

*The Alabama Supreme Court Has A
Chat with America About IVF*

**ASLME Health Law Professors Conference
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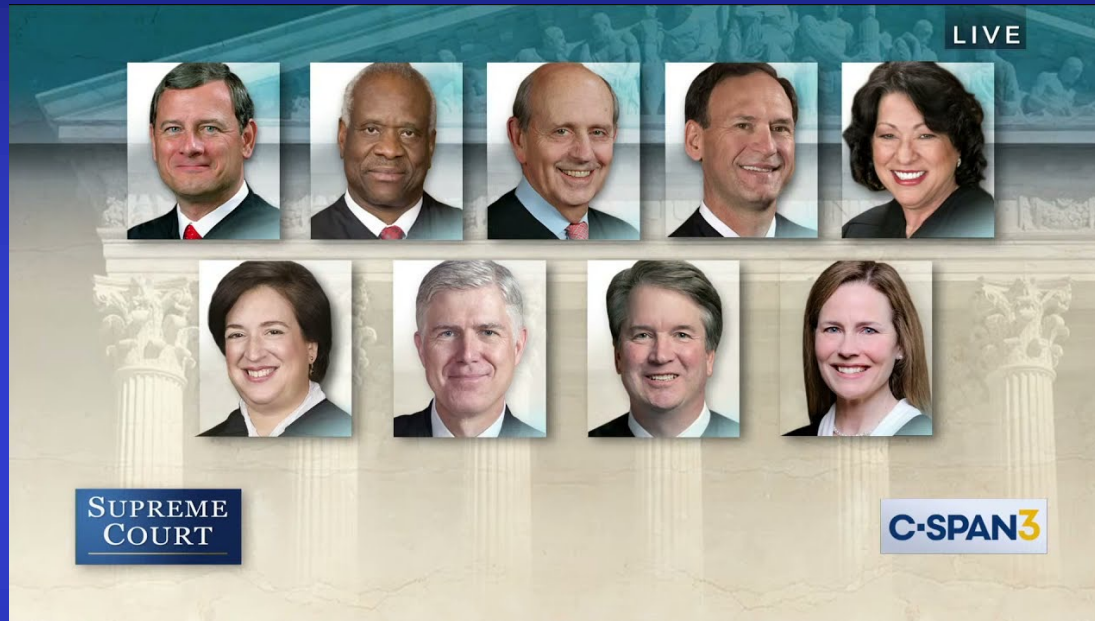


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Dobbs v. Jackson Women's Health Resets Entire Landscape



- Overturns *Roe* and *Casey*, abrogates undue burden analysis, elevates life of the unborn over interests of the pregnant person
- Abortion rights not in U.S. constitution, not rooted in nation's history and traditions, not essential to "ordered liberty"
- Permits states to restrict abortion without limitation
- No express or implied impact on ART but no protection either

A New Era in Embryo Protection?

LePage v. Center for Reproductive Medicine (Ala. 2024)

- Feb. 2024 - Alabama Sup. Ct. interprets 1872 wrongful death of a minor statute to apply to frozen embryos
- Allows claims for punitive damages, possible criminal charges
- Refers to “cryogenic nursery” and “extrauterine children”
- Court invokes ectogenesis as a rationale for rejecting in-utero std.
- Clinical implications were immediate and dramatic, closing IVF clinics



