlation between children and happiness for parents over the age of 40”).

² How Common is Infertility?, NATIONAL INSTITUTE OF CHILD HEALTH AND HUMAN DEVELOPMENT, <https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/common> (last reviewed Feb. 8, 2018).

³ Id.

impaired sperm production or function, genetic disorders, and unexplained infertility.⁴ For many, fertility challenges are compounded because fertility decreases with age.⁵ In particular, a woman's likelihood of becoming pregnant declines significantly after the age of 35.⁶

Fortunately, Assisted Reproductive Technology (hereinafter "ART") provides couples who are unable to conceive naturally with a viable path to pregnancy. The Centers for Disease Control and Prevention (hereinafter "CDC") defines ART to include "all fertility treatments in which either eggs or embryos are handled outside a woman's body."⁷ *In vitro* fertilization (hereinafter "IVF") accounts for approximately 99% of ART procedures.⁸ IVF involves surgically

⁴ In Vitro Fertilization (IVF), MAYO CLINIC (Sept. 10, 2021), <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716>.

⁵ How Common is Infertility?, *supra* note 2.

⁶ Id.

⁷ 2019 Assisted Reproductive Technology Fertility Clinic and National Summary Report, CENTERS FOR DISEASE CONTROL AND PREVENTION 1, 2 (2019), <https://www.cdc.gov/art/reports/2019/pdf/2019-Report-ART-Fertility-Clinic-National-Summary-h.pdf>.

⁸ Infertility and In Vitro Fertilization, WEBMD, <https://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization#1> (last medically reviewed by Nivin Todd, M.D. Aug. 1, 2021).

removing a woman's eggs; combining the eggs with the sperm of the woman's husband, partner, or other donor; and returning the fertilized eggs to the woman's uterus (or the uterus of a gestational carrier).⁹ Individuals who want to become parents typically undergo IVF only after other fertility options, such as fertility medication or artificial insemination, have been unsuccessful.¹⁰

IVF is not only beneficial for patients with fertility problems but also for patients who may undergo IVF for fertility preservation following a diagnosis of cancer or other medical condition that might impact future fertility.¹¹ Patients may also undergo IVF to freeze embryos if they are approaching an advanced age but are not ready to have children.¹²

Since the first successful IVF procedure took place in the United Kingdom in 1978, over eight million babies have been born worldwide through IVF or other similar ART procedures.¹³ In accordance with the

⁹ Id.

¹⁰ Id.

¹¹ In Vitro Fertilization (IVF), supra note 4.

¹² Id.

¹³ Susan Scutti, At least 8 Million IVF Babies Born in 40 Years Since Historic First, CNN HEALTH (July 3, 2018, 6:04 AM),

Fertility Clinic Success Rate and Certification Act enacted by Congress in 1992, the CDC tracks the number of ART treatment cycles on an annual basis.¹⁴ In 2019, the latest year in which the CDC has published a full report, there were 330,773 ART treatment cycles initiated in the U.S.¹⁵ 209,687 of these cycles (63.4%) were initiated with the intent to transfer embryos to the uterus shortly thereafter.¹⁶ Of these 209,687 cycles, there were 171,206 transfers of embryos created *in vitro*, which resulted in 95,030 pregnancies.¹⁷ Of these 95,030 pregnancies, 83,946 infants were born.¹⁸ The remaining 121,086 ART cycles (36.6%) involved cryogenic storage of eggs or embryos for future potential use.¹⁹

The number of children born in the U.S. due to ART has increased substantially over the past decade. The CDC reports 61,556 infants

<https://www.cnn.com/2018/07/03/health/worldwide-ivf-babies-born-study/index.html>.

¹⁴ 2019 Assisted Reproductive Technology Fertility Clinic and National Summary Report, *supra* note 7, at 2.

¹⁵ Id., at 25.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

were born due to ART in 2010.²⁰ The number of infants born due to ART increased to 83,949 in 2019.²¹ Approximately 2% of infants born in the U.S. are conceived using ART.²² A 2018 Pew Research study found 33% of adults in the U.S. have utilized ART or know someone who has.²³

Simply put, the medical advances in ART have allowed for more pregnancies, thereby allowing more people to become parents who otherwise would not have had the ability to raise biological children. The increased success rate of ART, and in particular IVF, has been a remarkable triumph for modern science and medicine. Any ruling that threatens access to ART in Alabama risks depriving thousands of Alabamians of their only chance of pregnancy.

II. *In vitro* fertilization is a medically complex process, which typically involves cryogenic preservation of embryos.

²⁰ ART Success Rates, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/art/artdata/index.html#reports> (last reviewed June 14, 2022).

²¹ Id.

²² Id.

