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IN THE SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: LIMITING GOVERNMENT INTERFERENCE WITH ABORTION	Case No.: SC2023-1392

NOTICE OF SUPPLEMENTAL AUTHORITY

Pursuant to Fla. R. App. P. 9.225, Opponents Florida Voters Against Extremism, PC ("FVAE") and Liberty Counsel, Inc. submits as supplemental authority the Opinion of the Supreme Court of Alabama in *LePage v. The Center for Reproductive Medicine, P.C.*, No. SC-2022-0515 (Ala. Feb. 16, 2024) (EXHIBIT A), which is directly related to questions raised during the February 7, 2024, oral argument by Chief Justice Carlos G. Muñiz regarding whether the Ballot Summary should apprise voters that the Proposed Amendment may impact Art. I, § 2 of the Florida Constitution respecting an unborn child, including legal rights of an unborn child in law.

In *LePage*, the Supreme Court of Alabama faced the question of whether an unborn child being kept in a cryogenic nursery is entitled to status as a person under Alabama's Wrongful Death of a Minor Act. (Ex. A, Slip Op. at 1-2 ("The central question presented in these

consolidated appeals, which involve the death of embryos kept in a cryogenic nursery, 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.").) The Supreme Court of Alabama held that such unborn children were entitled to status as a person. (*Id.* at 2.) "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.*" (*Id.* (emphasis added).) "[T]he relevant statutory text is clear: the Wrongful Death of a Minor Act applies on its face to all unborn children, without limitation." (*Id.* at 7.) (*See also id.* at 11 ("Unborn children are 'children' under the Act, without exception based on developmental stage, physical location, or any other ancillary characteristics.").)

Directly relevant to Chief Justice Muñiz's questions, the Alabama Supreme Court noted that an unborn child qualifies as a human life, a human being, and a person.

> All parties to these cases, like all members of this Court, agree that an unborn child is a genetically unique human being whose life begins at fertilization and ends at death. The parties further agree that an unborn child usually qualifies as a "human life," "human being," or "person," as

> those words are used in ordinary conversation and in the text of Alabama's wrongful-death statutes. That is true, as everyone acknowledges, throughout all stages of an unborn child's development, regardless of viability.

(*Id.* at 8.) (*See also id.* at 12 ("[T]he ordinary meaning of 'child' includes children who have not yet been born.").)

The Alabama Supreme Court held that its constitutional and statutory protection for unborn children was not contingent on viability. "[P]reviable unborn children qualify as 'children' under the Wrongful Death of a Minor Act." (*Id.* at 18 (citing *Mack v. Carmack*, 79 So.3d 597, 611 (Ala. 2011)).) (*See also id.* at 22 ("the text of the Wrongful Death of a Minor Act is sweeping and unqualified. It applies to all children, born and unborn, *without limitation*." (emphasis added)).) "[T]he People of this State have adopted a Constitutional amendment directly aimed at stopping courts from excluding "unborn life" from legal protection." (*Id.*)

Chief Justice Parker noted, "as a constitutional statement of public policy, § 36.06 circumscribes the Legislature's discretion to determine public policy with regard to unborn life. Accordingly, any legislative (or executive) act that contravenes the sanctity of unborn life is potentially subject to a constitutional challenge under the

Alabama Constitution." (Ex. A, Slip Op. at 42 (Parker, C.J., concurring specially).)

> Putting this all together, § 36.06 does much more than simply declare a moral value that the People of Alabama like. Instead, this constitutional provision tilts the scales of the law in favor of protecting unborn life. Although § 36.06 may not resolve every case involving unborn life, if reasonable minds could differ on whether a common-law rule, a statute, or even a constitutional provision protects life, § 36.06 instructs the Alabama government to construe the law in favor of protecting the unborn.

(*Id.* at 42.)

Chief Justice Parker concluded,

> The People of Alabama have declared the public policy of this State to be that unborn human 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. It is as if the People of Alabama took what was spoken of the prophet Jeremiah and applied it to every unborn person in this state: "Before I formed you in the womb I knew you, Before you were born I sanctified you." Jeremiah 1:5 (NKJV 1982). All three branches of government 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 were, 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.

(*Id.* at 48.)

Justice Shaw likewise noted that the meaning of child extending to unborn children was well-settled. (Ex. A, Slip Op. at 49 (Shaw, J.,

concurring specially) ("I agree with the main opinion that the meaning of the word 'child' for purposes of Alabama law is well settled and included an unborn child [and] the term 'minor child' includes an unborn child with no distinction between in vitro or in utero.").)

Respectfully submitted,

Dated: February 19, 2024

/s/ Mathew D. Staver

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EXHIBIT A

Rel: February 16, 2024

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

SC-2022-0515

James LePage and Emily LePage, individually and as parents and next friends of two deceased LePage embryos, Embryo A and Embryo B; and William Tripp Fonde and Caroline Fonde, individually and as parents and next friends of two deceased Fonde embryos, Embryo C and Embryo D

v.

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

Appeal from Mobile Circuit Court
(CV-21-901607)

SC-2022-0579

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

v.

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

Appeal from Mobile Circuit Court
(CV-21-901640)

MITCHELL, Justice.[1]

This Court has long held that unborn children are "children" for purposes of Alabama's Wrongful Death of a Minor Act, § 6-5-391, Ala. Code 1975, a statute that allows parents of a deceased child to recover punitive damages for their child's death. The central question presented in these consolidated appeals, which involve the death of embryos kept

[1]These consolidated appeals were originally assigned to another Justice on this Court; they were reassigned to Justice Mitchell on December 15, 2023.

in a cryogenic nursery, 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.

Facts and Procedural History

The plaintiffs in these consolidated appeals are the parents of several embryonic children, each of whom was created through in vitro fertilization ("IVF") and -- until the incident giving rise to these cases -- had been kept alive in a cryogenic nursery while they awaited implantation. James LePage and Emily LePage are the parents of two embryos whom they call "Embryo A" and "Embryo B"; William Tripp Fonde and Caroline Fonde are the parents of two other embryos called "Embryo C" and "Embryo D"; and Felicia Burdick-Aysenne and Scott Aysenne are the parents of one embryo called "Baby Aysenne."

Between 2013 and 2016, each set of parents went to a fertility clinic operated by the Center for Reproductive Medicine, P.C. ("the Center"), to undergo IVF treatments. During those treatments, doctors were able to

help the plaintiffs conceive children by joining the mother's eggs and the father's sperm "in vitro" -- that is, outside the mother's body. The Center artificially gestated each embryo to "a few days" of age and then placed the embryos in the Center's "cryogenic nursery," which is a facility designed to keep extrauterine embryos alive at a fixed stage of development by preserving them at an extremely low temperature. The parties agree that, if properly safeguarded, an embryo can remain alive in a cryogenic nursery "indefinitely" -- several decades, perhaps longer.

The plaintiffs' IVF treatments led to the creation of several embryos, some of which were implanted and resulted in the births of healthy babies. The plaintiffs contracted to have their remaining embryos kept in the Center's cryogenic nursery, which was located within the same building as the local hospital, the Mobile Infirmary Medical Center ("the Hospital"). The Hospital is owned and operated by the Mobile Infirmary Association ("the Association").

The plaintiffs allege that the Center was obligated to keep the cryogenic nursery secured and monitored at all times. But, in December 2020, a patient at the Hospital managed to wander into the Center's fertility clinic through an unsecured doorway. The patient then entered

the cryogenic nursery and removed several embryos. The subzero temperatures at which the embryos had been stored freeze-burned the patient's hand, causing the patient to drop the embryos on the floor, killing them.

The plaintiffs brought two lawsuits against the Center and the Association. The first suit was brought jointly by the LePages and the Fondes; the second was brought by the Aysennes. Each set of plaintiffs asserted claims under Alabama's Wrongful Death of a Minor Act, § 6-5-391. In the alternative, each set of plaintiffs asserted common-law claims of negligence (in the LePages and Fondes' case) or negligence and wantonness (in the Aysennes' case), for which they sought compensatory damages, including damages for mental anguish and emotional distress. The plaintiffs specified, however, that their common-law claims were pleaded "in the alternative, and only [apply] should the Courts of this State or the United States Supreme Court ultimately rule that [an extrauterine embryo] is not a minor child, but is instead property." In addition to those claims, the Aysennes brought breach-of-contract and bailment claims against the Center.

The Center and the Association filed joint motions in each case

asking the trial court to dismiss the plaintiffs' wrongful-death and negligence/wantonness claims against them in accordance with Rules 12(b)(1) and 12(b)(6), Ala. R. Civ. P. The trial court granted those motions. In each of its judgments, the trial court explained its view that "[t]he cryopreserved, in vitro embryos involved in this case do not fit within the definition of a 'person'" or "'child,'" and it therefore held that their loss could not give rise to a wrongful-death claim.

The trial court also concluded that the plaintiffs' negligence and wantonness claims could not proceed. Specifically, the court reasoned that, to the extent those claims sought recovery for the value of embryonic children, the claims were barred by Alabama's longstanding prohibition on the recovery of compensatory damages for loss of human life. And to the extent the claims sought emotional-distress damages, the trial court said that they were barred by the traditional limits to Alabama's "zone of danger test," which "limits recovery for emotional injury only to plaintiffs who sustained a physical injury … or were placed in immediate risk of physical harm …."

The trial court's judgments disposed entirely of the LePages' and the Fondes' claims, and left the Aysennes with only their breach-of-

contract and bailment claims. The Aysennes asked the trial court to certify its judgment as final under Rule 54(b), Ala. R. Civ. P., which the trial court did. Both sets of plaintiffs appealed.

Standard of Review

We review a trial court's judgment granting a motion to dismiss de novo, without any presumption of correctness. Hawkins v. Ivey, 365 So. 3d 1058, 1060 (Ala. 2022).

Analysis

The parties to these cases have raised many difficult questions, including ones about the ethical status of extrauterine children, the application of the 14th Amendment to the United States Constitution to such children, and the public-policy implications of treating extrauterine children as human beings. But the Court today need not address these questions because, as explained below, the relevant statutory text is clear: the Wrongful Death of a Minor Act applies on its face to all unborn children, without limitation. That language resolves the only issue on appeal with respect to the plaintiffs' wrongful-death claims and renders moot their common-law negligence and wantonness claims.

