

Understanding the Importance of the Alabama Supreme Court Decision:

Frozen IVF Embryos are Legally Protected “Extrauterine” Unborn Children

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THE LANDMARK ALABAMA SUPREME COURT DECISION

On February 16, 2024, in a 7-2 decision, the Alabama Supreme Court issued a first-in-the-nation ruling that extrauterine IVF human embryos are “unborn children” under Alabama’s Wrongful Death of a Minor Act regardless of their location, either inside or outside of the womb.

The Alabama Supreme Court Decision involved a lawsuit brought by three couples whose frozen embryos were negligently destroyed in 2020 at a fertility clinic by an unauthorized intruder who entered the cryostorage facility through an unlocked door, removed several frozen embryos from a cryostorage container, and then dropped them on the floor, killing all of them. (1)

The distraught parents sued the Mobile Medical Center for the tragic and negligent death of their IVF children “under Alabama’s Wrongful Death of a Minor Act. (1) “A lower court ruled in favor of the clinic, arguing that the embryos did not meet the criteria for ‘person’ or ‘child’ (...) but, on appeal, the Supreme Court overturned the lower court decision and ruled in favor of that the law ‘applies to all children, born and unborn, without limitation.’” (2)

In the majority ruling, Justice Jay Mitchell officially presented the Supreme Court’s landmark decision:

“This Court has long held that unborn children are ‘children’ for purposes of Alabama’s Wrongful Death of a Minor Act, (...) a statute that allows parents of a deceased child to recover punitive damages for their child’s death. The central question (...) is whether the Act contains an unwritten exception to that rule for extrauterine children – that is, unborn children who are located outside of a biological uterus at the time they are killed. Under existing black-letter law, the answer to that question is no: the Wrongful Death of a Minor Act applies to all unborn children, regardless of their location.” (3)

In his long and detailed majority opinion, Justice Jay Mitchell clearly and historically ruled:

“Unborn children are ‘children’ under the Act, without exception based on developmental stage, physical location, or any other ancillary characteristics. (...) It applies to all children, born and unborn without limitation.” (4)

Following Justice Mitchell’s main opinion, Chief Justice Tom Parker added his 22-page concurring opinion explaining in great legal detail how this decision was solidly based upon the “Sanctity of Unborn Life Amendment” to the Alabama Constitution that was voted into law by a majority of the People of Alabama back on November 6, 2018:

“A good judge follows the Constitution instead of policy, except when the Constitution itself commands the judge to follow a certain policy. In these cases, that means upholding the sanctity of unborn life, including unborn life that exists outside the womb. Our state Constitution contains the following declaration of public policy: ‘This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life.’” (5)

“This case presents an opportunity for this court to continue a line of decisions affirming Alabama’s recognition of the sanctity of life from the

earliest stages of development. We have done so in three recent cases (...); we do so again today.” (6)

“Accordingly, any legislative (or executive) act that contravenes the sanctity of unborn life is potentially subject to a constitutional challenge under the Alabama Constitution.” (7)

Importantly, in his concurring opinion Chief Justice Parker addressed the concerns raised by the lone dissenting judge, Justice Cook, who had argued that the application of the Sanctity of Life Act and the Wrongful Death of a Minor Act to frozen embryos “[would] have disastrous consequences for the in vitro fertilization (“IVF”) industry in Alabama.” (8) The Chief Justice acknowledged Justice Cook’s prescient concerns but correctly observed:

“[I]t is for the Legislature to decide how to address this issue. I note briefly that many other Westernized countries have adopted IVF practices or regulations that allow IVF to continue while drastically reducing the chances of embryos being killed, whether in the creation process, the implantation process, the freezing process, or by willful killing when they become inconvenient. For decades, IVF has been largely unregulated in the United States, with some commentators even comparing it to the Wild West. (...) (9)

“In Alabama, the only statutes that mention IVF address the issue of determining parentage of children conceived through IVF, but they do not govern the practice of IVF itself. (...) (10)

“If the Legislature agrees that it is time to regulate the IVF industry, then the good news is it need not reinvent the wheel. Other Westernized countries have given Alabama some examples to consider.” (11)

PUBLIC REACTION & PRO-LIFE SUPPORT

Much like the overwhelmingly joyous news regarding the United States Supreme Court decision in the Dobbs case that had finally overturned the infamous Roe v. Wade decision on June 24, 2022, so, too, the recent Alabama Supreme Court decision on February 16, 2024, was immediately celebrated as a landmark moment in the history of our Nation to secure the Right to Life for all unborn children, including roughly 1.5 million frozen, unborn IVF children here in the United States.

