

## Embryos as unborn children: the Alabama Supreme Court's ruling and its possible impact for legal rulings in other states



On February 16, 2024, the Alabama Supreme Court issued a landmark ruling, defining frozen embryos as “unborn children located outside of a biological uterus” (1). This judicial decree, enacted in response to the willful destruction of embryos at a storage facility, was to highlight that this act constituted more than mere property damage, signaling a significant legal shift. However, this decision has precipitated legal uncertainties surrounding the administration of in vitro fertilization (IVF) procedures, raising the potential for legal liabilities, and resulting in the temporary suspension of such services at numerous Alabama IVF facilities. In response, Alabama enacted legislation to shield medical professionals from liability in providing IVF services, influenced by advocacy from prominent state medical institutions. However, the potential for similar legal stances in other states, without protections for IVF practitioners, underscores the need for pre-emptive legal discourse to guide future adjudications.

The backdrop of this ruling is the 2022 decision by the Supreme Court of the United States to overturn *Roe v. Wade*, eliminating federal protection for abortion rights and thereby permitting states to redefine the legal onset of life, including the status of embryos. This seismic shift in jurisprudence has led to a legal mosaic across states regarding abortion rights, which tend to extend to reproductive rights and technologies.

Louisiana, for instance, has been navigating these murky waters since 1986, when it sought to reconcile IVF practices with the concerns of religious communities skeptical about the discarding of embryos inherent in IVF procedures. The resultant legislation permitted IVF but strictly prohibited the intentional destruction of embryos, designating any embryo that develops for 36 hours after fertilization as a “juridical person,” thereby protecting it from voluntary termination. Although Louisiana’s legislation offers a modicum of rights to embryos, the ruling by Alabama’s Supreme Court extends this position by equating embryos to unborn children, thereby amplifying potential legal repercussions for both intentional and unintentional harm to embryos.

To mitigate the immediate fallout from this ruling, Alabama enacted legislation (2) designed to protect medical professionals from liability in the provision of IVF services. This move, prompted by advocacy from medical institutions and patient associations, is, however, a temporary salve. The Governor of Alabama has indicated that this legislative intervention is provisional and aimed at facilitating the continuation of IVF practices while leaving the contentious embryo status unchanged. An amendment proposal to the Alabama Constitution, seeking to clarify that extrauterine embryos do not constitute “unborn life” or “unborn children,” remains pending, highlighting the ongoing legislative and ethical dilemmas surrounding IVF practices.

This Alabama ruling, by expanding the scope of the Wrongful Death of a Minor Act, introduced significant implications for individuals seeking IVF treatments and for the medical professionals who facilitate these procedures. Potential legal actions stemming from embryo loss, nonimplantation, or early pregnancy loss, common occurrences in the IVF process, now risk being construed as wrongful death or battery. Nonimplantation rates extend from 35% in high-quality euploid blastocysts (3) up to 75% in untested blastocysts (4) and are not adequately considered in the Alabama ruling, complicating the legal perspective for IVF practitioners in the case of failed implantation of the embryos. Moreover, these failures could stem from inherent abnormalities in the endometrium, the embryos, or the performed transfer characteristics and are beyond current diagnostic capabilities.

Bioethical discourse has long debated the onset of life, with this judicial decision implicitly endorsing a specific viewpoint, which could infringe on the reproductive autonomy of individuals and couples, potentially conflicting with their personal, moral, or religious convictions. Although states have exerted positions that permit the criminalization of early-term medical abortions and this is within the State’s legal prerogative, this has never been applied to preimplanted embryos.

Decisions concerning the disposition of surplus cryopreserved embryos are personal and vary between individuals and couples. They are linked to the symbolic representations attributed to embryos (5) and may also influence cryopreservation and transfer protocols. Consequently, patients in certain jurisdictions may not access the most advanced standards of care. Currently, the practice of single embryo transfer coupled with the cryopreservation of surplus embryos represents the optimal strategy for minimizing the risk of multiple pregnancies and associated complications. Nonetheless, a shift toward double embryo transfers may emerge as a strategy to decrease the inventory of cryopreserved embryos.