A. Wrongful-Death Claims

Before analyzing the parties' disagreement about the scope of the Wrongful Death of a Minor Act, we begin by explaining some background points of agreement. All parties to these cases, like all members of this Court, agree that an unborn child is a genetically unique human being whose life begins at fertilization and ends at death. The parties further agree that an unborn child usually qualifies as a "human life," "human being," or "person," as those words are used in ordinary conversation and in the text of Alabama's wrongful-death statutes. That is true, as everyone acknowledges, throughout all stages of an unborn child's development, regardless of viability.

The question on which the parties disagree is whether there exists an unwritten exception to that rule for unborn children who are not physically located "in utero" -- that is, inside a biological uterus -- at the time they are killed. The defendants argue that this Court should recognize such an exception because, they say, an unborn child ceases to qualify as a "child or "person" if that child is not contained within a biological womb.

The plaintiffs, for their part, argue that the proposed exception for extrauterine children would introduce discontinuity within Alabama law. They contend, for example, that the defendants' proposed exception would deprive parents of any civil remedy against someone who kills their unborn child in a "partial-birth" posture -- that is, after the child has left the uterus but before the child has been fully delivered from the birth canal -- despite this State's longstanding criminal prohibition on partial-birth abortion, see Ala. Code 1975, § 26-23-3.

The plaintiffs also argue that the defendants' proposed exception would raise serious constitutional questions. For instance, one latent implication of the defendants' position -- though not one that the defendants seem to have anticipated -- is that, under the defendants' test, even a full-term infant or toddler conceived through IVF and gestated to term in an in vitro environment would not qualify as a "child" or "person," because such a child would both be (1) "unborn" (having never been delivered from a biological womb) and (2) not "in utero."[2] And if such

[2]Until recently, there had been a longstanding ethical norm against artificially gestating human embryos past 14 days of development. Henry T. Greely, The 14-Day Embryo Rule: A Modest Proposal, 22 Hous. J. Health L. & Pol'y 147 (2022). But that norm is wavering, and there is currently nothing stopping "researchers from allowing ex vivo [that is,

children were not legal "children" or "persons," then their lives would be unprotected by Alabama law. The plaintiffs argue that this sort of unequal treatment would offend the Equal Protection Clause of the 14th Amendment to the United States Constitution, which prohibits states from withholding legal protection from people based on immutable features of their birth or ancestry. See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 208 (2023) ("'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" (citations omitted)).[3]

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extrauterine] human embryos to develop for eight or nine weeks post-fertilization .... Or to viability .... Or, for that matter, to 38 weeks post-fertilization and full term." Id. at 154-55; see also Kirstin R.W. Matthews & Daniel Morali, National Human Embryo and Embryoid Research Policies: A Survey of 22 Top Research-intensive Countries, 15 Regenerative Med. 1905 (2020) ("While the USA was the first to propose the 14-day limit, the limit was never passed as a federal law."). There are, of course, practical limitations on developing extrauterine embryos to term, but those limitations are shrinking each year due to "technological advances." See Matthews & Morali, 15 Regenerative Med. at 1905.

[3]In his dissenting opinion, Justice Cook appears to concede that the life of a fully developed child who was conceived and gestated in vitro would not be protected under his and the defendants' reading of the Wrongful Death of a Minor Act. See ___ So. 3d at ____ n.55 (arguing that "the Legislature" would have to intervene to protect the lives of any

These are weighty concerns. But these cases do not require the Court to resolve them because, as explained below, neither the text of the Wrongful Death of a Minor Act nor this Court's precedents exclude extrauterine children from the Act's coverage. Unborn children are "children" under the Act, without exception based on developmental stage, physical location, or any other ancillary characteristics.

1. The Text of the Wrongful Death of a Minor Act Applies to All Children, Without Exception

First enacted in 1872, the Wrongful Death of a Minor Act allows the parents of a deceased child to bring a claim seeking punitive damages "[w]hen the death of a minor child is caused by the wrongful act, omission, or negligence of any person," provided that they do so within six months of the child's passing. § 6-5-391(a). The Act does not define either "child" or "minor child," but this Court held in Mack v. Carmack, 79 So. 3d 597 (Ala. 2011), that an unborn child qualifies as a "minor child" under the Act, regardless of that child's viability or stage of development. Id. at 611. We reaffirmed that conclusion in Hamilton v. Scott, 97 So. 3d 728 (Ala. 2012), explaining that "Alabama's wrongful-death statute

children created with these "future technologies"). Justice Cook does not, however, discuss the constitutional implications of that position.

allows an action to be brought for the wrongful death of any unborn child." Id. at 735.

None of the parties before us contest the holdings in Mack and Hamilton,[4] and for good reason: the ordinary meaning of "child" includes children who have not yet been born. "This Court's most cited dictionary defines 'child' as 'an unborn or recently born person,'" Ex parte Ankrom, 152 So. 3d 397, 431 (Ala. 2013) (Shaw, J., concurring in part and concurring in the result) (citing Merriam-Webster's Collegiate Dictionary

[4]Justice Cook raises several novel arguments, none of which were briefed or mentioned by the parties, in support of his view that "the public meaning of 'minor child' as used in the Wrongful Death [of a Minor] Act did not include an unborn infant." ___ So. 3d at ____ (Cook, J., dissenting). If Justice Cook were correct on that point, then it would mean that Mack erred by interpreting the Act to protect unborn children. For the reasons given in this section of the opinion, we are not persuaded that the unborn were excluded from the original meaning of the term "child." But even if Justice Cook were correct on that point, the Court would still apply Mack's definition because, as Justice Cook himself acknowledges, no party has challenged the Mack line of cases. See id. at ___ (Cook, J., dissenting) (emphasizing that this Court does not overrule precedent unless asked to do so by the parties and explaining that "the parties [here] have neither asserted that the holdings or reasoning in either Mack or Stinnett [v. Kennedy, 232 So. 3d 202 (Ala. 2016),] are wrong, nor have they asked us to overrule those decisions"). We are perplexed by Justice Cook's insistence that we have not given Mack due deference when the bulk of his dissent is animated by the view that Mack was wrongly decided and that, contrary to its holding, unborn children are not "children" under the Act after all.

214 (11th ed. 2003)), and all other mainstream dictionaries are in accord. See, e.g., 3 The Oxford English Dictionary 113 (2d ed. 1989) (defining "child" as an "unborn or newly born human being; foetus, infant"); Webster's Third New International Dictionary 388 (2002) (defining "child" as "an unborn or recently born human being"). There is simply no "patent or latent ambiguity in the word 'child'; it is not a term of art and contains no inherent uncertainty." Ankrom, 152 So. 3d at 431 (Shaw, J., concurring in part and concurring in the result).

The parties have given us no reason to doubt that the same was true in 1872, when the Wrongful Death of a Minor Act first became law. See Act No. 62, Ala. Acts 1871-72 (codified at § 2899, Ala. Code 1876). Indeed, the leading dictionary of that time defined the word "child" as "the immediate progeny of parents" and indicated that this term encompassed children in the womb. Noah Webster et al., An American Dictionary of the English Language 198 (1864) ("[t]o be with child [means] to be pregnant").[5] And Blackstone's Commentaries, the leading

[5]As Justice Cook points out, this entry goes on to explain that the term "child" is "applied to infants from their birth; but the time when they cease ordinarily to be so called, is not defined by custom." ___ So. 3d at ____ (Cook, J., dissenting). Justice Cook believes that this language indicates that infants prior to birth were not considered "children." We

authority on the common law, expressly grouped the rights of unborn children with the "Rights of Persons," consistently described unborn children as "infant[s]" or "child[ren]," and spoke of such children as sharing in the same right to life that is "inherent by nature in every individual." 1 William Blackstone, Commentaries on the Laws of England 125-26.[6] Those expressions are in keeping with the United

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disagree. The language quoted by Justice Cook contrasts newborns with older children in order to make the point that there is no clear-cut time at which a young person transitions from childhood to adulthood; it does not indicate that infants were considered something other than children prior to their birth, as the definition elsewhere makes clear when it describes a pregnant woman as being "with child." Another definition on that same page further drives home the point that unborn children are "children" when it describes "childbearing" as the act of "bearing children" in the womb.

[6]It is true, as Justice Cook emphasizes, that the common law spared defendants from criminal-homicide liability for killing an unborn child unless the prosecution could prove that the child had been "born alive" before dying from its injuries. But the criminal law has always been "out of step with the treatment of prenatal life in other areas of law," in that it generally prioritizes lenity towards the accused over the otherwise applicable "'civil rights'" of unborn children. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 247 (2022) (citation omitted). Accordingly, the born-alive safe harbor appears to have operated primarily as an evidentiary rule rather than as a substantive limitation on personhood. Joanne Pedone, Filling the Void: Model Legislation for Fetal Homicide Crimes, 43 Colum. J. L. & Soc. Probs. 77, 82 (2009) (explaining that the function of the born-alive rule was "to make sure the government established causation before obtaining a homicide conviction," during an era in which "'the state of medical science'" was primitive and in which

States Supreme Court's recent observation that, even as far back as the 18th century, the unborn were widely recognized as living persons with rights and interests. See Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 246-48 (2022).

Courts interpreting statutes are required to give words their "'"natural, ordinary, commonly understood meaning,"'" unless there is some textual indication that an unusual or technical meaning applies. Swindle v. Remington, 291 So. 3d 439, 457 (Ala. 2019) (citations omitted). Here, the parties have not pointed us to any such indication, which reflects the overwhelming consensus in this State that an unborn child is just as much a "child" under the law as he or she is a "child" in everyday conversation.