The Alabama Supreme Court's historic decision was immediately featured by the mainstream media as "breaking news" and rapidly spread across the nation and around the world. The *National Catholic Register* reported that "President Biden denounced the decision as 'outrageous and unacceptable'" The same NCR article also reported that former-President Trump immediately called on Alabama's state legislators to "ensure access to IVF, saying his party 'should always be on the side of life and on the side of mothers and fathers and beautiful little babies.'" (12)

Praise and public support for Alabama's Supreme Court's decision also began pouring in from conservative media and the leaders of prominent pro-life and Catholic organizations.

According to Danielle Pimentel, a policy attorney at Americans United for Life, the Court's decision was "focused on Alabama law and will stay within Alabama." It is Pimentel's opinion that the ruling "doesn't limit IVF or access to it. It simply ensures that both the parents and the children are protected under the Wrongful Death of a Minor Act" which will allow the parents to bring a civil claim against a fertility clinic if it is proven to have acted negligently. (13)

Katie Daniel, the State Policy Director at SBA Pro-Life America, said in a statement to Catholic News Agency that the court in its ruling "recognized what is obvious and a scientific fact – life begins at conception." (14)

Lila Rose, Founder and President of Live Action, called the decision "an important step towards applying equal protection for all." (15)

The Catholic Medical Association (CMA) issued a Press Release to its 2,600 members and health care professionals who belong to 119 local guilds praising the Alabama Supreme Court "for its recent decision recognizing the biological fact that an embryo is a human being from the moment of fertilization, upholding the state's recognition of the right to life for every human being from the moment of conception." In addition, Marie Hilliard, J.C.L., Ph.D., RN, the co-chair of CMA's Ethics Committee added, "The Supreme Court of Alabama's ruling not only

protects the unborn but also assures parents that their precious embryos have the protection of the law.” (16)

Elizabeth Kirk, co-director of the Center for Law & the Human Person at The Catholic University of America Columbus School of Law in Washinton, commented on the historic fact that while the Alabama Supreme Court “had previously held that unborn children in the womb are ‘children,’ in this ruling, however, “the court held that the word ‘child; in the statute includes unborn children regardless of location, whether in or outside of a biological womb.” Kirk added, “all of us should welcome laws and court decisions that comport with the truth of the human person, including the dignity of all human life from conception to natural death.” (17)

And, the President of the National Catholic Bioethics Center, Dr. Joseph Meaney, when asked on February 23rd to comment on Alabama’s recent court ruling during his interview with “EWTN News in Depth,” supported the Court’s landmark decision stating:

“We become new human beings at the moment of conception. The Church is very clear about this, and science is very clear about this. We have to realize that if life begins at conception, then all those conceived human beings should be protected. Whether they’re in an IVF lab or in the wombs of their mothers, these are new human beings that deserve protection.” (18)

CATHOLIC AND PRO-LIFE CONCERNS VS ALABAMA’S “TEMPORARY FIX”

Over the next few weeks, however, the great news of this historic court decision was quickly replaced by the overwhelmingly chaotic news that three of Alabama’s largest fertility centers were “pausing” their IVF treatments out of fear of being criminally or civilly prosecuted for procedures that were previously considered as “standard” IVF protocol.

Lawmakers in both parties began to work at “warp speed” to draft legislative bills in the Alabama House and Senate to address the growing crisis and large protests from hundreds of IVF patients affected by the sudden “pausing” of the IVF clinics. On February 22, 2024, just 6 days after the Supreme Court’s decision, Democrat Representatives were the first to introduce HB 225, a bill that would completely dehumanize an unborn child located outside of the uterus.