²³ Gretchen Livingston, A Third of U.S. Adults Say They Have Used Fertility Treatments or Know Someone Who Has, PEW RESEARCH CENTER (July 17, 2018), <https://www.pewresearch.org/fact-tank/2018/07/17/a-third-of-u-s-adults-say-they-have-used-fertility-treatments-or-know-someone-who-has/>.

IVF treatment begins with an approximately two-week process called ovulation induction, during which the woman is injected with hormones to stimulate egg production with the objective of producing multiple eggs for retrieval.²⁴ During the ovulation induction stage, the woman undergoes several vaginal ultrasounds and blood tests to determine when her eggs are ready for removal.²⁵

The second step of IVF is egg retrieval.²⁶ This is a surgical procedure whereby the physician carefully retrieves the woman's eggs with a small hollow needle guided by ultrasound technology.²⁷ This surgery is conducted while the woman is under full anesthesia or conscious sedation.²⁸ The woman is normally given pain medication prior to the removal procedure, as well.²⁹ After surgical removal of the woman's eggs, the eggs are combined with the male's sperm, which the

²⁴ Morgan Parker, Comment: The Disposition of Frozen Embryos at Divorce, 33 J. AM. ACAD. MATRIMONIAL LAW 645, 647 (2021) (citing Infertility and In Vitro Fertilization, supra, note 8).

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ Infertility and In Vitro Fertilization, supra, note 8

²⁹ Id.

male typically donates the same day.³⁰ The combination of each egg with sperm creates an *in vitro* embryo.

Thereafter, the reproductive healthcare providers monitor the embryos in the fertilization clinic.³¹ Once the physician determines the embryos are ready for implantation, the woman returns to the clinic.³² The implantation procedure involves the insertion of a catheter into the woman's uterus through which the physician deposits several embryos.³³ To improve the chances of pregnancy, physicians may implant up to three embryos at a time.³⁴

After the implantation procedure, healthy *in vitro* embryos that were not initially selected for implantation commonly remain in the laboratory. In that case, patients may choose to freeze and preserve these remaining embryos for future use.³⁵ In the alternative, patients may choose to donate the extra embryos to other patients or for medical research purposes.³⁶

³⁰ Id.

³¹ Id.

³² Id.

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶ Id.

The main challenge of freezing embryos is that when water within the cells freezes, crystals can form and burst the cells.³⁷ In order to prevent this, the water in the cells is replaced with cryoprotectant before freezing.³⁸ After the freezing process is complete, the embryos are stored in liquid nitrogen.³⁹ Frozen embryos remain in sealed containers at temperatures of -321 degrees Fahrenheit.⁴⁰ In theory, these frozen embryos can remain viable for an infinite amount of time.⁴¹

There are multiple benefits to cryogenic preservation of embryos. Cryopreservation makes future IVF cycles less costly and less invasive than the initial IVF treatment.⁴² Cryopreservation allows the woman to undergo the first two steps in the IVF process – stimulation of egg production and surgical removal of her eggs – only once.⁴³ This results in less physical and emotional trauma. This also results in the woman having to encounter known risks of surgery – such as infection,

³⁷ Jon Johnson, Embryo Freezing: What You Need to Know, MEDICALNEWSTODAY (Mar. 13, 2019), <https://www.medicalnewstoday.com/articles/314662>.

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

⁴² Parker, supra note 24, at 649.

⁴³ Johnson, supra note 37.

excessive bleeding, or a negative reaction to anesthesia – only once, thereby lessening the chances of complications.

In addition, if implantation of an embryo is unsuccessful on the first attempt, cryopreservation permits the woman to attempt the process again with the frozen embryos.⁴⁴ As such, cryopreservation increases the woman's chance of becoming pregnant through IVF.

Moreover, cryopreservation benefits patients undergoing medical treatment or that have medical conditions that negatively affect fertility or their chances of a successful pregnancy. For example, cryopreservation allows for embryo preservation prior to patients undergoing chemotherapy.⁴⁵ Likewise, cryopreservation may be beneficial if a male has cancer or another medical condition that will threaten his future fertility.⁴⁶ Cryopreservation may also benefit individuals who are approaching an advanced age but who are not yet ready to have children.⁴⁷

Cryopreservation also gives couples who wish to have multiple children the opportunity to have multiple pregnancies during the

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id.

woman's childbearing years and thereby raise biological children of different ages. As a result, children conceived *in vitro* may have older and/or younger biological siblings who were also conceived *in vitro*.