Even if the word "child" were ambiguous, however, the Alabama Constitution would require courts to resolve the ambiguity in favor of

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proving causation for prenatal injuries was difficult (quoting Clarke D. Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 Val. U. L. Rev. 563, 586 (1987))). Like the so-called "quickening rule," the born-alive rule ensured that there was "'evidence of life,'" but did not provide a definition of life, and did not mean that unborn children were considered to be something other than living human beings. Dobbs, 597 U.S. at 246 (citation omitted); see also Forsythe, supra, at 586 & n.105.

protecting unborn life. Article I, § 36.06(b), of the Constitution of 2022 "acknowledges, 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 and measures lawful and appropriate." That section, which is titled "Sanctity of Unborn Life," operates in this context as a constitutionally imposed canon of construction, directing courts to construe ambiguous statutes in a way that "protect[s] … the rights of the unborn child" equally with the rights of born children, whenever such construction is "lawful and appropriate." Id.[7] When it comes to the Wrongful Death of a Minor Act, that means coming down on the side of

[7]Justice Cook argues that § 36.06 should not inform our analysis because, he contends, that provision "cannot retroactively change the meaning of words passed in 1872." ___ So. 3d at ___ (Cook, J., dissenting). But as part of our Constitution, § 36.06 represents "the supreme law of the state," meaning that all statutes "must yield" to it, whether or not they were enacted prior to its adoption. Alexander v. State ex rel. Carver, 274 Ala. 441, 446, 150 So. 2d 204, 208 (1963). Further, the definition of "child" that we apply here is in keeping with the definition that was established by this Court's precedents at the time § 36.06 was adopted. See Mack, 79 So. 3d at 611 ("[W]e hold that the Wrongful Death Act permits an action for the death of a previable fetus."); Hamilton, 97 So. 3d at 735 ("As set forth in Mack and as applicable in this case, Alabama's wrongful-death statute allows an action to be brought for the wrongful death of any unborn child."). It is Justice Cook's opinion, not this Court's, that seeks to set aside that meaning in favor of the view that the term "child," as originally understood, did not encompass "an unborn infant." See ___ So. 3d at ___ (Cook, J., dissenting).

including, rather than excluding, children who have not yet been born.

The upshot here is that the phrase "minor child" means the same thing in the Wrongful Death of a Minor Act as it does in everyday parlance: "an unborn or recently born" individual member of the human species, from fertilization until the age of majority. See Merriam-Webster's Collegiate Dictionary 214 (11th ed. 2020) (defining "child"); accord Noah Webster et al., An American Dictionary of the English Language 198 (defining "child"). Nothing about the Act narrows that definition to unborn children who are physically "in utero." Instead, the Act provides a cause of action for the death of any "minor child," without exception or limitation. As this Court observed in Hamilton, "Alabama's wrongful-death statute allows an action to be brought for the wrongful death of any unborn child." 97 So. 3d at 735 (emphasis added).

2. This Court's Precedents Do Not Compel Creation of an Unwritten Exception for Extrauterine Children

The defendants do not meaningfully engage with the text or history of the Wrongful Death of a Minor Act. Instead, they ask us to recognize an unwritten exception for extrauterine children in the wrongful-death context because, they say, our own precedents compel that outcome. Specifically, the defendants argue that: (1) this Court's precedents

require complete congruity between "the definition of who is a person" under our criminal-homicide laws and "the definition of who is a person" under our civil wrongful-death laws; (2) extrauterine children are not within the class of persons protected by our criminal-homicide laws; and (3) as a result, extrauterine children cannot be protected by the Wrongful Death of a Minor Act. Appellees' brief in appeal no. SC-2022-0579 at 47; Appellees' brief in appeal no. SC-2022-0515 at 49.

The most immediate problem with the defendants' argument is that its major premise is unsound:[8] nothing in this Court's precedents requires one-to-one congruity between the classes of people protected by Alabama's criminal-homicide laws and our civil wrongful-death laws. The defendants' error stems from their misreading of this Court's opinions in Mack and Stinnett v. Kennedy, 232 So. 3d 202 (Ala. 2016). As mentioned earlier, Mack held, based on "numerous considerations," that previable unborn children qualify as "children" under the Wrongful Death of a Minor Act. 79 So. 3d at 611. One of those considerations involved the fact that Alabama's criminal-homicide laws -- as amended

[8]The plaintiffs argue that both premises are faulty, but since we agree that the first is wrong, we have no need to reach the second.

by the Brody Act, Act No. 2006-419, Ala. Acts 2006 -- expressly included (and continues to include) unborn children as "'person[s],'" "'regardless of viability.'" 79 So. 3d at 600 (quoting Ala. Code 1975, § 13A-6-1(a)(3)). The Mack Court noted that it would be "'incongruous' if 'a defendant could be responsible criminally for the homicide of a fetal child but would have no similar responsibility civilly.'" 79 So. 3d at 611 (citation omitted). Stinnett echoed that reasoning. See 232 So. 3d at 215.

The defendants interpret the "incongruity" language in Mack and Stinnett to mean that the definition of "child" in the Wrongful Death of a Minor Act must precisely mirror the definition of "person" in our criminal-homicide laws. But the main opinions in Mack and Stinnett did not say that. Those opinions simply observed that it would be perverse for Alabama law to hold a defendant criminally liable for killing an unborn child while immunizing the defendant from civil liability for the same offense. The reason that such a result would be anomalous is because criminal liability is, by its nature, more severe than civil liability

-- so the set of conduct that can support a criminal prosecution is almost always narrower than the conduct that can support a civil suit.[9]

The defendants flip that reasoning on its head. Instead of concluding that civil-homicide laws should sweep at least as broadly as criminal ones (as Mack and Stinnett reasoned), the defendants insist that the civil law can never sweep more broadly than the criminal law. That type of maneuver is not only illogical, it was rejected in Stinnett itself:

> "[Mack's] attempt to harmonize who is a 'person' protected from homicide under both the Homicide Act and Wrongful Death Act, however, was never intended to synchronize civil and criminal liability under those acts, or the defenses to such liability. Although we noted that it would be unfair for a tortfeasor to be subject to criminal punishment, but not civil liability, for fetal homicide, it simply does not follow that a person not subject to criminal punishment under the Homicide Act should not face tort liability under the Wrongful Death Act. This argument, followed to its logical conclusion, would prohibit wrongful-death actions arising from a tortfeasor's simple negligence, something we have never held to be criminally punishable but which often forms the basis of wrongful-death actions."

232 So. 3d at 215. As this passage from Stinnett makes clear, the definition of "person" in criminal-homicide law provides a floor for the

[9]This reality also helps to illustrate why it is wrong to assume that the prospect of civil liability for the mishandling of embryos necessarily raises the spectre of criminal liability for the same conduct.

definition of personhood in wrongful-death actions, not a ceiling. So even if it is true, as the defendants argue, that individuals cannot be convicted of criminal homicide for causing the death of extrauterine embryos (a question we have no occasion to reach), it would not follow that they must also be immune from civil liability for the same conduct.

3. The Defendants' Public-Policy Concerns Cannot Override Statutory Text

Finally, the defendants and their amicus devote large portions of their briefs to emphasizing undesirable public-policy outcomes that, they say, will arise if this Court does not create an exception to wrongful-death liability for extrauterine children. In particular, they assert that treating extrauterine children as "children" for purposes of wrongful-death liability will "substantially increase the cost of IVF in Alabama" and could make cryogenic preservation onerous. Medical Association of the State of Alabama amicus brief at 42; see also Appellees' brief in appeal no. SC-2022-0515 at 36 (arguing that "costs and storage issues would be prohibitive").

While we appreciate the defendants' concerns, these types of policy-focused arguments belong before the Legislature, not this Court. Judges are required to conform our rulings "to the expressions of the legislature,

to the letter of the statute," and to the Constitution, "without indulging a speculation, either upon the impolicy, or the hardship, of the law." Priestman v. United States, 4 U.S. (4 Dall.) 28, 30 n.1 in the reporter's synopsis (1800) (Chase, J., writing for the federal circuit court).

Here, the text of the Wrongful Death of a Minor Act is sweeping and unqualified. It applies to all children, born and unborn, without limitation. It is not the role of this Court to craft a new limitation based on our own view of what is or is not wise public policy. That is especially true where, as here, the People of this State have adopted a Constitutional amendment directly aimed at stopping courts from excluding "unborn life" from legal protection. Art. I, § 36.06, Ala. Const. 2022.[10]

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[10]The defendants also suggest that, if extrauterine children are accorded the same protections under the Wrongful Death of a Minor Act as unborn children in utero, then providers could be held liable for routine treatment of ectopic pregnancies -- that is, pregnancies in which an embryo has implanted in an organ other than the uterus, such as the fallopian tubes.

The defendants' concerns are misguided. As the parties acknowledge, ectopic pregnancies almost invariably involve a fatal medical condition: if left in place, the ectopic embryo will either die from malnourishment or else grow to the point where it kills the mother -- in turn causing the embryo's own death. The parties agree that there is currently no way to treat an ectopic implantation without simultaneously

B. Negligence and Wantonness Claims

The second question raised in these consolidated appeals is whether the trial court erred in dismissing the plaintiffs' common-law negligence and wantonness claims. As discussed above, both sets of plaintiffs made clear in their operative complaints that those claims were "alternative" theories pleaded only as a fallback in case this Court held that extrauterine children are not protected by the Wrongful Death of a Minor Act. Since we now hold that the Act does protect extrauterine children, the plaintiffs' alternative negligence and wantonness claims are moot, and we affirm the trial court's dismissal of those claims on that basis.

C. Remaining Issues

During oral argument in these cases, the defendants suggested that the plaintiffs may be either contractually or equitably barred from pursuing wrongful-death claims. In particular, the defendants pointed out that all the plaintiffs signed contracts with the Center in which their

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causing the death of the unborn child, no matter how desperately the surgeon and the parents wish to preserve the child's life. In light of that tragic reality, we do not see how any hypothetical plaintiffs who attempt to sue over the consensual removal of an ectopic pregnancy could establish the core elements of a wrongful-death claim, including breach of duty and causation.

embryonic children were, in many respects, treated as nonhuman property: the Fondes elected in their contract to automatically "destroy" any embryos that had remained frozen longer than five years; the LePages chose to donate similar embryos to medical researchers whose projects would "result in the destruction of the embryos"; and the Aysennes agreed to allow any "abnormal embryos" created through IVF to be experimented on for "research" purposes and then "discarded." The defendants contended at oral argument that these provisions are fundamentally incompatible with the plaintiffs' wrongful-death claims.

If the defendants are correct on that point, then they may be able to invoke waiver, estoppel, or similar affirmative defenses. But those defenses have not been briefed and were not considered by the trial court, so we will not attempt to resolve them here. We are "a court of review, not a court of first instance." Henry v. White, 222 Ala. 228, 228, 131 So. 899, 899 (1931). The trial court remains free to consider these and any other outstanding issues on remand.

