Case No. SC-2022-0579

IN THE SUPREME COURT OF ALABAMA

Felicia Burdick-Aysenne and Scott Aysenne, in their individual capacities and as parents and next friend of Baby Aysenne, deceased embryo/minor

Appellants,

vs.

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

Appellees.

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

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 *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 through the IVF process 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 donated 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 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 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 the embryos are 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 their cryopreserved 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 cryopreserved embryos are typically discarded or donated. The embryos are not usually stored in perpetuity due to the high cost of cryogenic storage and limited storage 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 thereby 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 be denied access to IVF treatment entirely.

Likewise, a ruling in favor of the Appellants would require fertility clinics to store a multitude of embryos in perpetuity at a high cost – regardless of the wishes of the IVF patients. Such a result might render cryopreservation out of reach for many patients, who are 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, cryopreservation of additional embryos, that improves the chances of a successful pregnancy.

There is no statute or precedent articulated by this Court to support the Appellants' invitation for this Court to declare a cause of action for wrongful death for the loss of an *in vitro* embryo. The Alabama Legislature has never declared or insinuated the term "minor child" in Alabama's Wrongful Death Act includes a frozen embryo created through in vitro fertilization. The Appellants' Brief misconstrues several recent opinions of this Court, in which this Court recognized potential wrongful death claims arising from the death of a pre-viable fetus. These cases are

inapposite. This case does not involve a pre-viable fetus or even a pregnancy at all. Rather the embryo that was lost was in cryogenic storage and may never have been utilized. Additionally, the Appellants discount the importance this Court has placed on congruity in Alabama's criminal homicide and wrongful death statutes, both of which have the same purpose – the prevention of homicide. It would be incongruous for this Court to expand the wrongful death act's definition of "minor child" to include a pre-implanted embryo in cryogenic storage when there is no corresponding criminal liability for homicide arising from the loss of such an embryo. This Court should rightfully leave such a change in public policy to the Legislature.

The Appellants contend the trial court's dismissal of their tort claims violates the Remedies Clause of the Alabama Constitution. This Court should summarily reject this argument because the Remedies Clause only preserves causes of action that existed at common law. The Appellants' tort claims seek recovery for the alleged loss of a human life. As this Court has repeatedly observed, there was no common-law right of action for wrongful death. Rather, wrongful death is a statutory cause of action. As such, the Remedies Clause is inapplicable.

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's fertility clinics shutting down and fertility specialists moving to other states to practice fertility medicine. These consequences would threaten access of Alabamians who need IVF and thereby inhibit their ability to become parents to biological children. It is imperative that this Court consider these negative implications in reaching its holding in this Appeal.

As further discussed below, this Court should affirm the trial court's order dismissing the Appellants' tort claims for the "death" of their *in vitro* embryo and thereby avoid the potentially detrimental consequences for IVF treatment in Alabama should this Court permit the Appellants' tort 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 naturally. Approximately 9% of men and 11% of women of reproductive age experience fertility difficulty.[2] An estimated 12-15% of couples are unable to conceive within one year of attempting, and 10% are unable to conceive after two years.[3] There are numerous potential causes of fertility problems, such as fallopian tube damage or blockage, ovulation

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[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.

disorders, endometriosis, uterine fibroids, previous tubal sterilization or removal, 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 accounts for approximately 99% of ART procedures.[8] IVF involves surgically removing a woman's eggs; combining the eggs

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[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).

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 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 Fertility Clinic Success Rate and Certification Act enacted by Congress

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[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), https://www.cnn.com/2018/07/03/health/worldwide-ivf-babies-born-study/index.html.

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 published a full report, there were 330,773 ART treatment cycles initiated in the United States.[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 United States due to ART has increased substantially over the past decade. The CDC reports 61,556 infants 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

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[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.
[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.

in the United States are conceived using ART.[22] A 2018 Pew Research study found 33% of adults in the United States 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 been able to raise biological children. The increased success rate of ART, and in particular IVF, has been a remarkable triumph for modern science and medicine. A 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.