The complexity of IVF practice is poised to increase as the interests of patients’ potentially conflicts with legal stipulations, engendering tensions between fertility specialists and their patients. The Alabama Supreme Court’s ruling intensifies these decision-making challenges, introducing legal and psychological strains that could permeate the management and potential cryopreservation of excess embryos.

Furthermore, the ruling carries significant financial implications, effectively prohibiting embryo disposal and thereby inflating the costs tied to indefinite cryopreservation. Such escalated expenses could render IVF with the required cryopreservation financially untenable for many. Another scenario is that the IVF facilities will absorb these costs and impact the overall affordability of IVF services for all. In response, IVF providers in Louisiana have adapted by organizing the transfer of embryos to states permitting their disposal, albeit at additional physical, emotional, and financial costs. The legality of this transfer can also be debated.

Preimplantation genetic testing, aimed at identifying embryos with genetic anomalies for discard, now encompasses further legal issues. Despite the lower likelihood of such

embryos leading to successful pregnancies, the mandate for their preservation engenders ethical concerns, with the law possibly suggesting that they need to be maintained despite of genetic issues. Moreover, the procedure of trophoctoderm biopsy, which risks diminishing embryo quality, might inadvertently trigger legal actions for involuntary embryo harm or manslaughter.

IVF's goal is to select the most viable embryo for a successful, healthy live birth. Under the Alabama ruling, it is now laden with legal and ethical risks, including the risk of litigation under wrongful death statutes. The multifaceted steps in IVF, all involving selection and risk to the embryos, may expose fertility specialists to civil or criminal infractions for unintended harm to what may now legally be considered an unborn child. The potential legal equation of embryonic developmental failure with the premature death of an unborn child presents medical or even legal incongruences, given the substantial discrepancies between the natural trajectories of embryos and live births as evidenced by scientific research.

In conclusion, the Alabama Supreme Court's ruling recognizing frozen embryos as unborn children, facilitated by the US Supreme Court's overturning of *Roe v. Wade*, catalyzes profound ethical dilemmas impacting patients' personal rights, embryo moral status, and the operational dynamics for IVF practitioners and clinics. This may escalate IVF expenses and restrict service availability, consequently diminishing birth rates. Despite Alabama's expedited legislative intervention to safeguard IVF practitioners and resume embryo transfers in fertility clinics, the persisting legal ambiguities remain, and other states may adopt the same ruling without analogous boundaries. The ongoing debate over embryo status during the IVF process underscores the imperative for legislative clarity to ensure the viability of IVF practices and potentially enhance birth outcomes in Alabama.

## CRediT Authorship Contribution Statement

**Perrine Ginod:** Conceptualization, Writing – original draft.  
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## Declaration of Interests

P.G. has nothing to disclose. M.H.D. has nothing to disclose.

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## REFERENCES

1. Supreme Court of Alabama. Available at: <https://cases.justia.com/alabama/supreme-court/2024-sc-2022-0579.pdf?ts=1708115406>. Accessed March 1, 2024.
2. HB237 engrossed. Available at: <https://www.legislature.state.al.us/pdf/SearchableInstruments/2024RS/HB237-eng.pdf>. Accessed March 13, 2024.
3. Pirtea P, De Ziegler D, Tao X, Sun L, Zhan Y, Ayoubi JM, et al. Rate of true recurrent implantation failure is low: results of three successive frozen euploid single embryo transfers. *Fertil Steril* 2021;115:45–53.
4. Haviland MJ, Murphy LA, Modest AM, Fox MP, Wise LA, Nillni YI, et al. Comparison of pregnancy outcomes following preimplantation genetic testing for aneuploidy using a matched propensity score design. *Hum Reprod* 2020;35:2356–64.
5. Bruno C, Dudkiewicz-Sibony C, Berthaut I, Weil E, Brunet L, Fortier C, et al. Survey of 243 ART patients having made a final disposition decision about their surplus cryopreserved embryos: the crucial role of symbolic embryo representation. *Hum Reprod* 2016;31:1508–14.