Conclusion

We reverse the trial court's dismissal of the plaintiffs' wrongful-death claims in both appeal no. SC-2022-0515 and appeal no. SC-2022-

0579. Because the plaintiffs' alternative negligence and wantonness claims are now moot, we affirm the trial court's dismissal of those claims on that basis.

SC-2022-0515 -- AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SC-2022-0579 -- AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Wise and Bryan, JJ., concur.

Parker, C.J., concurs specially, with opinion.

Shaw, J., concurs specially, with opinion, which Stewart, J., joins.

Mendheim, J., concurs in the result, with opinion.

Sellers, J., concurs in the result in part and dissents in part, with opinion.

Cook, J., dissents, with opinion.

PARKER, Chief Justice (concurring specially).

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." Art. I, § 36.06(a), Ala. Const. 2022 (adopted Nov. 6, 2018) (sometimes referred to as "the Sanctity of Unborn Life Amendment"). As noted in the main opinion, these cases involve unborn life -- a fact that no party in these cases disputes. Therefore, I take this opportunity to examine the meaning of the term "sanctity of unborn life" as used in § 36.06 and to explore the legal effect of the adoption of the Sanctity of Unborn Life Amendment as a constitutional statement of public policy.

I. Meaning of "Sanctity"

The Alabama Constitution does not expressly define the phrase "sanctity of unborn life." But because the parties have raised § 36.06 in

their arguments, these cases call for us to interpret what this phrase means. The goal of constitutional interpretation is to discern the original public meaning, which is "'the meaning the people understood a provision to have at the time they enacted it.'" Barnett v. Jones, 338 So. 3d 757, 767 (Ala. 2021) (Mitchell, J., joined by Parker, C.J., concurring specially) (citation and emphasis omitted). Constitutional interpretation must start with the text, but it also must include the context of the time in which it was adopted. Id.; see also Hagan v. Commissioner's Court of Limestone Cnty., 160 Ala. 544, 554, 49 So. 417, 420 (1909) (holding that the Alabama Constitution "must be understood and enforced according to the plain, common-sense meaning of its terms"); Antonin Scalia, A Matter of Interpretation 37 (new ed. 2018) ("In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation -- though not an interpretation that the language will not bear.").

Helpful sources in interpretation include contemporaneous dictionaries, but the analysis must also "draw from deeper wells" instead of relying "solely on dictionaries." Gulf Shores City Bd. of Educ. v.

Mackey, [Ms. 1210353, Dec. 22, 2022] ___ So. 3d ____, ____ (Ala. 2022) (Parker, C.J., concurring in part and concurring in the result). Such "deeper wells" include (1) the history of the period, (2) similar provisions in predecessor constitutions, (3) the records of the constitutional convention, inasmuch as they shed light on what the public thought, (4) the common law, (5) cases, (6) legal treatises, (7) evidence of contemporaneous general public understanding, especially as found in other state constitutions and court decisions interpreting them, (8) contemporaneous lay-audience advocacy for (or against) its adoption, and (9) any other evidence of original public meaning, which could include corpus linguistics. Gulf Shores, ___ So. 3d at ____ (Parker, C.J., concurring in part and concurring in the result in part); Young Ams. for Liberty at Univ. of Alabama at Huntsville v. St. John, [Ms. 1210309, Nov. 18, 2022] ___ So. 3d ___, ___ (Ala. 2022) (Parker, C.J., concurring in part and concurring in the result); Barnett, 338 So. 3d at 766-67 (Mitchell, J., concurring specially).

Section 36.06 specifically recognizes the sanctity of unborn life. Nevertheless, the phrase "sanctity of unborn life" involves the same terms and concepts as the broader and more common phrase, "sanctity of

life." Thus, the history and meaning of the phrase "sanctity of life" informs our understanding of "sanctity of unborn life" as that phrase is used in § 36.06.

At the time § 36.06 was adopted, "sanctity" was defined as: "1. holiness of life and character: GODLINESS; 2 a: the quality or state of being holy or sacred: INVIOLABILITY b *pl*: sacred objects, obligations, or rights." Merriam-Webster's Collegiate Dictionary 1100 (11th ed. 2003). Recent advocates of the sanctity of life have attempted to articulate the principle on purely secular philosophical grounds. See, e.g., John Keown, The Law and Ethics of Medicine 3 (2012); Neil M. Gorsuch, The Future of Assisted Suicide and Euthanasia 157-58 (2009) (arguing that "human life is fundamentally and inherently valuable" based on the "secular moral theory" that human life is a "basic good" that "ultimately comes not from abstract logical constructs (or religious beliefs)"). Such advocates have preferred to use the term "inviolability" rather than "sanctity" to avoid what one scholar calls "distracting theological connotations." Keown, supra, at 3. But even though "inviolability" is certainly a synonym of "sanctity" in that the meaning of the two words largely overlap, the two words cannot simply be substituted for each

other because each word carries its own set of implications. When the People of Alabama adopted § 36.06, they did not use the term "inviolability," with its secular connotations, but rather they chose the term "sanctity," with all of its connotations.

This kind of acceptance is not foreign to our Constitution, which in its preamble "invok[es] the favor and guidance of Almighty God," pmbl., Ala. Const. 2022, and which declares that "all men … are endowed [with life] by their Creator," Art. I, § 1, Ala. Const. 2022.[11] The Alabama Constitution's recognition that human life is an endowment from God emphasizes a foundational principle of English common law, which has been expressly incorporated as part of the law of Alabama. § 1-3-1, Ala. Code 1975 ("The common law of England … shall … be the rule of decisions, and shall continue in force …."). In his Commentaries on the Laws of England, Sir William Blackstone declared that "[l]ife is the immediate gift of God, a right inherent by nature in every individual."[12]

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[11]Accord the philosophy of the United States of America as expressed in the Declaration of Independence -- "endowed by their Creator with certain unalienable Rights, that among these are Life …." The Declaration of Independence para. 2 (U.S. 1776).

[12]Blackstone went on to state that life "begins in contemplation of law as soon as an infant is able to stir in the mother's womb." 1 William

1 William Blackstone, Commentaries on the Laws of England *125. He later described human life as being "the immediate donation of the great creator." Id. at *129.

Only recently has the phrase "sanctity of life" been widely used as shorthand for the general principle that human life can never be intentionally taken without adequate justification. The phrase was first used in the modern bioethical debate by Rev. John Sutherland Bonnell as the title to his 1951 article opposing euthanasia: The Sanctity of Human Life. 8 Theology Today 194-201. Glanville Williams later employed the phrase in his groundbreaking book, The Sanctity of Life and the Criminal Law, in 1957. The common usage of this phrase has continued into the 21st century, referring to the view that all human beings bear God's image from the moment of conception. See, e.g.,

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Blackstone, Commentaries on the Laws of England *125. Similarly, Alabama law has recognized that human life begins at conception. See Ex parte Hicks, 153 So. 3d 53, 72 (Ala. 2014); Ex parte Ankrom, 152 So. 3d 397 (Ala. 2013); Hamilton v. Scott, 97 So. 3d 728 (Ala. 2012); Mack v. Carmack, 79 So. 3d 597 (Ala. 2011); § 26-22-2(8), Ala. Code 1975 (defining an "unborn child" as "[a]n individual organism of the species Homo sapiens from fertilization until live birth"); § 26-23A-3(10), Ala. Code 1975 (defining an "unborn child" as "[t]he offspring of any human person from conception until birth").

Manhattan Declaration: A Call of Christian Conscience (Nov. 20, 2009) (at the time of this decision, this document could be located at: https://www.manhattandeclaration.org) (referring multiple times to the "sanctity of life" in response to abortion).[13]

The phrase appeared only twice in our precedents before 2018. In 1982, Justice Faulkner used it to describe the argument that so-called "wrongful birth" actions should not be cognizable at law because the "sanctity of life" precluded them. Boone v. Mullendore, 416 So. 2d 718, 724 (Ala. 1982) (Faulkner, J., concurring specially). More recently, however, it was used in a 2014 special concurrence referring to this Court's decisions in Ex parte Ankrom, 152 So. 3d 397 (Ala. 2013), Hamilton v. Scott, 97 So. 3d 728 (Ala. 2012), and Mack v. Carmack, 79 So. 3d 597 (Ala. 2011). Ex parte Hicks, 153 So. 3d 53, 72 (Ala. 2014) (Parker, J., concurring specially) ("This case presents an opportunity for this Court to continue a line of decisions affirming Alabama's recognition

[13]It is worth noting that the Manhattan Declaration was signed by "Orthodox, Catholic, and Evangelical Christians" who "joined together across historic lines of ecclesial differences" to speak together on certain issues, one of which was the sanctity of life. Id. Despite major theological disagreements, signers from all three branches of Christianity were able to agree on the sanctity of life.

of the sanctity of life from the earliest stages of development. We have done so in three recent cases [Ankrom, Hamilton, and Mack]; we do so again today." (footnote omitted)).

But the principle itself -- that human life is fundamentally distinct from other forms of life and cannot be taken intentionally without justification -- has deep roots that reach back to the creation of man "in the image of God." Genesis 1:27 (King James). One 17th-century commentator has explained the significance of man's creation in God's image as follows:

> "[T]he chief excellence and prerogative of created man is in the image of his Creator. For while God has impressed as it were a vestige of himself upon all the rest of the creatures … so that from all the creatures you can gather the presence and efficiency of the Creator, or as the apostle [Paul] says, you can clearly see his eternal power and divinity, yet only man did he bless with his own image, that from it you may recognize not only what the Creator is, but also who he is, or what his qualities are.
>
> "… God did this: (1) so that he might as it were contemplate and delight himself in man, as in a copy of himself, or a most highly polished mirror, for which reason his delights are said to be with the children of men. (2) So that he might, as much as can be done, propagate himself as it were in man. … (3) So that he would have on earth one who would know, love, and worship him and all that is his, which could not be obtained in the least apart from the image of God …. (4) So that he might have one with whom he would live most blessed for eternity, with whom he would converse as with a

> friend …. Therefore, so that God could eternally dwell and abide with man, he willed him to be in some manner similar to him, to bear his image ….
>
> "….
>
> "Therefore, the image of God in man is nothing except a conformity of man whereby he in measure reflects the highest perfection of God."