The number of ART cycles using frozen patient eggs or embryos has increased from approximately 30,000 to over 120,000 from 2010 to 2019.⁴⁸ The CDC's preliminary data from 2020 shows that 123,304 ART cycles resulted in the storage of eggs or embryos for future use.⁴⁹ There is no statistical difference in the IVF success rate between fresh or frozen embryos.⁵⁰

Simply put, cryopreservation is fundamental to the current practice of IVF. Cryopreservation of embryos provides many patients with the best chance of a safe and successful pregnancy. For some patients, cryopreservation is their only chance of a safe and successful pregnancy.

Without cryopreservation, patients utilizing IVF would likely have two options. One option would be immediate implantation of all of the fertilized eggs into the woman's uterus rather than implantation of only

⁴⁸ 2019 Assisted Reproductive Technology Fertility Clinic and National Summary Report, *supra* note 7, at 33.

⁴⁹ ART Success Rates, *supra* note 20.

⁵⁰ Johnson, *supra* note 37.

one to three embryos, which is the normal and safest practice. This outcome would substantially increase the likelihood of multiple gestation (a pregnancy with more than one child). However, multiple gestation may be less desirable for many parents and poses additional risks to the mother and her children. Multiple gestation results in a high-risk pregnancy. Multiple gestation carries a greater risk of preterm delivery, which leads to long-term complications associated with prematurity.⁵¹ This risk increases with the number of children in the womb. According to the American College of Obstetrics and Gynecology, more than half of twins are born prematurely, and almost all triplets are born prematurely.⁵² A single embryo transfer decreases the chance of multiple gestation and the risks involved.

Finally, implantation of all fertilized embryos in one procedure provides only one chance of pregnancy. If the IVF pregnancy is unsuccessful, the woman has lost her chance of becoming pregnant.

⁵¹ Id.

⁵² Multiple Pregnancy: Frequently Asked Questions: What is the Most Common Complication of Multiple Pregnancy?, THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, <https://www.acog.org/womens-health/faqs/multiple-pregnancy> (last updated Feb. 2021).

Cryopreservation gives couples a potential second chance to become pregnant.

It is better medicine and in the mother and child's best interest to use only the embryos that the physician deems necessary to lead to a successful pregnancy and to preserve the remaining embryos for future implantation when/if the woman so desires.

The second option for IVF without cryopreservation would be for the physician to remove a single egg with the objective of achieving a successful pregnancy and leave the remaining eggs in the uterus for removal in the future. There are multiple problems with this approach. First, this approach would present unnecessary risks and trauma for women having to undergo multiple surgical procedures to remove their eggs. As discussed above, egg removal is a surgical procedure, which, as in any other surgery, carries the risk of complications, such as infection, excessive bleeding, a negative reaction to anesthesia, or even death. This approach would also require the woman to undergo hormone therapy multiple times (for each time she desires to become pregnant), which can have negative side effects. Cryopreservation of multiple embryos benefits the woman by reducing complications such as severe

ovarian hyperstimulation syndrome, which may result when a woman must undergo numerous egg-retrieval procedures.⁵³

In addition, an important aspect of IVF is that the embryos are monitored for several weeks before implantation to determine which will have the greatest likelihood of developing *in utero* and resulting in a successful pregnancy. Removing only a limited number of eggs would decrease the chances of creating a healthy embryo and a successful pregnancy on the first attempt.

For these reasons, it is safer, more efficient, and simply better medicine for a woman undergoing IVF to undergo a single surgical procedure to remove her eggs.

Ironically, the success of the Appellants' IVF treatment with the Center for Reproductive Medicine is a perfect example of the benefits of cryogenic preservation. The Appellants benefited immeasurably from IVF and the cryopreservation of their embryos. IVF allowed the Appellants to start families. The Fondes and LePages each have two children who were conceived through IVF. They stored their extra cryopreserved embryos, and, consequently, each couple still has three

⁵³ Johnson, supra note 37.

additional frozen *in vitro* embryos if they would like to pursue the possibility of additional pregnancies. As the Appellees point out in their Brief, the Appellants have not pleaded that they intend to utilize their excess embryos. Regardless of whether the Appellants intended to utilize these embryos, their option to eventually utilize them in the event they desire additional children highlights the benefit cryopreservation bestows on thousands of Alabamians, including the Appellants.

In short, eliminating cryopreservation from the IVF process would be inferior medicine and would negatively impact Alabama families who need IVF treatment. As further discussed below, should this Court reverse the trial court's order of dismissal and declare a wrongful death cause of action for the loss of *in vitro* embryos, it would undermine the safety and success of IVF and force fertility specialists and physicians to take steps backwards. Such a ruling will increase the risk of harm to IVF patients and their children.

III. No statute enacted by the Legislature or precedent of this Court supports the application of Alabama's Wrongful Death Act to the destruction of embryos created *in vitro* prior to implantation in the uterus.