IVF treatment begins with an approximately two-week process called ovulation induction, during which the woman is injected with hormones to stimulate her egg production with the objective of producing

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[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/.

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] Egg retrieval is a surgical procedure whereby the physician carefully retrieves the woman's eggs using 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 the surgical removal of the woman's eggs, the eggs are combined with the male's sperm, which the male typically donates the same day.[30] The combination of each egg with sperm creates an *in vitro* embryo.

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[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.
[30] Id.

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] In the implantation procedure, the physician inserts a catheter into the woman's uterus through which the physician deposits several embryos.[33] To improve the chances of pregnancy, physicians commonly implant up to three embryos at a time.[34]

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

The main challenge of cryopreserving embryos is that when water within the cells freezes, crystals can form and burst the cells.[37] To

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[31] Id.
[32] Id.
[33] Id.
[34] Id.
[35] Id.
[36] Id.
[37] Jon Johnson, Embryo Freezing: What You Need to Know, MEDICALNEWSTODAY (Mar. 13, 2019), https://www.medicalnewstoday.com/articles/314662.

prevent this, 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 the 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 eggs – only once.[43] This results in less physical and emotional trauma for the woman. This also results in the woman having to encounter known risks of surgery – such as infection, excessive bleeding, or a negative reaction to anesthesia – only once, thereby lessening the risk of complications.

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[38] Id.
[39] Id.
[40] Id.
[41] Id.
[42] Parker, supra note 24, at 649.
[43] Johnson, supra note 37.

In addition, if implantation of an embryo is unsuccessful in the first cycle, 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 who have medical conditions that negatively affect their 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 one partner has cancer or another medical condition that will threaten his or her future fertility.[46] Cryopreservation also benefits individuals who are approaching an advanced age but who are not yet ready to have children.[47]

Cryopreservation gives couples who wish to have a number of children the opportunity to have multiple pregnancies during the woman's childbearing years and thereby raise biological children of

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[44] Id.
[45] Id.
[46] Id.
[47] Id.

different ages. As a result, children conceived *in vitro* often 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 IVF patients with the best chance of a safe and successful pregnancy.

Without cryopreservation, patients utilizing IVF would seemingly 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 one to three embryos, which is the normal and safest practice. This option would substantially increase the likelihood of multiple gestation

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[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.

(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, as it carries a greater risk of preterm delivery, which leads to long-term complications associated with prematurity.[51] This risk increases with the number of fetuses 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] The ability to transfer a single or small number of embryos decreases the chance of multiple gestation and the inherent risks involved.

Finally, implantation of all fertilized embryos in one procedure provides only one chance of pregnancy. If the IVF cycle is unsuccessful, the woman has lost her chance of becoming pregnant. Cryopreservation gives couples a potential second chance to become pregnant. It is better medicine, and it is in the mother and child's best interest to use only the

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[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).

embryos that the physician deems necessary to lead to a successful pregnancy and to preserve the remaining embryos for future implantation when/if the couple so desires.

The second option for IVF without cryopreservation would be for the physician to remove only 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 added 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, and even death. This approach would also require the woman to undergo hormone therapy multiple times (for each time she desires to undergo an IVF cycle), 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 undergoes numerous egg-retrieval procedures.[53]

[53] Johnson, supra note 37.

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 one or a limited number of eggs would decrease the chances of creating a healthy embryo and a successful pregnancy on the first attempt.

For the above 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 provided by the Center for Reproductive Medicine is a perfect example of the benefits of cryogenic preservation of additional *in vitro* embryos. The Appellants' Brief notes they "were able to conceive healthy children, including from embryos that had been frozen and then thawed." See Appellants' Amended Brief, p. 16, ¶ 37. In fact, as the Appellees point out in their Brief, the Appellants did not even plead that they needed or intended to utilize their remaining embryo.

In short, eliminating cryopreservation from the IVF process would be inferior medicine and would negatively impact Alabama families who

seek 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 would 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 loss of embryos created *in vitro* prior to implantation in the uterus.