3 Petrus Van Mastricht, Theoretical-Practical Theology 282-85 (Joel R. Beeke ed., Todd M. Rester trans., Reformation Heritage Books 2021) (1698-99).[14]

Van Mastricht's assessment of the significance of man's creation in the image of God accords with that of Thomas Aquinas centuries earlier. Following Augustine, Aquinas distinguished human life from other things God made, including nonhuman life, on the ground that man was made in God's image.

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[14]Petrus Van Mastricht (1630-1706) was a Dutch Reformed theologian and professor at the University of Utrecht. He was a favorite of Jonathan Edwards, a leading minister in the First Great Awakening and later President of Princeton University. Edwards opined that, "for divinity in General, doctrine, Practice & Controversie; or as an [sic] universal system of divinity, [Van Mastrict's Theoretical-Practical Theology] is much better than … any other Book in the world, excepting the Bible." Jonathan Edwards & Stanley T. Williams, Six Letters of Jonathan Edwards to Joseph Bellamy, 1 New Eng. Q. 226, 230 (footnotes omitted) (reprinting Edwards's letter to Bellamy dated January 15, 1747).

> "As Augustine observes, man surpasses other things, not in the fact that God Himself made man, as though He did not make other things; since it is written, 'The work of Thy hands is the heaven,' and elsewhere, 'His hands laid down the dry land,' but in this, that man is made to God's image."

Thomas Aquinas, Summa Theologica First Part, Treatise on Man, Question 91, Art. 4 (Fathers of the English Dominican Province trans., Benziger Bros., Inc. 1947). Further, Aquinas explained that every man has the image of God in that he "possesses a natural aptitude for understanding and loving God," which imitates God chiefly in "that God understands and loves Himself." Id., First Part, Question 93, Art. 4. Thus, man's creation in God's image directs man to his last end, which is to know and love God. Id., Second Part, Question 1, Art. 8.

Man's creation in God's image is the basis of the general prohibition on the intentional taking of human life. See Genesis 9:6 (King James) ("Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man."). John Calvin, in expounding that text, explains:

> "For the greater confirmation of the above doctrine [of capital punishment for murder], God declares, that he is not thus solicitous respecting human life rashly, and for no purpose. Men are indeed unworthy of God's care, if respect be had only to themselves; but since they bear the image of God engraven on them, He deems himself violated in their person. Thus,

> although they have nothing of their own by which they obtain the favour of God, he looks upon his own gifts in them, and is thereby excited to love and to care for them. This doctrine, however, is to be carefully observed, that no one can be injurious to his brother without wounding God himself. Were this doctrine deeply fixed in our minds, we should be much more reluctant than we are to inflict injuries. Should any one object, that this divine image has been obliterated, the solution is easy; first, there yet exists some remnant of it, so that man is possessed of no small dignity; and secondly, the Celestial Creator himself, however corrupted man may be, still keeps in view the end of his original creation; and according to his example, we ought to consider for what end he created men, and what excellence he has bestowed upon them above the rest of living beings."

John Calvin, Commentaries on the First Book of Moses Called Genesis 295-96 (John King trans., Calvin Translation Society 1847) (1554) (emphasis added). Likewise, the Geneva Bible, which was the "most popular book in colonial homes,"[15] includes a footnote to Genesis 9:6 that provides: "Therefore to kill man is to deface God's image, and so injury is not only done to man, but also to God." Genesis 9:6 n.2 (Geneva Bible 1599).

Finally, the doctrine of the sanctity of life is rooted in the Sixth Commandment: "You shall not murder." Exodus 20:13 (NKJV 1982). See

[15]Kenneth Graham, Confrontation Stories: Raleigh on the Mayflower, 3 Ohio St. J. Crim. L. 209, 213-14 (2005).

John Eidsmoe, Those Ten Commandments: Why Won't They Just Go Away? 31 Regent U. L. Rev. 11, 15 (2018) (arguing that the Sixth Commandment is the basis for "Respect for Life" in Western law); see also Van Orden v. Perry, 545 U.S. 677, 686-90 (2005) (discussing the impact of the Ten Commandments on America generally). Aquinas taught that "it is in no way lawful to slay the innocent" because "we ought to love the nature which God has made, and which is destroyed by slaying him." Aquinas, supra, Second Part of the Second Part, Treatise on Prudence and Justice, Question 64, Art. 6. Likewise, Calvin explained the reason for the Sixth Commandment this way: "Man is both the image of God and our flesh. Wherefore, if we would not violate the image of God, we must hold the person of man sacred." 2 John Calvin, Institutes of the Christian Religion 256 (Henry Beveridge trans., Hendrickson Publishers 2008) (1559). These and many similar writings, creeds, catechisms, and teachings have informed the American public's view of life as sacred.

In summary, the theologically based view of the sanctity of life adopted by the People of Alabama encompasses the following: (1) God made every person in His image; (2) each person therefore has a value that far exceeds the ability of human beings to calculate; and (3) human

life cannot be wrongfully destroyed without incurring the wrath of a holy God, who views the destruction of His image as an affront to Himself. Section 36.06 recognizes that this is true of unborn human life no less than it is of all other human life -- that even before birth, all human beings bear the image of God, and their lives cannot be destroyed without effacing his glory.

II. Effect of Constitutional Policy

Having discussed the meaning of the phrase "sanctity of unborn life," I will briefly explore the legal effect of its inclusion in the Alabama Constitution as a statement of public policy. Again, I will start with the text. Section 36.06 provides, in relevant part:

> "(a) 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.
>
> "(b) This state further acknowledges, 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 and measures lawful and appropriate."

In 2018, the term "public policy" was a legal term that meant: "The collective rules, principles, or approaches to problems that affect the commonwealth or (esp.) promote the general good; specif., principles and

standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole society." Black's Law Dictionary 1426 (10th ed. 2014); see also Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 73 (Thomson/West 2012) (noting that ordinary legal meaning governs instead of common meaning when the law is the subject). Notice that the dictionary does not just say that "public policy" is something like "whatever is in the best interests of Alabama," which really is for the Legislature and not this Court to decide. Instead, it refers to the collective rules, principles, or approaches to problems or principles and standards. Because this term refers to fixed standards and not subjective opinions of whatever serves the public good, this Court can look to this § 36.06 in appropriate cases to aid it in its decisions.

When considering a question concerning "public policy," an Alabama judge is supposed to look to "the Constitution, the statutes, or definite principles of customary law which have been recognized and developed by the course of judicial decisions," such as the common law, but not "some considerations of policy which might properly have weight with the Legislature if it had occasion to deal with the question." Couch

v. Hutchison, 2 Ala. App. 444, 447, 57 So. 75, 76 (1911). Thus, Alabama precedents confirm that the Judiciary can look to the Constitution, statutes, and principles of customary law to determine what the public policy of this state is. It must not, however, usurp the role of the Legislature by attempting to guess what policy decision the Legislature might have made if it had considered other factors. That decision must be left for the Legislature itself.

Now that we know what "public policy" means, we must consider what effect it has on statutory interpretation. In one of its oldest decisions considering that question, this Court held: "It is not denied that where public policy or substantial justice obviously requires it, Courts should strongly incline to such liberal construction of the statute as will effect the object." Jones v. Watkins, 1 Stew. 81, 85 (Ala. 1827). However, in more modern times, this Court has repeatedly emphasized adherence to the plain language of the statute, and I agree with this approach. See generally Jay Mitchell, Textualism in Alabama, 74 Ala. L. Rev. 1089, 1100-10 (2023). Consequently, I believe that, ordinarily, this Court may consider public policy in statutory interpretation only if (1) there is substantial doubt about the meaning of the statute and (2) the precepts

of public policy and jurisprudence to which we look are settled. Ex parte Z.W.E., 335 So. 3d 650, 660 (Ala. 2021) (Parker, C.J., concurring in the result) (citing Old Republic Ins. Co. v. Lanier, 644 So. 2d 1258, 1260-62 (Ala. 1994); Allgood v. State, 20 Ala. App. 665, 667, 104 So. 847, 848 (1925); 82 C.J.S. Statutes § 472 (2009); 73 Am. Jur. 2d Statutes § 91 (2012)). Thus, I agree with the main opinion that, if the Wrongful Death of a Minor Act, § 6-5-391, Ala. Code 1975, were ambiguous, then the Sanctity of Unborn Life Amendment would resolve the matter in favor of the plaintiffs.

But a special problem arises when the People of Alabama enshrine a specific statement of public policy in their Constitution. Instead of gleaning bits and pieces of the state's public policy from the Constitution, statutes, common law, and precedents, the People of Alabama explicitly told the Legislature, the Executive, and the Judiciary what they are supposed to do. Ordinarily, we resort to public-policy considerations in statutory interpretation as a last resort, so that the Judiciary does not usurp the role of the Legislature. But in this case, the People explicitly told all three branches of government what they ought to do. See The Federalist No. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)

(noting that "the power of the people is superior to both" the judicial and legislative powers). Consequently, as Alexander Hamilton wrote in The Federalist No. 78, "where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former." Id. Thus, as a constitutional statement of public policy, § 36.06 circumscribes the Legislature's discretion to determine public policy with regard to unborn life. Accordingly, any legislative (or executive) act that contravenes the sanctity of unborn life is potentially subject to a constitutional challenge under the Alabama Constitution.

Putting this all together, § 36.06 does much more than simply declare a moral value that the People of Alabama like. Instead, this constitutional provision tilts the scales of the law in favor of protecting unborn life. Although § 36.06 may not resolve every case involving unborn life, if reasonable minds could differ on whether a common-law rule, a statute, or even a constitutional provision protects life, § 36.06 instructs the Alabama government to construe the law in favor of protecting the unborn. Furthermore, to exclude the unborn from § 36.06's

protection, the Legislature would have to do so very clearly and for a reason that is consistent with upholding the sanctity of life.