“Existing law protects the rights of unborn children in certain circumstances. The Alabama Supreme Court has held that “extrauterine children: that is, unborn children “located outside of a biological uterus,” are considered unborn children for purposes of the Wrongful Death of a Minor Act.

“This bill would provide that any fertilized human egg or human embryo that exists outside of a human uterus *is not considered an unborn child or a human being for any purpose under state law.*” (Emphasis added) (19)

On February 27, 2024, Republican Representatives and Senators introduced two similar bills, HB 237 and SB 159 which stated:

“Relating to in vitro fertilization: to provide civil and criminal immunity for death or damage to an embryo to any individual or entity when providing or receiving services related to in vitro fertilization.” (20)

On Thursday, February 29, following hours of debate in both chambers, a vote was taken to proceed: HB 159, sponsored by Rep. Terri Colins, R-Decatur, passed the House on a 94-6 vote, and SB 159, sponsored by Sen. Tim Melson, R-Florence, passed the Senate on a 34-0 vote.

Meanwhile, in the Democrat-controlled US Senate, another legislative war erupted over an attempt to federally protect access to IVF as a direct response to the Alabama Supreme Court decision. On February 27, 2024, Sen. Tammy Duckworth (D-IL) introduced a bi-cameral bill (S. 3612) called the *Access to Family Building Act* (21) “to establish a federally protected right to IVF access, preempting state-imposed restrictions.” (22) On February 28, the USCCB officially released a Letter

(23) that was addressed to every US Senator “urging lawmakers to oppose [the] bill that would create a federally sanctioned right to access in vitro fertilization (IVF)- a fertility treatment that has resulted in the deaths of millions of human embryos in the United States.” (24)

The Catholic bishops expressed their strong opposition to in vitro fertilization which “involves the creation of countless preborn children and results in most of them being frozen or discarded and destroyed.” (24) The bishops strongly opposed the terms of the bill that could be “interpreted to fabricate and impose new rights to human cloning, gene editing, making human-animal chimeras, reproducing children of a parent who is long deceased, engaging in the buying and selling of human embryos, commercial gestational surrogacy, and more.” In addition, they warned the senators that this bill would require faith-based organizations to provide insurance coverage for IVF in their employee health plans and thus “would be the first law ever to exempt itself from the longstanding Religious Freedom Restoration Act (NRFR) ... passed in the Senate by a vote of 97 to 3 in 1993.” (25)

Fortunately, thanks to an “objection for the Senate floor from Sen. Cindy Hyde-Smith, R-Mississippi, the bill was blocked from advancing via unanimous consent and must go through the committee process before it can receive a vote.” (26)

On the same day that the USCCB letter to the Senators was written, March 4, 2024, another important letter addressed to Governor Kay Ivey of Alabama was publicly released. It was titled, the *Pro-Life Coalition Letter Opposing Alabama IVF Legislation* and was signed by over a dozen pro-life leaders at prominent pro-life organizations who are “united in opposition to the passage of current legislation headed to [her] desk (SB159/SB 237)” and encouraging the Governor and “the elected officials of Alabama to slow down and study the ethical implications of this highly complex topic.” (27) The Pro-Life Coalition Letter concluded by stating:

“Any political determination that takes up the question of how we treat and protect human lives – no matter how young – must resist an ideology that treats human beings as expendable commodities. Any legislation on this issue must take into consideration the millions of human lives who face the fate of either being discarded or frozen indefinitely, violating the inherent dignity they possess by virtue of being human” and they called on

Governor Ivey “to lead with courage on an issue that holds such moral gravity.” (28)

Three days later, on in the evening of Wednesday, March 7, Governor Kay Ivey signed the bill that had just been passed by the Alabama Legislature with an overwhelming, bi-partisan majority: in the House the vote was 81 -12, and in the Senate the vote was 29-1. After signing the bill into law, Governor Ivey immediately released the following statement on X:

“The overwhelming support of SB 159 from the Alabama Legislature proves what we have been saying: Alabama works to foster a culture of life, and that certainly includes IVF. I am pleased to sign this important, short-term measure into law so that couples in Alabama hoping and praying to be parents can grow their families through IVF. IVF is a complex issue, no doubt, and I anticipate there will be more work to come, but right now, I am confident that this legislation will provide the assurances our IVF clinics need and will lead them to resume services immediately.