The Appellants argue Alabama's Wrongful Death Act should provide a remedy for the loss of an *in vitro* embryo. The Appellants' Brief is replete with conclusory statements that the term "minor child" in Alabama's wrongful death statute, Ala. Code § 6-5-391, should include an *in vitro* embryo. The Appellants' Brief glosses over the fact that the Alabama Legislature has never declared an embryo developed *in vitro* to have the same degree of protection as an embryo developing *in utero* during a pregnancy. Likewise, this Court has never held or suggested it would apply Alabama's Wrongful Death Act to the loss of pre-implanted embryos created through IVF.

The Appellants assert this Court has endeavored to broaden the term "minor child" in the "prenatal context" such that this Court has recognized wrongful death claims arising from the death of a pre-viable fetus. While this general proposition may be accurate, this Court's jurisprudence pertaining to wrongful death in the "prenatal context" has no bearing on the Appellants' claims. This case does not involve a pregnancy or the death of a pre-viable fetus developing in a mother's womb. Rather, this case involves the loss of a pre-implanted embryo preserved in cryogenic storage that was literally frozen in time. The record does not even indicate that the Appellants had any intention of ever using this embryo to attempt to become pregnant again.

In fact, despite the Appellants' effort to misconstrue several recent cases in their favor, the cases in which this Court has recognized wrongful death claims arising from the death of a pre-viable fetus actually undermine the Appellants' position. In Mack v. Carmack, 79 So. 3d 597 (Ala. 2011), this Court held an alleged tortfeasor could be liable for the wrongful death of a child *in utero* regardless of viability. In reaching this holding, this Court relied on the Legislature's amendment ("the Brody Act") of Alabama's criminal Homicide Act 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(a)(3)). Noting the importance of congruity between the criminal homicide statute and the wrongful death statute, this 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)).

Likewise, Stinnett v. Kennedy, 232 So. 3d 202 (Ala. 2016), which relied heavily on Mack, cited the importance of congruity between criminal and civil statutes in holding that the death of an unborn child can give rise to a wrongful death claim regardless of viability. Citing Mack, this Court stated that "this Court repeatedly has emphasized the need for congruence between the criminal law and our civil wrongful-death statutes." Stinnett, 232 So. 3d at 214 (quoting Mack, 79 So. 3d at 611).

Given that Mack and Stinnett relied on the importance of congruity in the criminal homicide statute and the civil wrongful death statute,

these opinions run counter to the Appellants' argument. The Legislature has not extended the Homicide Act to the destruction of a cryopreserved embryo created *in vitro*. ALA. CODE § 13A-6-1 *et seq*. Therefore, as the purposes of Alabama's Homicide and Wrongful Death Acts are the same – to prevent homicides – it would be incongruous for this Court to expand the Wrongful Death Act's definition of "minor child" to include a pre-implanted embryo in cryogenic storage when there is no corresponding criminal liability for homicide arising from the loss of such an embryo.

Despite this Court's guidance to the contrary, the Appellants' Brief suggests congruence is not important in this case. The Appellants assert: "[C]ongruency is only necessary in those cases were the civil law must be expanded to prevent situations where 'a defendant could be responsible criminally for the homicide of a fetal child but would have no similar responsibility civilly.'" See Appellants' Amended Brief, p. 28 (quoting Stinnett v. Kennedy, 232 So. 3d 202 (Ala. 2016)). However, this Court has not limited the importance of congruity in this fashion. In Stinnett and Mack, this Court expressed "**the need for congruence between the criminal law and our civil wrongful-death statutes**." Stinnett, 232 So. 3d at 214 (quoting Mack, 79 So. 3d a 611) (emphasis added). The

Court did not qualify or limit this statement in the way the Appellants suggest. Nowhere in Stinnett, Mack, or any other case has this Court held that congruence is unimportant such that this Court should disregard criminal statutes when a plaintiff asks this Court to substantially expand civil liability, as the Appellants seek to do in the present case. To the contrary, Stinnett and Mack hold that Alabama's criminal and civil statutes should be construed congruently when the purposes of the statutes are the same.

