

**COMMENTARY ON THE SUPREME COURT OF ALABAMA’S OPINION OF  
FEBRUARY 16<sup>TH</sup>, 2024, SC-2022-0515, SC-2022-0579**

With the opinion of February 16<sup>th</sup>, 2024, the Supreme Court of Alabama ruled that vitrified embryos, i.e., frozen during the in vitro fertilization (IVF) process and, therefore, located outside the human body, must be considered as “extrauterine children” under the Alabama’s Wrongful Death of a Minor Act (1872), which allows parents of a deceased child to obtain damages for the death of their child.

The case concerned the destruction of some vitrified embryos, preserved in a cryobiological room at the Center of Reproductive Medicine, P.C. (Center), an operating facility within the Mobile Infirmary Medical Center hospital, by a patient hospitalized in the latter. The individual had managed to access the fertility center through an uncontrolled entrance and, once in the cryobiological room, had removed a series of embryos from the tanks. However, the extremely low temperature to which the embryos must be subjected to be properly preserved burned the hands of the patient, who lost grip of the embryos, causing them to fall to the floor and be destroyed.

The plaintiffs therefore alleged the responsibility of the Center and of the Association owning the Hospital and the Center itself, the Mobily Infirmary Association, bringing to the attention of the Court two alternative requests: to apply the Alabama’s Wrongful Death of a Minor Act and, only secondarily, if the Court did not equate an extra-uterine embryo with a child but instead classified it as “property”, to accept the common law claims alleging negligence and wantonness of the resisting parties.

The Wrongful Death of a Minor Act allows parents of a deceased child to obtain damages when the death of the minor child is caused by another’s wrongful act, omission, or negligence. The Act does not define what should be understood by the word “child” or “minor child” but the Alabama Supreme Court, in the case of *Mack v. Carmack* 79 So. 3d 597 (Ala. 2011), had already clarified that an unborn child qualifies as a “minor child” within the meaning of the aforementioned law regardless of its ability to survive outside the mother’s womb and regardless of its stage of development<sup>1</sup>. Alabama’s criminal-homicide laws, as amended by the Brody Act of 2006, expressly qualify the unborn child as a person, regardless of its “viability”, i.e., having reached a stage of development that allows it to live under normal conditions outside the mother’s womb. Similarly, the Human Life Protection Act, enacted in 2019, defines the unborn child in the same terms as the Brody Act defines a “person”, namely a living being, including the unborn child in the mother’s womb, regardless of its stage of development and regardless of its viability.

The issue addressed in the opinion under consideration therefore concerned the possibility of qualifying embryos located outside the mother’s womb in the same sense as embryos waiting to be implanted inside it, according to the well-known IVF procedure.

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<sup>1</sup> The Wrongful Death of a Minor Act addressed a “defect of the common law” under which the possibility of bringing a lawsuit for a wrongdoing or harm to a person died with the person offended, pursuant to the maxim “*actio personalis moritur cum persona.*”

The trial court had dismissed the plaintiff's claims, denying that cryopreserved embryos could be included in the definition of "person" or "child". The Alabama Supreme Court instead ruled that the Wrongful Death of a Minor Act applies to any unborn child, without any exceptions. The Court based its opinion on the textual interpretation of the term "child" contained in the law, considering the common sense of the word and referring, for this purpose, to a series of definitions contained in various dictionaries, including some dating back to the same period of the enactment of the Wrongful Death of a Minor Act. Therefore, there is no ambiguity regarding the meaning to be attributed to the word "child", which necessarily includes embryos located outside the mother's body.

Secondly, the Court proceeds by stating that, even if the word "child" were to present some margins of ambiguity, in any case, this ambiguity would be resolved by the Alabama Constitution which, in Article I, § 36.06(b), "recognizes, declares, and affirms that it is the public policy of this State to ensure the protection of the rights of the unborn child in all manners measures lawful and appropriate." According to the Court, this Section of the Constitution, entitled "Sanctity of Unborn Life," operates as a constitutionally imposed hermeneutical canon, which directs courts to interpret ambiguous statutes in a manner that ensures the protection of the rights of the unborn equal to the rights granted to born children.

In his specially concurring opinion, the President of the Alabama Supreme Court, Tom Parker, provided his personal and different rationale for the majority's decision, focusing particularly on the meaning of "sanctity," contained in the Constitution but not specifically defined there. He argued that this term, far from being equitable to the secular term "inviolability," instead expresses the will of the People of Alabama to recognize human life as sacred as a gift from God, consistent with what is stated in the preamble, which invokes the favour and guidance of Almighty God. As a gift from God, life is an inherent right of every individual and carries with it the consequent general principle that it cannot be wilfully taken away without just cause. The President extensively references the book of Genesis, Thomas Aquinas, and Calvin, to support the claim that the principle in question has deep roots, dating back to the creation of man "in the image of God." Human beings are distinguished from every other thing created by God in that they bear His image, possess a natural inclination to understand and love God, imitating Him to the maximum extent that God knows and loves Himself.

Therefore, the creation of man in the image of God directs man towards his ultimate end, which is to know and love Him. Consequently, killing a man is equivalent to defacing and destroying the image of God, causing harm not only to the victim but also and especially to God himself.

According to the President, the above teleological view of the sanctity of life, adopted by the People of Alabama, applies to the human life of unborn children no less than it does to all other human lives, since even before birth and regardless of the location of the unborn child, all human beings bear the image of God, and their lives cannot be destroyed without erasing His glory.

Furthermore, since, according to the President, § 36.06 represents a constitutional declaration concerning public policy, it has the effect of circumscribing the discretion of the legislature regarding policy choices concerning those who are not

yet born, so any legislative or executive act that contravenes the sanctity of the lives of the unborn is potentially subject to a question of constitutional legitimacy under the Constitution of Alabama. All three branches of government are subject to the constitutional mandate to treat every life yet to be born with respect and reverence as an image of God, and any exception, however small, to this imperative would be unacceptable to the people of the State of Alabama.

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