Justice Cook argues in his dissent that applying § 36.06 and the Wrongful Death of a Minor Act to frozen embryos will have disastrous consequences for the in vitro fertilization ("IVF") industry in Alabama. Although it 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. See, e.g., Alexander N. Hecht, The Wild Wild West: Inadequate Regulation of Assisted Reproductive Technology, 1 Hous. J. Health L. & Pol'y 227, 228 (2001) ("Unfortunately, this industry remains largely unregulated. The near-absence of federal and state law combined with ineffective and unheeded industry guidelines leads to a lawless free-for-all." (footnotes omitted)); see also Myrisha S. Lewis, The American Democratic Deficit in Assisted Reproductive

Technology Innovation, 45 Am. J. L. & Med. 130, 144 & n.77 (2019) (noting that IVF in the United States is still unregulated and that commentators are still comparing it to the Wild West). 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. See The Alabama Uniform Parentage Act, § 26-17-101 et seq., Ala. Code 1975. And the only administrative regulation of IVF in Alabama governs IVF clinics' use of radioactive materials, but not any other IVF practice. Ala. Admin. Code (State Bd. Of Health, Dep't of Pub. Health), r. 420-3-26-.02. 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.

For instance, in Australia and New Zealand, prevailing ethical standards dictate that physicians usually make only one embryo at a time.[16] On the related issue of embryo transfers, which is the process of

[16]Code of Practice for Assisted Reproductive Technology Units § 3.3, p. 24, Fertility Society of Australia and New Zealand, Reproductive Technology Accreditation Committee (2021) (at the time of this decision, this document could be located at:

implanting the embryos into the uterus,[17] in Australia and New Zealand over 90% of embryo transfers occur only one at a time.[18] Likewise, European Union ("EU") countries set a legal limit on the number of embryos transferred in a single cycle.[19] In EU countries, 58% of embryo

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https://www.fertilitysociety.com.au/wp-content/uploads/20211124-RTAC-ANZ-COP.pdf.).

[17]According to the contract that the LePages signed, the number of embryos transferred to the mother could range from 1-5. LePage Contract at 9. It appears that the objective of transferring multiple embryos is to increase the chances of pregnancy. Id. at 8. At least two issues arise from this practice. First, it results in the mother becoming pregnant with multiple babies 30% of the time, which can cause health problems for the mother and babies. See id. at 17. Second, less than half of embryo transfers result in live births, which raises the question whether transferring multiple embryos at once risks the deaths of these little people. See Jennifer Choe & Anthony L. Shanks, In Vitro Fertilization, NIH National Library of Medicine (last updated Sep. 4, 2023), (at the time of this decision, this document could be located at: https://www.ncbi.nlm.nih.gov/books/NBK562266.

[18]See Choe & Shanks, supra, at n.17; Christine Wyns, Number of Frozen Treatment Cycles Continues to Rise Throughout the World, European Society of Human Reproduction and Embryology (June 30, 2021) (at the time of this decision, this document could be located at: https://www.focusonreproduction.eu/article/ESHRE-News-ESHRE-2021-freeze-all) (reporting that "Australia/New Zealand leads the way" in the "number of single embryo transfers" in "more than 90% of cycles").

[19]Regulation and Legislation in Assisted Reproduction, European Society of Human Reproduction and Embryology (Jan. 2017) (at the time of this decision, this document could be located at: https://tinyurl.com/299cvcbf). Specifically, Austria, Belgium, and Malta

transfers involve just one embryo, and 38% involve two; thus, 96% of embryo transfers in EU countries involve two or fewer transfers at one time.[20] Such limitations on embryo creation and transfer necessarily reduce or eliminate the need for storing embryos for extended lengths of time. Italy went one step further, banning cryopreservation of embryos except when a bona fide health risk or force majeure prevented the embryos from being transferred immediately after their creation.[21] All of these measures protect the lives of the unborn and still allow couples to become parents. Therefore, although certain changes to the IVF industry's current creation and handling of embryos in Alabama will

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have allowed only one transfer at a time; the United Kingdom, France, and Sweden have allowed no more than two; and Germany has allowed only three, although a maximum of two is recommended. Id.; Embryo Protection Act, Chapter 524, § 6, of the Laws of Malta; Susan Mayor, UK Authority Sets Limits on Number of Embryos Transferred, 328 BMJ 65, 65 (2004). Some of these laws may have changed over time, but they illustrate that other Westernized countries have, at some point, adopted these positions.

[20]More Women Are Using Single Embryos During Fertility Treatment, European Society of Human Reproduction and Embryology (June 27, 2023) (at the time of this decision, this document could be located at: https://www.eshre.eu/ESHRE2023/Media/2023-Press-releases/EIM).

[21]See Legge 19 Feb. 2004, no. 40 (art. 14, para. 3), in G.U. Feb. 24, 2004, no. 45 (It.).

result from this decision, to the extent that Justice Cook is predicting that IVF will now end in Alabama, that prediction does not seem to be well-founded.

These regulations adopted by other countries seem much more likely to comport with upholding the sanctity of life than the prevailing practice of creating and transferring at once many embryos that have little chance of survival and then throwing embryos away after a while. The American states, unfortunately, have not followed the example of other Westernized countries that have regulations that achieve both the protection of life and the promotion of parenthood. Ultimately, however, it is for the Legislature to decide how the IVF industry can help parents have children. The Legislature is free to do so in any way it decides, provided that it comports with the Alabama Constitution, including the Sanctity of Unborn Life Amendment.[22]

III. Conclusion

In application to these cases, the contentions of the defendants and their amicus are not sustainable in light of the Sanctity of Unborn Life

[22]The Legislature should also take note of § 36.06 if it considers other ethical issues related to reproduction if they arise.

Amendment. The People of Alabama have declared the public policy of this State to be that unborn human 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. It is as if the People of Alabama took what was spoken of the prophet Jeremiah and applied it to every unborn person in this state: "Before I formed you in the womb I knew you, Before you were born I sanctified you." Jeremiah 1:5 (NKJV 1982). All three branches of government 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 were, 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.

SHAW, Justice (concurring specially).

I concur fully in the main opinion. I write specially to note the following.

I agree with the main opinion that the meaning of the word "child" for purposes of Alabama law is well settled and includes an unborn child. Thus, for purposes of the Wrongful Death of a Minor Act, § 6-5-391, Ala. Code 1975 ("the Wrongful Death Act"), the term "minor child" includes an unborn child with no distinction between in vitro or in utero.

In prior cases determining whether an unborn child is a "minor child" for purposes of the Wrongful Death Act, this Court has referenced the definition of a "person" found in § 13A-6-1(3), Ala. Code 1975, which in turn applies to certain portions of the criminal code. The main opinion thoroughly explains why this criminal-law definition does not limit the determination whether an in vitro embryo is a "minor child" for purposes of a civil-law action under the Wrongful Death Act.

I do not believe that any purported prior common-law rule requires a different result.

> "The common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this state, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, except as

> from time to time it may be altered or repealed by the Legislature."

§ 1-3-1, Ala. Code 1975 (emphasis added). The language of this Code section is plain: the common law does not apply when it is inconsistent with the Constitution, laws, and institutions of this state. The legislature may always alter the common law, but this Code section does not provide that the common law, if inconsistent with the above, remains in place unless altered by the legislature. As one Justice has explained:

> "This statute does not provide that 'the common law of England shall be the rule of decisions in Alabama unless changed by the legislature.' On the contrary, it provides that the common law of England shall be the rule of decisions in this State, so far as the common law is not inconsistent with the constitution, the laws, and the institutions of Alabama."

Swartz v. United States Steel Corp., 293 Ala. 439, 446-47, 304 So. 2d 881, 887 (1974) (Faulkner, J., concurring specially).

In the context of civil law, the legislature, the constitution, and this Court's decisions have collectively repealed the common law's prohibition on wrongful-death actions, § 6-5-391; protected the rights of the unborn, Ala. Const. 2022, Art. I, § 36.06(b) ("[I]t is the public policy of this state to ensure the protection of the rights of the unborn child …."); and eliminated the common law's prohibition on seeking a civil remedy for

injuries done to the unborn, Huskey v. Smith, 289 Ala. 52, 265 So. 2d 596 (1972), and Hamilton v. Scott, 97 So. 3d 728 (Ala. 2012). If, after this, the common law does not allow wrongful-death actions for some unborn children when they are injured -- here, based on their physical location -- that rule must be consistent with the Constitution, laws, and institutions of this state. Whether such rule is in fact consistent, we can respectfully disagree. But if it is inconsistent, then it need not be first altered or repealed by the legislature.

It can scarcely be argued that science is not outdistancing the law in various areas, especially in the context of human reproduction. Creating and sustaining life outside a woman's womb is nothing less than the stuff of miracles. The overriding public policy of this state recognizes and supports the sanctity of unborn life and the rights of unborn children, including the right to life, and requires the protection of the rights of the unborn child "in all manners and measures lawful and appropriate." § 36.06(b). The people of Alabama, apparently recognizing that advancements in reproductive science necessarily come with concomitant responsibilities, have bound all three branches of our state government

to this policy, and, in my view, the enactments of the Alabama Legislature are consistent with it.

Stewart, J., concurs.

MENDHEIM, Justice (concurring in the result).