“Make no mistake about it, though, in the coming days, weeks and months, particularly as we are in the heat of a national election, we will hear a lot of political rhetoric around IVF. Let me say clearly: Alabama supports growing families through IVF. From protecting the unborn to supporting IVF, Alabama is proud we are a pro-life, pro-family state.” – Governor Kay Ivey (29)

Legislators on both sides of the aisle have repeatedly expressed concerns that “this is a really bad piece of legislation” that will surely invite lawsuits and constitutional challenges. In fact, a second “wrongful death of a minor” lawsuit has just recently been filed against the same Mobile clinic and is already challenging the very immunity that the Alabama legislature has just provided for IVF providers.

Most of the Alabama legislators realized this legislation was just a “temporary fix” – a band-aid -to reopen the IVF clinics and to allow them more time to prepare a better legislative solution as soon as possible. At a press conference called by the House Republican Caucus after the bill’s passage, the sponsor of the bill, Rep. Terri

Collin, R-Decatur, explained that finding the right solutions will require “a longer conversation than we can have in five days.” (30)

THE URGENT NEED FOR “EMBRYO PROTECTION” LAWS IN EVERY STATE

The Alabama Supreme Court is the first state in the nation to rule that frozen human embryos constitute children under state statute, by ruling that the constitutional provisions in the state’s 1872 Wrongful Death of a Minor Act and the state’s 2018 Sanctity of Life Act “apply to all children, born and unborn, without limitation” stating that it is “especially true where, as here, the people of Alabama have adopted a constitutional amendment directly aimed at stopping courts from excluding ‘unborn life’ from legal protection.” (31)

Chief Justice Parker concluded his legal opinion in this historic court ruling as follows:

“The people of Alabama have declared the public policy of this State to be that unborn life is sacred. We believe that each human being, from the moment of conception, is made in the image of God, created by Him to reflect his likeness. (...) All three branches are subject to a constitutional mandate to treat each unborn human life with reverence. Carving out an exception for the people in this case, small as they are, would be unacceptable to the People of this State, who have required us to treat every human being in accordance with the fear of a holy God who made them in His image. For these reasons, and for the reasons stated in the main opinion, I concur.” (32)

The Magisterium of the Catholic Church confirms the truth of Alabama’s historic ruling:

“The inalienable rights of the person must be recognized and respected by civil society and the political authority. These human rights depend neither on single individuals nor on parents; nor do they represent a concession made by society and the state; they belong to human nature and are

inherent in the person by virtue of the creative act from which the person took his origin. Among such fundamental rights one should mention in this regard every human being's right to life and physical integrity from the moment of conception until natural death.”

“The moment a positive law deprives a category of human beings of the protection which civil legislation out to accord them, the state is denying the equality of all before the law. When the state does not place its power at the service of each citizen, and in particular of the more vulnerable, the very foundations of a state based on law are undermined.... As a consequence of the respect and protection which must be ensured for the unborn child from the moment of conception, the law must provide appropriate penal sanctions for every deliberate violation of the child's rights.” (33)

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- (1) Supreme Court of Alabama, October Term, 2023-2024, SC-2022-0515, p 5. <https://publicportal-api.alappeals.gov/courts/68f021c4-6a44-4735-9a76-5360b2e8af13/cms/case/343D203A-B13D-463A-8176-C46E3AE4F695/docketentrydocuments/E3D95592-3CBE-4384-AFA6-063D4595AA1D> (accessed 2/24/24)
 - (2) Alanda Rocha, “University of Alabama Birmingham pauses IVF treatments after court ruling,” *Alabama Reflector*, February 21, 2024, <https://alabamareflector.com/2024/02/21/university-of-alabama-birmingham-pauses-ivf-treatments-after-court-ruling/> (accessed 3/10/2024).
 - (3) Supreme Court of Alabama, p 2.
 - (4) *Ibid.*, p 11.
 - (5) *Ibid.*, p 26.
 - (6) *Ibid.*, p 33.
 - (7) *Ibid.*, p 42.
 - (8) *Ibid.*, p 43.
 - (9) *Ibid.*, p 43.
 - (10) *Ibid.*, p 44.
 - (11) *Ibid.*, p 44.
 - (12) Richard M. Doerflinger, “Fact and Fiction in the Alabama Embryo Case,” *National Catholic Register*, March 10 – 23, 2024, Volume 100, No. 7, p 1.
 - (13) Daniel Payne/CNA, “After Alabama Supreme Court's Embryo Personhood Ruling, What Comes Next?” *National Catholic Register*, February 24, 2024, <https://www.ncregister.com/cna/after-alabama-supreme-court-s-embryo-personhood-ruling-what-comes-next> (accessed 2/27/24).
 - (14) *Ibid.*
 - (15) *Ibid.*