The Appellants' Brief misconstrues several statutes and cases in a flawed effort to convince this Court that existing law supports the Appellants' position. Contrary to the Appellants' argument, the Legislature has never declared that an embryo developed *in vitro* has the same degree of protection as an embryo developing during the course of a pregnancy. Likewise, this Court has never held or suggested that it would apply Alabama's Wrongful Death Act to the loss of pre-implanted embryos created through IVF.

A. No Alabama statute supports the application of the Wrongful Death Act to the destruction of pre-implanted embryos created *in vitro*.

The Appellants cite several statutes in their Brief in asking this Court to create a cause of action for the destruction of an *in vitro* embryo in cryogenic storage. See Ala. Code §§ 26-22-1, *et seq.*; 26-23A-1, *et seq.*; and 26-23H-1, *et seq.* However, these statutes pertain to abortions. Abortion, by any definition, involves the termination of a pregnancy. A woman cannot have an abortion unless she first becomes pregnant. The Legislature enacted these statutes to regulate and, in some instances, prohibit termination of pregnancies. An *in vitro* embryo does not result in a pregnancy if it is not implanted into the

woman's uterus. The destruction of cryopreserved embryos does not terminate a pregnancy. The Appellants completely ignore this fundamental distinction. Extending the reach of these abortion statutes to embryos created *in vitro* would be blatantly outside the scope of the intent of the Legislature. This Court should decline the Appellants' invitation to engage in such audacious judicial activism.

The Appellants greatly emphasize the Alabama Human Life Protection Act, which prohibits abortion under most circumstances. See 26-23H-4 ("It shall be unlawful for any person to intentionally perform or attempt to perform an abortion except . . . [when] an attending physician licensed in Alabama determines that an abortion is necessary in order to prevent serious health risk to the unborn child's mother.") Nowhere in this statute did the Legislature restrict any procedure other than abortion. In fact, the Legislature defined an "unborn child" as a "[h]uman being, **specifically including an unborn child *in utero* at any stage of development regardless of viability.**" 26-23H-3(7) (emphasis added).

The Appellants argue the "unborn child *in utero* at any stage of development" language is superfluous because the term "including" is

not exclusive. While the term “including” in a statute is not exclusive in certain circumstances depending on the context, the Appellants’ argument that the statute’s definition of “unborn child” includes *in vitro* embryos is misplaced and simply cannot be accurate given the context of the statute. As discussed above, the Human Life Protection Act applies to abortions. An abortion requires a pregnancy. The Legislature obviously intended to include the “unborn child *in utero* at any stage of development” language to make clear that the Act applies to abortions at any stage of pregnancy. It would not make sense for the Legislature to have intended the definition of “unborn child at any stage of development” to include *in vitro* embryos given that (1) the scope of the statute is limited to abortion, (2) the Legislature specifically used the term “unborn child *in utero*,” and (3) the Legislature did not use the term *in vitro* anywhere in the statute.

Construing Section 26-23H-3(7) to include *in vitro* embryos would be counter to fundamental rules of statutory construction as articulated by this Court. This Court has stated “[t]here is a presumption that every word, sentence, or provision [of a statute] was intended for some useful purpose, has some force and effect, and that some effect is to be

given to each, and also that no superfluous words or provisions are used.” State Superintendent of Educ. v. Ala. Educ. Ass’n, 144 So. 3d 265, 273 (Ala. 2013) (quoting AltaPointe Health Sys., Inc. v. Davis, 90 So. 3d 139, 157 (Ala. 2012)). The Appellants’ argument that Section 26-23H-3(7) should extend to *in vitro* embryos would render the term “*in utero*” completely meaningless and superfluous.

Finally, it is a matter of public record (of which this Court may take judicial notice) that during the debate on the Alabama Senate floor regarding the Human Life Protection Act, Senator Clyde Chambliss, the Bill’s sponsor in the Alabama Senate, stated the “*in utero*” language in the Act was intentional, since it was *not* the intent of the Legislature through this Act to impact or prevent the destruction of fertilized *in vitro* eggs because in those circumstances, the woman is not pregnant.⁵⁴ Likewise, Eric Johnston, president of the Alabama Pro-Life Coalition

⁵⁴ Jerry Lambe, Alabama Abortion Law Says Terminating a Fertilized Egg Is Legal in a Lab Setting, LAW & CRIME (May 29, 2019, 12:49 PM), <https://lawandcrime.com/high-profile/alabama-abortion-law-says-terminating-a-fertilized-egg-is-legal-in-a-lab-setting/> (“During the bill’s legislative debate, a Democratic state Senator inquired as to how the law would impact labs that discard fertilized eggs at an *in vitro* fertilization clinic. Republican state Senator and sponsor of the bill, Clyde Chambliss, responded that, **The egg in the lab doesn’t apply. It’s not in a woman. She’s not pregnant.**”) (emphasis added).

and one of the individuals who helped draft the Human Life Protection bill, stated in an interview with the Washington Post that the Bill would “absolutely not” impact *in vitro* fertilization.⁵⁵ Mr. Johnston gave this statement in response to the ACLU’s misguided suggestion that the Act might affect *in vitro* fertilization. The Appellants’ argument the Human Life Protection Act pertains to *in vitro* embryos is similarly misguided.