Post-Script Still Unfolding: The Alabama Response

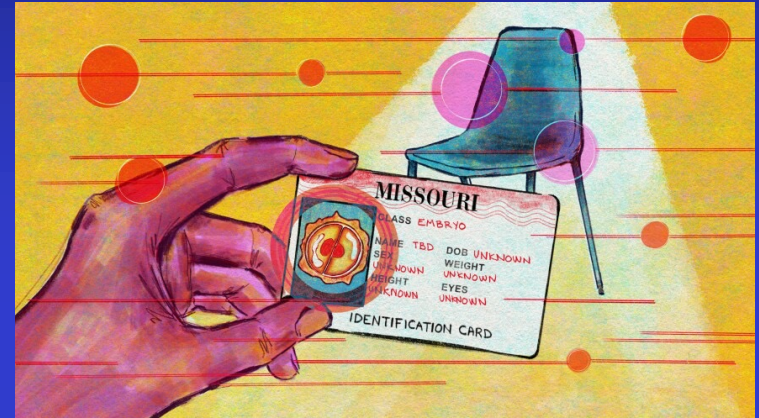


- March 2024, Gov. Ivey signed new law providing “civil and criminal immunity for death or damage to an embryo to any individual or entity when providing or receiving services related to in vitro fertilization”
- Provides criminal immunity for manufacturers of products used in IVF treatment if embryos are destroyed, though not civil immunity
- Manufacturers of goods used in IVF found responsible would be required to compensate for damages, based on the cost of IVF treatment
- Most treatment has resumed; at least one clinic announced closure at the end of this year.



Alabama Decision Follows Decades of Jurisprudence on Embryo Status under Law

- Courts have addressed legal status of the IVF embryo for decades.
- *Davis v. Davis* (Tenn. 1992) brought us, “embryos are neither persons or property, but occupy an interim category that entitles them to special respect because of their potential for human life.”
- Since early 1990s, numerous state courts have considered and rejected application of wrongful death statutes to embryos.
- Key impact is conversion of claim from tort (negligence) to family law (best interests of the child standard)



Could a “Best Interests Standard” Impact Standard of Care IVF Practice?

- **Cryopreservation** contrary to or in support of an embryo’s best interest?
- **Embryo discard** for any reason highly questionable
- **Transfer of multiple embryos** required in each cycle?
- **Preimplantation Genetic Testing** unlikely to meet standard, given lack of treatment for genetic anomalies at the embryo stage
- **Selective Reduction of Multiple Pregnancy** shift focus from pregnancy-saving to fetal-destruction



Other Legislative Activity in Response to *Dobbs and LePage*

- Several states enact “carve-out” protection for IVF in restrictive **abortion laws** (ex. KS, IN)
- Select state **personhood laws** limit application to embryos in the womb (ex. AK, GA, WY)
- Post-Alabama decision provoked states to enact **limited liability laws** for IVF providers and ancillary actors in the chain of reproductive medicine (ex. KY enacts criminal immunity for “medical mistakes”)
- Congress debates protection and funding for IVF (June 3, 2024 Senators introduce Right to IVF Act)



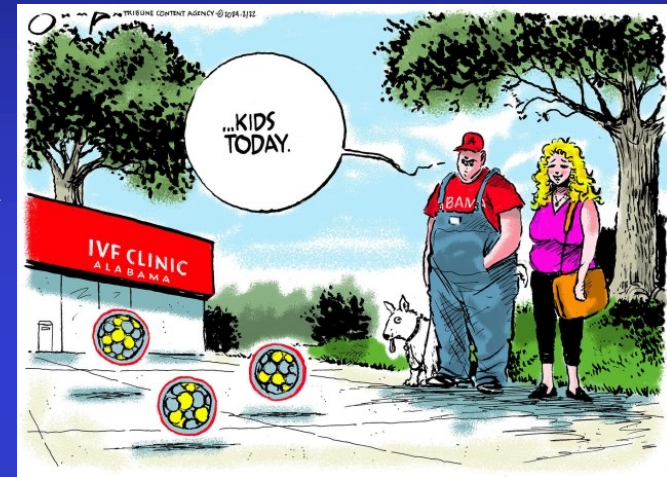
What Are the Benefits and Drawbacks of This Reactive Approach to Protecting IVF?

- **Benefits**

- Treatments resumes
- Providers, clinics, manufacturers protected from legal liability
- May provide some cost-savings for patients
- Popular support for IVF well-established

- **Drawbacks**

- Liability laws skirt foundational issue of embryo status under law
- Fail to adopt situational relativism for law applied to “unborn life”
- May deprive patients of recovery for legitimate claims
- Worsens distributive justice misalignment in abortion v. IVF laws



Thank you for this opportunity