Devoid of any authority in support of their wrongful death claim, the Appellants' Brief is essentially a clarion call for this Court to judicially decree a wrongful death cause of action for the loss of a pre-implanted, cryopreserved embryo created *in vitro*. However, this Court has stated it "is not at liberty to rewrite statutes or to substitute its judgment for that of the Legislature." Stinnett, 232 So. 3d at 223. This statement reflects the principle of judicial deference to legislative intent and the doctrine of separation of powers. The doctrine of separation of powers is expressly adopted in Alabama's Constitution, 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, regarding 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).

It would be inappropriate for this Court to accept the Appellants' invitation to legislate from the bench. There is no statutory support whatsoever for extending the scope of Alabama's Wrongful Death Act to the loss of *in vitro* embryos in cryogenic storage. Any change in Alabama's Wrongful Death Act must be left to the Legislature.

This Amicus Brief does not dispute the Appellants' assertion that this Court has issued rulings in recent years to protect the unborn, and, as Chief Justice Parker has observed, "to dutifully ensure that the laws of Alabama are applied equally to the most vulnerable members of our society, both born and unborn." Stinnett, 232 So. 3d at 224 (citing Ankrom in Hicks v. State,153, So. 3d 53, 76 (Ala. 2014) (Parker, J. concurring specially)). However, in asking this Court to declare a wrongful-death cause of action for the loss of an *in vitro* embryo, the Appellants ask this Court to do something it has never done or suggested

it would do. The Appellants ask this Court to equate, for purposes of Alabama's wrongful death statute, a cryopreserved embryo created *in vitro* which may never be implanted into a woman's uterus with an actual unborn child developing *in utero*. Such an expansion of wrongful death liability has no support in statutory or case law of this State, or, to the Medical Association's knowledge, any other state.

As further discussed in Section V, extending wrongful-death liability to the loss of cryopreserved embryos created *in vitro* as the Appellants urge this Court to do would threaten access to safe and successful IVF treatment in Alabama and thereby deprive thousands of Alabamians of their only chance of becoming pregnant and raising biological children. This Court should reject the Appellants' bid for this Court to declare such a cause of action by judicial decree.

IV. The Appellants' argument that *in vitro* embryos and embryos developing *in utero* are only different by virtue of their location ignores fundamental aspects of IVF treatment and does not square with statutes enacted by the Legislature.

The Appellants attempt to reduce the obvious and fundamental differences between *in vitro* embryos and embryos developing *in utero* to nothing but their location. Part II of this Brief discusses at length the

process of IVF treatment and cryogenic storage. Embryos in cryogenic storage are different from embryos developing in a mother's womb in a multitude of ways. Perhaps the most fundamental difference is that *in vitro* embryos in cryogenic storage do not result in a pregnancy. Cryogenically-stored *in vitro* embryos do not develop in a mother's womb. Indeed, they do not develop at all. Rather, they are frozen in time in storage tanks. Many cryogenically-stored embryos are never used. In fact, the Appellants do not even contend they intended to use the cryogenically-stored embryo at issue. Respectfully, the Appellants' contention that the only difference between IVF embryos in cryogenic storage and embryos developing in a mother's womb is one of location is completely frivolous. This Court should summarily dispense with this argument.

As the Appellees discuss at length in their Brief, the Appellants signed agreements with the Center for Reproductive Medicine in which they consented to contingencies that are completely inconsistent with their contention that the only difference between a cryogenically stored *in vitro* embryo and an embryo developing *in utero* is one of location. The Appellants consented to dispose of abnormal embryos for "quality control

and training purposes before they are discarded."[54] Certainly, the Appellants would not have agreed to dispose of such an embryo if they believed doing so would constitute a wrongful death.