Several weeks ago, the Tennessee Attorney General issued an Opinion confirming that Tennessee’s Human Life Protection Act, which contains similar abortion restrictions as Alabama’s Human Life Protection Act, does not impact IVF treatment.⁵⁶ The Tennessee Attorney General answered in the negative the question of whether

⁵⁵ Ariana Eunjung Cha and Emily Wax-Thibodeaux, American Civil Liberties Union Sues Alabama Over Near-Total Abortion Ban, THE WASHINGTON POST (May 24, 2019, 9:33 AM), <https://www.washingtonpost.com/health/2019/05/24/planned-parenthood-other-health-clinics-sue-alabama-over-near-total-abortion-ban-law/>; see also Michelle Jokisch Polo, Infertility Patients Fear Abortion Bans Could Affect Access to IVF Treatment, NPR (July 21, 2022, 5:04 AM), <https://www.npr.org/sections/health-shots/2022/07/21/1112127457/infertility-patients-fear-abortion-bans-could-affect-access-to-ivf-treatment> (“In other states with strict abortion bans like **Alabama** and **Oklahoma**, **officials have clarified that their current abortions bans will not impact IVF treatments.**”) (emphasis added).

⁵⁶ Op. Tenn. Att’y Gen. No. 22-12 (Oct. 20, 2022).

disposal of *in vitro* embryos implicates the State’s anti-abortion laws or violates the State’s declared interest in “protecting unborn children.”⁵⁷ Tennessee’s Attorney General confirmed “the disposal of a human embryo that has not been transferred to a woman’s uterus” is not covered by the Human Life Protection Act, which “only applies when a woman has a living unborn child within her body.”⁵⁸ This guidance is completely consistent with the statements of Senator Chambliss and Eric Johnston.

The Appellants also suggest that the Woman’s Right to Know Act includes a cause of action for the death of *in vitro* embryos. However, the Woman’s Right to Know Act regulates abortions only. The Woman’s Right to Know Act has nothing to do with *in vitro* embryos or IVF in any respect – much less creates a cause of action for destruction of *in vitro* embryos in cryogenic storage.

This Court has stated it “is not at liberty to rewrite statutes or to substitute its judgment for that of the Legislature.” Stinnett v. Kennedy, 232 So. 3d 202, 223 (Ala. 2016). This statement reflects the principle of judicial deference to legislative intent and the doctrine of

⁵⁷ Id.

⁵⁸ Id.

separation of powers. The doctrine of separation of powers is expressly adopted in the Constitution of Alabama, which provides, “[T]he judicial [department] shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.” ALA CONST. art. III, § 43 (1901). Specifically, in regard to the Wrongful Death Act, this Court has cautioned “it should, as a matter of public policy, leave any change of [the] interpretation to the legislature.” Tatum v. Schering Corp., 523 So. 2d 1042, 1045 (Ala. 1988) (citation omitted).

There is no statutory support whatsoever for extending the scope of Alabama’s Wrongful Death Act to the destruction of *in vitro* embryos. Any change in Alabama’s Wrongful Death Act must be left to the Legislature.

B. No Alabama Supreme Court case supports the application of the Wrongful Death Act to the destruction of pre-implanted embryos created *in vitro*.

The Appellants cite three opinions from this Court, which they assert “cannot be reconciled” with the trial court’s order of dismissal. Stinnett v. Kennedy, 232 So. 3d 202 (Ala. 2016); Hamilton v. Scott, 97 So. 3d 728 (Ala. 2012); and Mack v. Carmack, 79 So. 3d 597 (Ala. 2011).

However, all three of these cases involved wrongful death actions arising from the deaths of pre-viable fetuses conceived and developing *in utero*. Thus, there was a pregnancy in all three of these cases. Contrary to the Appellants' argument, these cases actually undermine the Appellants' position.

In Mack, this Court held an alleged tortfeasor could be liable for the wrongful death of a child *in utero* regardless of the stage of the child's viability. 79 So. 3d at 611. In reaching this conclusion, this Court looked to the Legislature's amendment of Alabama's homicide statute to expand the definition of person to include "an unborn child at any stage of development, regardless of viability" Id. at 600 (citing Ala. Code § 13A-6-1). The Court held: "Given the purpose of the Wrongful Death Act of preventing homicide, . . . it would be 'incongruous' if 'a defendant could be responsible criminally for the homicide of a fetal child but would have no similar responsibilities civilly.'" Id. at 611 (citing Huskey v. Smith, 265 So. 2d 596, 597-598 (Ala. 1972)).