Over the course of time, previous cases from this Court have applied the protection afforded to a "minor child" in subsection (a) of § 6-5-391, Ala. Code 1975, the Wrongful Death of a Minor Act, to human lives at earlier and earlier stages of development. In Stanford v. St. Louis-San Francisco Railway Co., 214 Ala. 611, 108 So. 566 (1926), this Court, construing a predecessor to § 6-5-391(a),[23] held that a "parental injury before the birth is no basis for action in damages by the child or its personal representative." Birmingham Baptist Hosp. v. Branton, 218 Ala. 464, 467, 118 So. 741, 743 (1928) (citing Stanford). However, in Huskey v. Smith, 289 Ala. 52, 265 So. 2d 596 (1972), "[t]he Court concluded that the term 'minor child' in the predecessor to § 6-5-391(a) [Title 7, § 119, Ala. Code 1940 (Recomp. 1958),] included an unborn child who was viable at the time of a prenatal injury, who thereafter was born alive, but who later died. 289 Ala. at 55, 265 So. 2d at 596." Mack v. Carmack, 79 So. 3d 597, 601 (Ala. 2011). The Court pushed the boundary back again in Wolfe v. Isbell, 291 Ala. 327, 280 So. 2d 758 (1973), in which the Court "concluded that [a] father could maintain an action for the

[23]Section 5695, Ala. Code 1923.

wrongful death of his unborn child even though the injuries that allegedly caused the death occurred before the fetus became viable." Mack, 79 So. 3d at 604. A year later, in Eich v. Town of Gulf Shores, 293 Ala. 95, 100, 300 So. 2d 354, 358 (1974), the Court held that "the parents of an eight and one-half month old stillborn fetus [were] entitled to maintain an action for the wrongful death of the child." The Court stepped back from those broader applications of protection in Gentry v. Gilmore, 613 So. 2d 1241 (Ala. 1993), and Lollar v. Tankersley, 613 So. 2d 1249 (Ala. 1993), concluding that "the Wrongful Death [of a Minor] Act did not permit recovery for the death of a fetus that occurs before the fetus attains viability." Mack, 79 So. 3d at 606. But, several years later in Mack, the Court returned to its understanding of the Wrongful Death of a Minor Act espoused in Wolfe, holding that "the Wrongful Death [of a Minor] Act permits an action for the death of a previable fetus." Mack, 79 So. 3d at 611. In Hamilton v. Scott, 97 So. 3d 728, 735 (Ala. 2012), the Court reaffirmed its conclusion from Mack, stating that "Alabama's wrongful-death statute allows an action to be brought for the wrongful death of any unborn child, even when the child dies before reaching viability."

The foregoing history of previous decisions concerning the Wrongful Death of a Minor Act, and the fact that the pertinent language in the Act has not been amended since its enactment in 1872, shows that this Court, rather than the Legislature, has taken the lead in shaping when the protection afforded by the Act may be invoked. See Eich, 293 Ala. at 100, 300 So. 2d at 358 (describing that decision as one in which the Court was "again extending out judicial prerogative as was done in Huskey and Wolfe ...."). Because of that, and because the terms "child" and "minor child" in § 6-5-391(a) are not further defined in the Wrongful Death of a Minor Act, I agree with the main opinion that the Act can be construed to include frozen embryos produced through in vitro fertilization ("IVF"). For those reasons, I concur in the result reached today that reverses the trial court's dismissal of the plaintiffs' wrongful-death claims.

However, I have misgivings about the reasoning and some of the comments contained in the main opinion. The main opinion begins its analysis by observing that "[t]he parties to these cases have raised many difficult questions," but it insists throughout that applying the protection of § 6-5-391(a) to frozen embryos is not one of those difficulties because "existing black-letter law" dictates our answer to the central question. __

So. 3d at __. Indeed, the main opinion states that the text of § 6-5-391(a) is "clear" and that there is no ambiguity as to whether its protection applies to frozen embryos. __ So. 3d at __.

> "Too often, a court's conclusion that statutory language is 'plain' is a substitute for careful analysis. At best, such unexplained conclusions are based on a judge's gestalt sense of the best meaning of the words in question. At worst, the bare insistence that statutory language is 'plain' is cover (perhaps subconscious) for judicial policymaking."

Carranza v. United States, 267 P.3d 912, 916 (Utah 2011) (opinion of Lee, J., joined by one other Justice).

In my judgment, the main opinion's view that the legal conclusion is "clear" and "black-letter law" is problematic because when the Wrongful Death of a Minor Act was first enacted in 1872, and for 100 years thereafter, IVF was not even a scientific possibility. Likewise, although it may be true that "the phrase 'minor child' … in everyday parlance" has long included an "unborn child," the main opinion fails to acknowledge that, at the time the Wrongful Death of a Minor Act was

enacted -- and long thereafter -- the term "unborn child" was only understood to refer to a child within its mother's womb.[24] __ So. 3d at __.

The main opinion's contention that "[t]he central question presented in these consolidated appeals … is whether the [Wrongful Death of a Minor] Act contains an unwritten exception to th[e] rule" that the Act "allows parents of a deceased child to recover punitive damages for their child's death" is similarly simplistic. __ So. 3d at __. The defendants have never argued for an "exception" to the Wrongful Death

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[24]See, e.g., Wolfe, 291 Ala. at 331, 280 So. 2d at 761 (observing that "the fetus or embryo is not a part of the mother, but rather has a separate existence within the body of the mother" (emphasis added)); Clarke v. State, 117 Ala. 1, 8, 23 So. 671, 674 (1898) ("'When a child, having been born alive, afterwards died by reason of any potion or bruises it received in the womb, it seems always to have been the better opinion that it was murder in such as administered or gave them.'" (quoting 3 Russell on Crimes 6 (6th ed.))). Cf. Ex parte Ankrom, 152 So. 3d 397, 416 (Ala. 2013) (observing, in the course of construing the term "child" in the chemical-endangerment statute, that "[c]learly, for an unborn child, the mother's womb is an essential part of its physical circumstances"). Indeed, even with regard to IVF, a mother's womb is obviously an indispensable part of pregnancy. See Maher v. Vaughn, Silverberg & Assocs., LLP, 95 F. Supp. 3d 999, 1002 n.1 (W.D. Tex. 2015) (describing IVF as "a multi-step medical procedure," and listing the final steps of that process to be "the grown embryos are transferred into the patient's uterus" and then "the patient takes supplemental hormones for the ensuing nine to eleven days, and if an embryo implants in the lining of the patient's uterus and grows, a pregnancy can result").

of a Minor Act. The main opinion reaches that conclusion by implication -- simply assuming that the term "minor child" includes frozen embryos -- a wholesale adoption of the plaintiffs' argument. See Appellants' brief in appeal no. SC-2022-0515, p. 19 (contending that the "[d]efendants' arguments … create an exception to existing Alabama law so that not all embryonic lives are treated equally under the law").

The main opinion then goes on in Part A.2. of its analysis to provide reasons why this Court's many pronouncements about "congruence" between Alabama's wrongful-death statutes and its criminal-homicide statutes[25] do not dictate importing the definition of the term "person" in § 13A-6-1(a)(3), Ala. Code 1975, into § 6-5-391(a). The reasoning in that portion of the main opinion also strikes me as strained given the history behind our wrongful-death statutes.

As this Court has observed numerous times, there was no right of action for wrongful death at common law. See, e.g., Ex parte Bio-Med. Applications of Alabama, Inc., 216 So. 3d 420, 422 (Ala. 2016) ("'"A wrongful death action is purely statutory; no such action existed at

[25]See, e.g., Mack, 79 So. 3d at 611 (observing that "this Court repeatedly has emphasized the need for congruence between the criminal law and our civil wrongful-death statutes").

common law."'" (quoting Ex parte Hubbard Props., Inc., 205 So. 3d 1211, 1213 (Ala. 2016), quoting in turn Waters v. Hipp, 600 So. 2d 981, 982 (Ala. 1992))); Giles v. Parker, 230 Ala. 119, 121, 159 So. 826, 827 (1935) ("There is no civil liability, under the common law, as interpreted in this jurisdiction, against one who wrongfully or negligently causes the death of a human being; and hence no right of action exists under the common law therefor. The right of action is purely statutory."); Kennedy v. Davis, 171 Ala. 609, 611-12, 55 So. 104, 104 (1911) ("It has been decided and many times reaffirmed by this court that actions under [the wrongful-death statutes] are purely statutory. There was no such action or right of action at common law."). This was also true for the wrongful death of a minor child. See White v. Ward, 157 Ala. 345, 349, 47 So. 166, 167 (1908) ("There was no right of action at the common law for the death of the child. … The right to recover damages for its death is therefore purely statutory.").

The reasons for the common-law prohibition appear to have been based on two legal concepts.

> "The effect to be given the death of a person connected with a tort rests almost entirely upon statutory foundations. The common-law limitations that eventually led to legislative reform were twofold. First was the rule that personal tort

> actions die with the person of either the plaintiff or the defendant. This limitation is expressed by the maxim, actio personalis moritur cum persona, which has roots deep in the early history of English law. The second limitation was that the death of a human being was not regarded as giving rise to any cause of action at common law on behalf of a living person who was injured by reason of the death. This latter is of more recent origin as a distinct proposition, although it doubtless rests in part on the same considerations that underlie the other and older maxim of actio personalis moritur cum persona."

Wex S. Malone, The Genesis of Wrongful Death, 17 Stan. L. Rev. 1043, 1044 (1965) (footnotes omitted).[26] Our wrongful-death statutes sought to remedy that erroneous legal thinking. See, e.g., Suell v. Derricott, 161 Ala. 259, 262, 49 So. 895, 897 (1909) ("Statutes like ours were clearly intended to correct what was deemed a defect of the common law, that the right of action based on a tort or injury to the person died with the person."); King v. Henkie, 80 Ala. 505, 509 (1886) ("The purpose of this, and like legislation, was clearly to correct a defect of the common law, by

[26]See also Malone, 17 Stan. L. Rev. at 1055 (explaining that "[t]he probable origin of the rule denying a cause of action for wrongful death was the doctrine, since discarded, that when a cause of action disclosed the commission of a felony the civil action was merged into the criminal wrong"). Restatement (Second) of Torts § 925, cmt. a. (Am. Law Inst. 1979), also provides a nice summary of the genesis of wrongful-death statutes.

a rule of which it was well settled, that a right of action based on a tort or injury to the person, died with the person injured. Under the maxim, 'Actio personalis moritur cum persona,' the personal representative of a deceased person could maintain no action for loss or damage resulting from his death.").

The close connection between Alabama's wrongful-death statutes and its criminal-homicide statutes was reflected in the first wrongful-death statute, Act No. 62, Ala. Acts 1871-72, p. 83, which was titled "AN ACT To prevent homicides," and their shared purpose has been repeatedly noted in our cases. See, e.g., Stinnett v. Kennedy, 232 So. 3d 202, 215 (Ala. 2016) (noting "the shared purpose of the Wrongful Death Act and the Homicide Act to prevent homicide"); Ex parte Bio-Med. Applications, 216 So. 3d at 424 ("'[The wrongful-death] statute authorizes suit to be brought by the personal representative for a definite legislative purpose -- to prevent homicide.'" (quoting Hatas v. Partin, 278 Ala. 65, 68, 175 So. 2d 759, 761 (1965))); Eich, 293 Ala. at 100, 300 So. 2d at 358 ("[T]he pervading public purpose of our wrongful death statute ... is to prevent homicide through punishment of the culpable party and the determination of damages by reference to the quality of the tortious act.