The Appellants also signed a "Disposition of Embryos" in which they directed the Center for Reproductive Health to "destroy the frozen embryos" in the event the Appellants no longer wished to pay storage fees.[55] This Agreement would have no application to embryos developing *in utero*. However, taken to its logical conclusion, the Appellants' position would mean the they consented to homicide by authorizing the Center for Reproductive Medicine to destroy their *in vitro* embryos in certain circumstances. Surely, the Appellants would not have agreed to the potential destruction of their remaining frozen embryos if they viewed this choice as killing their unborn children. In fact, contrary to the Appellants' current position, the Appellants did not consider *in vitro* embryos in cryogenic storage as enjoying the same rights as an embryo developing *in utero* during the course of pregnancy when the Appellants initially underwent IVF treatment.

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[54] (C. 184).
[55] (C. 202).

The Alabama Legislature has distinguished between *in vitro* embryos and embryos developing *in utero* in other contexts. For example, Alabama's Uniform Parentage Act contains unique provisions with respect to parental rights relative to *in vitro* embryos. See ALA. CODE § 26-17-101 *et seq*. The Act contains an article entitled "Child of Assisted Reproduction." See ALA. CODE §§ 26-17-701-707. This article specifies it "does not apply to the birth of a child conceived by means of sexual intercourse." ALA. CODE § 26-17-701. With respect to the unique question of parenthood of *in vitro* embryos following dissolution of a marriage, the Act provides: "If a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a signed record . . . ." ALA. CODE § 26-17-706. Alabama law has no similar provision with respect to parenthood of an embryo developing *in utero*. The Act also provides: "If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a signed record . . . ." ALA. CODE § 26-17-707. As such, this Act treats *in vitro* embryos differently with respect to inheritance rights than embryos developing *in utero*.

Likewise, the Legislature distinguished *in vitro* embryos from embryos developing *in utero* in 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.") The Act specifically defines 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). Thus, the Legislature specifically excluded *in vitro* embryos from the Act's definition of "unborn child."

Moreover, 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, confirmed that the "*in utero*" language in the Act was intentional, since it was *not* the intent of the Legislature through this Act to impact or prevent the destruction of fertilized *in vitro* eggs because in those circumstances, the woman is not

pregnant.[56] Likewise, Eric Johnston, president of the Alabama Pro-Life Coalition and one of the individuals who helped draft the Human Life Protection bill, stated in an interview with the Washington Post that the Bill would "absolutely not" impact *in vitro* fertilization.[57] Mr. Johnston gave this statement in response to the ACLU's misguided suggestion that the Act might affect *in vitro* fertilization.[58]

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[56] 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).

[57] 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).

[58] The Tennessee Attorney General also recently issued an Opinion confirming that Tennessee's Human Life Protection Act does not impact IVF treatment. See Op. Tenn. Att'y Gen. No. 22-12 (Oct. 20, 2022). The

The Appellants fail to cite a single case or statute to support their position that cryogenically stored *in vitro* embryos are the legal equivalent of embryos developing *in utero*. As discussed above, the Alabama Legislature has recognized *in vitro* embryos are not the equivalent of a human being developing *in utero* and has enacted statutes accordingly. The Appellants' argument that *in vitro* embryos only differ from embryos developing *in utero* by virtue of their location is incorrect medically, scientifically, legally, and logically. This Court should reject this argument.

V. The Appellants' argument that the trial court's dismissal of their tort claims violates the Remedies Clause of the Alabama Constitution is inconsistent with Alabama law and directly contravenes this Court's previous holdings.

The Appellants contend the trial court's dismissal of their tort claims violates the Remedies Clause of the Alabama Constitution. See ALA. CONST. art. I, § 13 (1901) ("That all courts shall be open; and that

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Tennessee Attorney General answered in the negative the question of whether disposal of *in vitro* embryos implicates the State's anti-abortion laws or violates the State's declared interest in "protecting unborn children." Id. 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." Id.