Given that Mack relied on the importance of congruity in the criminal homicide statute and the civil wrongful death statute, Mack runs counter to the Appellants' argument. The Legislature has not

extended the definition of homicide to the destruction of an *in vitro* embryo. The Appellants appear to concede this point. See Appellants Brief, p. 39. It would be incongruous for this Court to create a wrongful death cause of action for the destruction of an *in vitro* embryo in cryogenic storage when there is no corresponding criminal liability for homicide.

In Mack, this Court discussed the history of Alabama wrongful death claims “arising out of **prenatal** injuries.” 79 So. 3d, at 601-609 (emphasis added). Every case included in that discussion dealt with allegations of negligence or other harm done to an unborn child *in utero*.

Likewise, Hamilton does not support the creation of a wrongful death cause of action for the destruction of an *in vitro* embryo. Hamilton involved a wrongful death claim involving a stillborn fetus. 97 So. 3d at 735. Applying Mack, this Court held the death of the fetus gave rise to a potential cause of action for wrongful death. In Hamilton, like Mack and all of the prior cases upon which this Court relied in reaching its holding, there was a pregnancy. In contrast, the Appellants’ claims do not involve prenatal injuries or otherwise involve a pregnancy. This is a fundamental distinction, which the Appellants

completely gloss over. As such, Hamilton does not support the Appellants' position.

In Stinnett, this Court held a plaintiff had a potential cause of action for the wrongful death of a pre-viable fetus so long as the plaintiff established with medical evidence that the defendant's alleged actions probably caused the fetus's death. 232 So. 3d at 218-19. Stinnett also involved a fetus that was developing *in utero*. In fact, in reaching its holding, this Court specifically acknowledged "the legislative recognition that a 'person' includes an 'unborn child *in utero* at any stage of development, regardless of viability.'" The issue in Stinnett was the viability of a fetus conceived and developing *in utero*, i.e., during a pregnancy. Nothing in Stinnett supports the Appellants' position that Alabama law recognizes a wrongful death cause of action for the destruction of an *in vitro* embryo in cryogenic storage.

In all three of these cases, the mother was pregnant, and the alleged malpractice concerned prenatal injuries to a child developing *in utero*. Nowhere in any of these cases did this Court suggest or imply Alabama recognizes a wrongful death action for the destruction of an *in vitro* embryo in cryogenic storage.

The Appellants invite this Court to “lead the way for other states” following the U.S. Supreme Court’s decision in Dobbs v. Jackson Women’s Health Organization, 142 S. Ct. 2228 (2022). This Court is no doubt well aware that Dobbs upheld a Mississippi law restricting abortion. However, Dobbs has nothing to do with *in vitro* embryos or IVF. While references to Dobbs are scattered throughout the Appellants’ Brief, the Appellants fail to specify what Dobbs has to do with the issue before this Court.

It is obvious why the Appellants put such great emphasis on abortion. Abortion draws impassioned opinions on all sides of the issue. Devoid of any legal authority in support of their position, the Appellants attempt to conflate abortion with the issue in this Appeal – whether this Court should create a wrongful death cause of action for the destruction of an *in vitro* embryo. The Appellants suggest the Court’s holding in this Appeal is the equivalent to a ruling on abortion. The Appellants’ invitation for this Court to “lead the way” in the wake of the Dobbs decision is a perfect illustration of the Appellants’ attempt to conflate these issues. In reality, this invitation is a ruse, and this Court should reject it as such.

There is no legal precedent in Alabama whatsoever for extending wrongful death liability to the destruction of *in vitro* embryos. This Court should reject the Appellants' bid for this Court to declare such a cause of action by judicial decree. Likewise, this Court should reject the Appellants' attempt to conflate IVF treatment with abortion.

IV. **Creating a cause of action for wrongful death for the loss of a cryogenically-stored embryo would threaten access to *in vitro* fertilization in Alabama and thereby deprive many thousands of Alabamians of their best chance of becoming parents biologically.**

In asking this Court to declare a wrongful death cause of action for the loss of *in vitro* embryos, the Appellants ask this Court to take an extreme position that would threaten IVF treatment in Alabama.