- (16) Press Release, “CMA Praises Alabama Supreme Court Decision Recognizing Right to Life of Embryos” *Catholic Medical Association*, February 29, 2024, <https://www.cathmed.org/media/press-releases/>
- (17) Kate Scanlon/OSV News, “Alabama Supreme Court rules frozen embryos are children under wrongful death law,” *America Magazine*, February 26, 2024, <https://www.americamagazine.org/politics-society/2024/02/22/alabama-supreme-court-ivf-abortion-247362>
- (18) Peter Pinedo/CNA, “Here’s what Trump, Biden, and the Catholic Church are saying about IVF,” *Catholic News Agency*, February 26, 2024, <https://www.catholicnewsagency.com/news/256918/here-s-what-trump-biden-and-the-catholic-church-are-saying-about-ivf>
- (19) Alabama Legislature HB 225 (accessed 3/9/2024) <https://www.legislature.state.al.us/pdf/SearchableInstruments/2024RS/HB225-int.pdf>
- (20) Alabama Legislature HB 159 (accessed 3/9/2024) <https://www.legislature.state.al.us/pdf/SearchableInstruments/2024RS/SB159-enr.pdf>
- (21) Press Release, “Support for Duckworth Bill to Protect IVF Access Grows after Alabama Supreme Court Ruling,” March 4, 2024 (accessed 3/11/2024). <https://www.duckworth.senate.gov/news/press-releases/support-for-duckworth-bill-to-protect-ivf-access-grows-after-alabama-supreme-court-ruling>
- (22) EWTN News, *National Catholic Register*, “Catholic Bishops Object to Senate IVF Bill, Warn Against Deaths of Preborn Children,” March 1, 2024, (accessed 3/8/2024) <https://www.ncregister.com/cna/catholic-bishops-object-to-senate-ivf-bill-warn-against-deaths-of-preborn-children>
- (23) United States Conference of Catholic Bishops, *Letter to Senators on the Access to Family Building Act*, February 28, 2024. https://www.usccb.org/resources/Letter_Access_to_Family_Building_Act_2024.pdf
- (24) EWTN, *ibid.*
- (25) USCCB, *ibid.*
- (26) EWTN, *ibid.*
- (27) Lila Rose *et al.*, Live Action, *Pro-Life Coalition Letter Opposing Alabama IVF Legislation*, March 4, 2024 (accessed 3/10/2024). <https://www.liveaction.org/wp-content/uploads/2024/03/Pro-Life-Coalition-Letter-on-Alabama-IVF.pdf>
- (28) Lila Rose, *ibid.*
- (29) Cf. Steve Ertelt, LifeNews.com, *Alabama Republican Governor Signs Law Protecting IVF*, March 7, 2024. <https://www.lifenews.com/2024/03/07/alabamas-republican-governor-signs-law-protecting-ivf/> (accessed 3/7/2024)
- (30) Alander Rocha, Alabama Reflector, *Alabama passes law to protect access to IVF treatments*, March 7, 2024 (accessed on 3/7/2024). <https://19thnews.org/2024/03/alabama-ivf-bill-legislature-approval/>
- (31) Cf. Peter Pinedo, Catholic News Agency, *Ibid.*,
- (32) Supreme Court of Alabama, *ibid.*, p 48.
- (33) *Catechism of the Catholic Church* n. 2273, citing *Donum vitae* III.