every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law . . . ."). However, to the extent the Remedies Clause operates to preserve causes of action, it only preserves causes of action that existed at common law. See Baugher v. Beaver Constr. Co., 791 So. 2d 932, 935 (Ala. 2000) ("*Legislation which abolishes or alters a common-law cause of action*, then, or its enforcement through legal process, is automatically suspect under § 13.") (quoting Reed v. Brunson, 527 So. 2d 102, 115 (Ala. 1988)) (italics in original); Kruszewski v. Liberty Mut. Ins. Co., 653 So. 2d 935, 937 (Ala. 1995) ("Generally, legislation that abolishes or alters a common-law cause of action is automatically suspect under § 13."); Grantham v. Denke, 359 So. 2d 785, 787 (Ala. 1978) (holding that it is only "rights and remedies . . . enjoyed under the common law which are preserved under § 13 of our constitution").

The Remedies Clause does not apply in the present case because all of the Appellants' tort claims – whether couched as wrongful death, negligence, or wantonness – seek recovery for the alleged loss of a human life. This Court has repeatedly observed that "[t]here was no right to recover for death at common law." Akins v. Drummond Co., 628 So. 2d

591, 592 (Ala. 1993) (citing Tatum v. Schering Corp., 523 So. 2d 1042 (Ala. 1988) and Breed v. Atlanta, B. & C.R.R., 4 So. 2d 315 (Ala. 1941)); see also Ex parte Tyson Foods, Inc., 146 So. 3d 1041, 1042 (Ala. 2013) ("Neither a wrongful-death action nor an action for workers' compensation death benefits existed at common law. Both are purely statutory causes of action.") In Akins, this Court held specifically that "there is no Art. I, § 13, Alabama Constitution of 1901, 'right to a remedy' problem if the legislature did not provide a remedy for death." 628 So. 2d at 592. This Court's holding in Akins defeats the Appellants' argument that the trial court violated the Remedies Clause by dismissing the Appellants' tort claims.

Yarchak v. Munford, Inc., 570 So. 2d 648 (Ala. 1990), similarly precludes the Appellants' Remedies Clause argument. In Yarchak, the Plaintiff argued that the exclusivity of Alabama's Workmen's Compensation Act was unconstitutional, in part because it violated the Remedies Clause. Id. at 649. The Plaintiff argued "a wrongful death action is common law in nature and that as such, its removal as a remedy by the exclusivity provision of the Act" was subject to strict scrutiny. Id. This Court rejected that argument, explaining it has "consistently held

that wrongful death actions are statutory . . ., and, therefore, that they may be modified, limited, or repealed as the legislatures sees fit." Id. This Court reiterated: "Where common-law rights are altered or abolished, this Court will review such legislation more strictly than normal. Where no common law right is affected, a judicial deference to the legislature is required[.]" Id. at 649-50 (quoting Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996, 1000 (Ala. 1982)). The Appellants ignore numerous opinions of this Court explaining that the Remedies Clause only protects causes of action that existed at common law, which excludes any remedy or right to recover for death.

The Appellants' reliance on Stanford v. St. Louis-San Francisco RY Co., 108 So. 566 (Ala. 1927), in support of their Remedies Clause argument is puzzling. Stanford involved injuries sustained by a pregnant woman while disembarking from a train. Id. at 566. The woman gave birth prematurely, and the infant allegedly died because of injuries sustained in the accident. Id. Stanford articulated the now-overruled law that "a prenatal injury affords no basis for an action in damages, in favor either of the child or its personal representative." Id. In Stanford, the Court based its holding on the antiquated notion that "a

child before birth is, in fact, a part of the mother and is only severed from her at birth . . . ." Id. at 567. Discussing the parameters of its holding, the Court noted "the mother, of whom the unborn child was a part at the time of the injury, may recover for any damage to it, which was not too remote to be recovered at all." Id. at 566. The Appellants characterize this statement as the "central tenet" of Stanford that "every wrong must have a remedy." See Appellants' Amended Brief, p. 25. The Appellants attach far too much significance to this statement, which stands for nothing more than the proposition that a pregnant mother may recover for her own personal injuries. Stanford does not create a remedy for death outside of Alabama's Wrongful Death Act.