It is common for couples to have unutilized *in vitro* embryos remaining in cryogenic storage after they have completed all desired IVF treatment cycles. A couple who has utilized IVF treatment may not use all of the embryos in cryopreservation for numerous reasons. For example, couples who have had successful pregnancies following previous IVF cycles may not desire additional children. Couples may not use their remaining embryos because a pregnancy is not in the best interest of the mother due to age, health, or some other reason. Couples

may not use their embryos because they get divorced. The embryos may not be used if one partner dies. In such circumstances, the unused embryos are discarded, donated to other IVF patients, or donated for research. The embryos are not stored in perpetuity due to the cost of cryogenic storage and limited capacity.

It is common practice for fertility clinics to address with the participants prior to IVF treatment how to dispose of unused embryos under various future contingencies. To that end, IVF patients are encouraged to sign contracts, which memorialize how their unused frozen embryos are to be discarded if not used.⁵⁹ Consistent with this practice, as the Appellees point out in their Brief, the Appellants entered into a Disposition of Embryos Agreement with the Center for Reproductive Medicine. This Agreement reflects that the Appellants agreed their cryopreserved embryos would be preserved for five years.⁶⁰ The Agreement also provided that the frozen embryos would be discarded in the event of divorce or other termination of the marital relationship.⁶¹ Agreements such as these are common. These

⁵⁹ Parker, *supra* note 24, at 649.

⁶⁰ C. 40.

⁶¹ C. 41.

agreements show the Appellants began the IVF process with full knowledge that they may create and preserve more embryos than they would ultimately use. Surely, the Appellants would not have agreed to discard their embryos upon the occurrence of certain contingencies if they viewed this choice as killing unborn children.

IVF clinics do not have the capacity to store all unused embryos in perpetuity. It is a common and necessary practice for IVF clinics to eventually discard or donate unused embryos for research – just as the Appellants acknowledged and agreed to in their Disposition of Embryos Agreement. Creating a cause of action for wrongful death for destruction of *in vitro* embryos would upend this common and necessary practice because it would subject physicians, reproductive clinics, and potentially the patients who consent to disposition of the unused frozen embryos to civil liability for punitive damages.

A wrongful death cause of action for the destruction of pre-implanted embryos would require fertility clinics to preserve these embryos in perpetuity. Such indefinite preservation is impractical and would undermine IVF treatment. In 2017, the Fertility Law Group estimated there were approximately 600,000 to four million frozen

embryos stored in the U.S.⁶² Storage fees for frozen embryos range from \$350 to \$1,000 per year depending on the facility.⁶³ As more embryos are stored, the cost of storage will likely increase.⁶⁴ If IVF patients are required to store their unused *in vitro* embryos indefinitely, the cost of storage would fall on either the patient or the clinic. Perpetual storage would be prohibitively expensive for many patients. Others might simply refuse to pay after completing all of their desired IVF cycles. As a result, fertility clinics and future patients would bear these costs because the clinic would be legally unable to destroy, donate, or otherwise dispose of the embryos due to potential wrongful death liability.⁶⁵ At the very least, this outcome would substantially increase the cost of IVF in Alabama. Worse, the widely accepted practice of cryogenic preservation might end in Alabama, which would deny access to the safest and most effective method of IVF to thousands of Alabamians who experience fertility challenges.

⁶² Caroline A. Harman, Comment: Defining the Third Way - The Special-Respect Legal Status of Frozen Embryos, 26 GEO. MASON L. REV. 515, 521 (2018).

⁶³ Id. (citing Embryo Storage Costs, REPROTECH LTD., <https://www.reprotech.com/embryo-storage-costs/> (last visited Nov. 9, 2022)).

⁶⁴ Id.

⁶⁵ Id.

It bears reemphasis that the logical outcome of the Appellants' position is that wrongful death liability would attach anytime an *in vitro* embryo is lost or destroyed. *In vitro* embryos can theoretically be stored forever. The Appellants' position would require *in vitro* embryos to remain in cryogenic storage even after the couple who underwent the IVF treatment have died and potentially even after the couple's children, grandchildren, and even great grandchildren have died. This absurd result would be the logical outcome of this Court extending wrongful death liability to the destruction of embryos in cryogenic storage.

There are other potential negative consequences of creating a wrongful death cause of action for the loss of *in vitro* embryos. Commonly in the IVF process, some previously frozen embryos may not be used because they are damaged or defective. The cryogenic freezing and de-thawing processes carry a risk of damaging the embryos such that they may not be suitable to result in a pregnancy. The Appellants acknowledged this risk in their agreement with the Center for Reproductive Medicine.⁶⁶ When embryos are damaged or otherwise

⁶⁶ C. 42.

determined to be unsuitable for implantation, the clinic typically discards them. The Appellants' position would subject healthcare providers to wrongful death liability for this common practice.