The Appellants assert that even if they have no claim for wrongful death, they should have a claim for simple negligence and/or wantonness. However, the only injury for which the Appellants seek recovery under these claims is the alleged death of their cryopreserved *in vitro* embryo.[59] As such, even though the Appellants allege a negligence/wantonness

[59] The Appellants' assertion that the trial court's dismissal of their tort claims leaves "these human, *in vitro* embryos . . . completely unprotected by Alabama's tort laws" illustrates that the Appellants' tort claims are in essence wrongful death claims. See Appellants' Amended Brief, p. 26.

count separate from the wrongful death count, these counts are one in the same as far as they seek recovery for the alleged loss of life. Alabama's Wrongful Death Act provides the only right of action for death under Alabama law. See e.g., King v. Nat'l Spa & Pool Inst., Inc., 607 So. 2d 1241, 1243 (Ala. 1992) (stating the Wrongful Death Act remains the sole right of action for death under Alabama law) (citing Black Belt Wood Co. v. Sessions, 514 So. 2d 1249 (Ala. 1986) and Mattison v. Kirk, 497 So. 2d 120 (Ala. 1986)). Thus, the Appellants may not bring common law negligence/ wantonness claims based upon the alleged death of their cryopreserved embryo.

The Appellants seek recovery for mental anguish and emotional distress. The trial court was correct in dismissing this claim. Damages for mental anguish and emotional distress are not available because the Appellants seek recovery for an alleged death, and punitive damages are the only damages available in wrongful death actions. Hendrix v. United Healthcare Ins. Co., 327 So. 3d 191, 196 (Ala. 2020) ("Alabama's wrongful-death statute creates a 'new right' that arises after the decedent's death and allows for the recovery of only punitive damages."); Tillis Trucking Co. v. Moses, 748 So. 2d 874, 890 (Ala. 1999) ("Alabama

law allows no compensatory damages in a wrongful death case.") (quoting Cherokee Elec. Coop. v. Cochran, 706 So. 2d 1188, 1194 (Ala. 1997)); Price v. Southern Ry. Co., 470 So. 2d 1125, 1140 (Ala. 1985) (holding "under our wrongful death statute, *all* tort claims arising out of a personal injury are extinguished by the death of the injured party where he dies as a result of those injuries, and a statutory cause of action for wrongful death arises, which affords only punitive damages") (citing Carter v. Birmingham, 444 So. 2d 373 (Ala. 1983)) (italics in original). As the Appellees' Brief notes, the Appellants even conceded on the record that only punitive damages are available for wrongful death. See Appellee's Brief, p. 19 (citing R. 59) ("Well, we don't get compensatory damages for death in Alabama.")

Even if the Appellants claimed the cryopreserved embryo at issue was their personal property, the Appellants still cannot recover damages for mental anguish and emotional distress. This Court has stated a general rule that "the law will not allow recovery of damage for mental distress where the tort results in *mere* injury to property." White Consol. Indus., Inc. v. Wilkerson, 737 So. 2d 447, 449 (Ala. 1999) (quoting Reinhardt Motors, Inc. v. Boston, 516 So. 2d 509 (Ala. 1986)) (italics in

original). Therefore, the Appellants are not entitled to damages for mental anguish and emotional distress even if this Court were to categorize the loss of their embryo as a loss of personal property.

For these reasons, the trial court's dismissal of the Appellants' tort claims did not violate the Remedies Clause. As such, this Court should uphold the order of dismissal.

VI. Creating a cause of action for wrongful death for the loss of a cryopreserved embryo would threaten access to *in vitro* fertilization in Alabama and thereby deprive 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 cryopreserved embryos created *in vitro*, 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 embryos remaining in cryogenic storage after they have completed all desired IVF treatment cycles. Couples who have utilized IVF may not use all of the embryos in cryopreservation for numerous reasons. For example, couples who have had one or more successful pregnancies following previous IFV 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 divorce. The embryos may not be used if one partner dies. In such circumstances, the unused embryos are typically discarded, donated to other IVF patients, or donated for research. The embryos are not stored in perpetuity due to the high cost of cryogenic storage and limited storage capacity.