Adopting the Appellants' position would subject physicians and fertility clinics to wrongful death exposure any time *in vitro* embryos are handled. As discussed above, while the IVF success rate has increased substantially, the success rate is only slightly above 50%, even when the woman is at optimal child-bearing age. The Appellants' position would result in physicians being potentially liable for wrongful death any time *in vitro* embryos fail to develop into a successful pregnancy. Such potential liability exposure would be devastating to the practice of IVF treatment in Alabama. Simply put, fertility specialists would not practice medicine in the State of Alabama if they were faced with such potential wrongful death exposure.

Moreover, some embryos created *in vitro* do not develop normally in the lab due to no fault of the physician or anyone else. These embryos are normally discarded (or potentially utilized for research). However, the Appellants' position would subject fertility physicians and clinics to wrongful death liability anytime embryos fail to develop in the

clinic, even though it is normal and expected for some embryos to fail to develop.⁶⁷ This would be an absurd result, which would render IVF treatment so legally risky that most if not all fertility specialists would cease providing IVF treatment in Alabama.

There would be additional negative consequences if this Court were to accept the Appellants' position. As discussed above, several embryos may be implanted in the woman's uterus during IVF to improve the chance she will become pregnant. In most cases, all of the embryos that are implanted do not develop. The Appellants' position would allow for a wrongful death claim on behalf of embryos that did not develop even when another embryo implanted during the same procedure developed perfectly and the woman experienced a successful pregnancy. This would be another absurd result but a possibility should this Court accept the Appellants' position.

Another potential impact of adopting the Appellants' position is the possibility that women with uterine abnormalities, such as uterine fibroids, or other conditions that decrease the chances of successful IVF

⁶⁷ Eve C. Feinberg, M.D. et al., Roe v. Wade and the Threat to Fertility Care, 140 OBSTETRICS & GYNECOLOGY 557, 559 (2022).

would be denied the chance to receive the treatment because the potential exposure to wrongful death liability would be too high. It would be tragic for this Court to issue a ruling that increases the wrongful death liability exposure of IVF medical providers such that women with a lesser chance of successful IVF treatment are denied the opportunity to participate due to potential wrongful death liability.

Further, if physicians and researchers face wrongful death liability for the loss or destruction of *in vitro* embryos, medical research in the State will be inhibited and scientific progress will be impeded.⁶⁸ This would also undermine medical education in Alabama because residency programs in Alabama would be endangered due to the inability to train fertility specialists in the most advanced IVF treatment methods. Researchers and medical professionals are to thank for the successes of ART and IVF. A ruling by this Court adopting the Appellants' position would hamper the continued success and progress of ART and IVF, which has been essential to so many Alabama families.

⁶⁸ Id.

If this Court creates a cause of action for the wrongful death of an embryo created *in vitro*, the potential detrimental impact on IVF treatment in Alabama cannot be overstated. Alabama has at least five ART clinics.⁶⁹ The increased exposure to wrongful death liability as advocated by the Appellants would – at best – substantially increase the costs associated with IVF. More ominously, the increased risk of legal exposure might result in Alabama’s fertility clinics shutting down and fertility specialists moving to other states to practice fertility medicine. Such a result would jeopardize Alabamians’ access to IVF when IVF is the only option for many who hope to become parents. Alabama citizens would thus be deprived of the most effective infertility treatment. Cancer patients in Alabama would no longer have access to reliable fertility preservation. Couples who need or desire to freeze their embryos for subsequent implantation would no longer have this option. Fertility specialists would practice elsewhere because practicing the most effective form of IVF would no longer be feasible in Alabama. This Court can avoid these detrimental consequences by upholding the trial court’s dismissal of the Appellants’ wrongful death claims.

⁶⁹ 2019 Assisted Reproductive Technology Fertility Clinic and National Summary Report, *supra* note 7, at 55-56.

CONCLUSION

Extending wrongful death liability to the loss of *in vitro* embryos would inflict a devastating blow to the safe and successful IFV treatment in Alabama that has benefited thousands of Alabamians. The Appellants' position has no basis in Alabama law. The trial court's Order dismissing the Appellants' wrongful death claims was entirely correct and is due to be affirmed.

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
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1. This brief complies with the type-volume limitation of Ala. R. App. P. 28(j)(1) because this brief contains 7,731 words, excluding the parts of the brief exempted by Ala. R. App. P. 28(j)(1) and 32(c), as counted by the word count function of Microsoft Word processing software.

2. This brief complies with the typeface and type style requirements of Ala. R. App. P. 32(a)(7) because this brief has been prepared in a proportionately spaced typeface using the Microsoft Word processing software in 14-point Century Schoolbook font.

CERTIFICATE OF SERVICE

I hereby certify that on **November 14, 2022**, I electronically filed the above-brief with the Clerk of the Court using the Alabama Supreme Court's C-Track electronic filing system and will have it served on the following counsel via email:

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