It is common practice for fertility clinics and patients to address prior to IVF treatment how unused embryos should be disposed of or used in the event of various future contingencies. To that end, IVF patients are encouraged to sign contracts which memorialize how their unused frozen embryos are to be discarded.[60] As discussed above, consistent with this practice, the Appellants entered a "Disposition of Embryos" Agreement with the Center for Reproductive Medicine, whereby the Appellants agreed their embryos would be cryopreserved for five years after which they would be destroyed. [61]

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[60] Parker, supra note 24, at 649.
[61] (C. 202).

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 – just as the Appellants acknowledged and agreed to in the 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 patients who consent to disposition of unused frozen embryos to civil liability for punitive damages.

A wrongful death cause of action for the destruction of pre-implanted, cryopreserved 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 United States.[62] Storage fees for frozen

[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).

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 must store their unused embryos indefinitely, the cost of storage will fall on either the patients or the fertility 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 clinics would be legally unable to destroy, donate, or otherwise dispose of the remaining cryopreserved 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 cease in Alabama, which would deny thousands of Alabamians who experience fertility challenges access to the safest and most effective method of IVF.

It bears reemphasis that the logical outcome of the Appellants' position is that wrongful death liability would attach anytime an embryo

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

created *in vitro* is lost or destroyed. Embryos created *in vitro* can theoretically be frozen and stored forever. The Appellants' position would require such 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 outcome if this Court extends wrongful death liability to the destruction of cryopreserved embryos.

There are other potential negative consequences of creating a wrongful death cause of action for the loss of cryopreserved embryos created *in vitro*. Commonly in the IVF process, some previously frozen embryos may be unusable because they are damaged or defective. The cryogenic freezing and de-thawing processes carry a risk of damaging embryos such that they may not be likely to result in a pregnancy. The Appellants acknowledged this very risk in their Agreement with the Center for Reproductive Medicine.[66] When embryos created *in vitro* are damaged or otherwise determined to be unsuitable for implantation, fertility clinics typically discard them. The Appellants' position would

[66] (C. 188).

subject fertility physicians 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 liability exposure would be devastating to the practice of IVF treatment in Alabama. Simply put, fertility specialists will not perform IVF in Alabama if they are 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 properly in the lab, even though it is normal and expected for some embryos to fail to

develop.[67] This absurd result 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 accepts the Appellants' position. As discussed above, up to three embryos are commonly implanted in the woman's uterus during IVF to improve the chance that 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 those embryos that did not develop even when another embryo implanted during the same procedure developed perfectly and the woman experienced a successful pregnancy. This absurd result would be possible 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 treatment would be denied the chance to undergo IVF because the

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

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 fertility specialists such that women with a lesser chance of successful IVF treatment are denied the opportunity to participate.

Further, if fertility physicians and researchers face wrongful death liability for the loss or destruction of embryos created *in vitro*, medical research in Alabama will be inhibited and scientific progress will be impeded.[68] Medical education in Alabama would also be undermined, as residency programs would be endangered due to the inability to train residents as fertility specialists in the most advanced IVF treatment methods. Researchers and medical professionals are to thank for the successes of ART and IVF. If this Court adopts the Appellants' position, it will hamper the continued success and progress of ART and IVF, which has been essential to so many Alabama families.

If this Court creates a cause of action for the wrongful death of a cryopreserved embryo created *in vitro*, the potential detrimental impact on IVF treatment in Alabama cannot be overstated. Alabama has at least

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[68] Id.

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 which may be the only option for many who hope to become parents to biological children. 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 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' tort claims.

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[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 pre-implanted, cryopreserved embryos created *in vitro* 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. Therefore, the trial court's Order dismissing the Appellants' wrongful death claims was correct and is due to be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Ala. R. App. P. 28(j)(1) because this brief contains 9,480 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.

s/Philip A. Sellers, II

CERTIFICATE OF SERVICE

I hereby certify that on **December 7, 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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