..."); Huskey, 289 Ala. at 55, 265 So. 2d at 597 ("One of the purposes of our wrongful death statute is to prevent homicides.") Thus, it seems logical to me for there to be a correlation between the persons protected under Alabama's wrongful-death statutes and the persons protected under Alabama's criminal-homicide statutes.

The main opinion is correct that the protection afforded in a civil law certainly can be broader than its corollary in criminal law, but nothing requires the civil law to be read more broadly, particularly given the absence of legislative action on this subject.[27]

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[27]The main opinion asserts that Art. I, § 36.06(b) of the Alabama Constitution of 2022, in stating that "it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate," "operates in this context as a constitutionally imposed canon of construction, directing courts to construe ambiguous statutes in a way that 'protect[s] … the rights of the unborn child' equally with the rights of born children, whenever such a construction is 'lawful and appropriate.'" __ So. 3d at __. The main opinion offers no authority for taking § 36.06 as a canon of legal construction, and I am not sure what an "appropriate" construction of the law means.

More generally, it is unclear to me why a constitutional amendment that was adopted in 2018 is somehow so central to deciding the specific meaning of a statute that has substantively remained unchanged since 1872. In any event, "'[t]o declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative.'" Lindsay v. United States Sav. & Loan Ass'n, 120 Ala. 156, 168, 24 So. 171, 174 (1898) (quoting Thomas Cooley, Constitutional Limitations 114).

Moreover, I find it interesting that the Human Life Protection Act, § 26-23H-1 et seq., Ala. Code 1975, which was enacted in 2019 -- well after the Brody Act, which amended § 13A-6-1 of our criminal-homicide statutes, (and also after the Sanctity of Unborn Life Amendment, i.e., Art. I, § 36.06, Ala. Const. 2022) -- defines an "unborn child" exactly the same way the Brody Act defines a "person": "A human being, specifically including an unborn child in utero at any stage of development, regardless of viability." § 26-23H-3(7), Ala. Code 1975. In its amicus curiae brief, the Alabama Medical Association states:

> "[D]uring 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. 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. Mr. Johnston gave this statement in response to the ACLU's misguided suggestion that the Act might affect in vitro fertilization."

Alabama Medical Association's brief, pp. 30-31 (footnotes omitted). I fully realize that such legislative history is not persuasive for purposes of

statutory interpretation, but that history should give us pause regarding any kind of expansive interpretation of the Brody Act.

I also take issue with a hypothetical employed by the main opinion to support the decision. Despite asserting at the outset of its analysis that "the Court today need not address" questions such as "the application of the 14th Amendment to the United States Constitution to [IVF] children," __ So. 3d at __, the main opinion nonetheless proceeds to share -- and implicitly agree with -- a hypothetical posited by the plaintiffs that purports to implicate the Equal Protection Clause of the 14th Amendment.[28] The main opinion asserts that "one latent implication" of the defendants' interpretation of § 6-5-391(a) is that

> "even a full-term infant or toddler conceived through IVF and gestated to term in an in vitro environment would not qualify as a 'child' or 'person,' because such a child would both be (1) 'unborn' (having never been delivered from a biological womb) and (2) not 'in utero.' And if such children were not legal

[28]It is, perhaps, telling that the plaintiffs and the main opinion chose to insert a hypothetical federal equal-protection issue given that there is no express equal-protection clause in the Alabama Constitution, a fact this Court has noted on several occasions. See, e.g., Mobile Infirmary Ass'n v. Tyler, 981 So. 2d 1077, 1104 (Ala. 2007) (observing that "'this Court has acknowledged that the Alabama Constitution contains no equal-protection clause ….'" (quoting Mobile Infirmary Med. Ctr. v. Hodgen, 884 So. 2d 801, 813 (Ala. 2003), and citing Ex parte Melof, 735 So. 2d 1172 (Ala. 1999))).

> 'children' or 'persons,' then their lives would be unprotected by Alabama law."

__ So. 3d at __ (footnote omitted).

First, in mentioning the foregoing hypothetical, the main opinion ignores the fact that it is not now -- or for the foreseeable future -- scientifically possible to develop a child in an artificial womb so that such a scenario could somehow unfold.[29] Second, the main opinion's choice to

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[29]Perhaps in anticipation of that objection, the main opinion inserts a footnote that selectively quotes from a couple of journal articles to make it seem as if the time when artificial wombs for the earliest stages of human life are a reality is just around the corner. See __ So. 3d at __ n.2. That is simply untrue. See, e.g., Jen Christensen, FDA Advisers Discuss Future of 'Artificial Womb' for Human Infants, CNN, Sept. 19, 2023 (at the time of this decision, this article could be located at: https://www.cnn.com/2023/09/19/health/artificial-womb-human-trial-fda/index.html) (reporting that "[a] handful of scientists have been experimenting with animals and artificial wombs," but that "no such device has been tested in humans," and that, in any event, "[a]n artificial womb is not designed to replace a pregnant person; it could not be used from conception until birth. Rather, it could be used to help a small number of infants born before 28 weeks of pregnancy, which is considered extreme prematurity."); Stephen Wilkinson et al., Artificial Wombs Could Someday be a Reality, The Conversation, Dec. 1, 2023 (at the time of this decision, this article could be located at: https://theconversation.com/artificial-wombs-could-someday-be-a-reality-heres-how-they-may-change-our-notions-of-parenthood-217490) (observing that even an artificial womb for premature babies "may be many decades away" but that "artificial womb technologies could eventually lead to 'full ectogenesis' -- growing a foetus from conception to 'birth' wholly outside the human body" (emphasis added)).

include that emotionally charged hypothetical undermines its earlier observation that "[a]ll parties to these cases, like all members of this Court, agree that an unborn child is a genetically unique human being whose life began at fertilization and ends at death."[30] __ So. 3d at __. No

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[30]I note that although I certainly agree with the above-quoted statement from the main opinion, even that observation is not as simple as it appears because of the terms involved.

> "Notwithstanding various legislative pronouncements, from a medical and scientific perspective, fertilization is currently considered to be a chaotic and multi-step process, whereas 'conception' has variously been described as the time frame between fertilization and implantation in a woman's uterus, or the process of implantation. Precisely how long an in vitro growing cell mass is considered an embryo versus a pre-embryo, or whether the latter term is a legitimate distinction has long been the subject of debate among scientists as well as legal and ethical scholars."

Susan L. Crockin & Gary A. Debele, Ethical Issues in Assisted Reproduction: A Primer for Family Law Attorneys, 27 J. Am. Acad. Matrim. Law. 289, 299 (2015). See also McQueen v. Gadberry, 507 S.W.3d 127, 134 n.4 (Mo. Ct. App. 2016) (observing that "'"Pre-embryo" is a medically accurate term for a zygote or fertilized egg that has not been implanted in a uterus. It refers to the approximately 14-day period of development from fertilization to the time when the embryo implants in the uterine wall and the "primitive streak," the precursor to the nervous system, appears. An embryo proper develops only after implantation. The term "frozen embryos" is a term of art denoting cryogenically preserved pre-embryos.'" (quoting Elizabeth A. Trainor, Annotation, Right of Husband, Wife, or Other Party to Custody of Frozen

one -- not Mobile Infirmary Association, the Center for Reproductive Medicine, the amicus Alabama Medical Association, my dissenting colleagues, or anyone who disagrees with today's Court's decision -- is suggesting that such a child, if he or she could be produced, should not be protected by Alabama law.

Ultimately, as I stated at the outset, we must be guided by the language provided in the Wrongful Death of a Minor Act and the manner in which our cases have interpreted it. Under those guideposts, today's result is correct. However, the decision undoubtedly will come as a shock in some quarters of the State. I urge the Legislature to provide more leadership in this area of the law given the numerous policy issues and serious ethical concerns at stake,[31] and the fact that there is little

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Embryo, Pre-embryo, or Pre-zygote in Event of Divorce, Death, or Other Circumstances, 87 A.L.R. 5th 253, 260 (2001))).

[31]See, e.g., Yehezkel Margalit, From (Moral) Status (of the Frozen Embryo) to (Relational) Contract and Back Again to (Relational Moral) Status, 20 Ind. Health L. Rev. 257, 257 (2023) ("The existing hundreds of thousands of unused frozen embryos, coupled with the skyrocketing rate of divorce, raise numerous moral, legal, social, and religious dilemmas. Among the most daunting problems are the moral and legal status of the frozen embryo; what should its fate be in the event of conflicts between the progenitors?; and whether contractual regulation of frozen embryos is valid and enforceable."); Caroline A. Harman, Defining the Third Way -- the Special-Respect Legal Status of Frozen Embryos, 26 Geo. Mason L.

Rev. 515, 516 (2018) (observing that, "[u]nfortunately, American courts have not kept pace with the advancements happening in the field of ART [assisted reproductive technology]" and that, "[m]ost often, frozen embryo cases come to the courts during divorce suits between progenitors. Due to the personal nature of ART, however, progenitors are less likely to seek legal recourse when frozen embryos are negligently destroyed and the harm caused by the clinic is shielded from the public eye. While suits regarding negligent destruction of frozen embryos and suits when progenitors stop paying storage fees are less common, they are not without their legal and societal implications. When couples do turn to the judicial system, the courts are often ill-equipped to answer such legal questions in a manner that also considers the unique nature of ART and the accompanying emotions of the progenitors." (footnotes omitted)); Shirley Darby Howell, The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation, 14 DePaul J. Health Care L. 407, 407 (2013) (explaining that "[u]sing IVF to assist individuals and couples having trouble procreating would be seemingly positive, but the procedure has resulted in serious unintended consequences that continue to trouble theologians, physicians, and the courts. The ongoing legal debate focuses on two principal questions: (1) whether a frozen embryo should be regarded as a person, property, or something else and, (2) how to best resolve disputes between gamete donors concerning disposition of surplus frozen embryos."); Maggie Davis, Indefinite Freeze?: The Obligations A Cryopreservation Bank Has to Abandoned Frozen Embryos in the Wake of the Maryland Stem Cell Research Act of 2006, 15 J. Health Care L. & Pol'y 379, 396-97 (2012) (asserting that "[c]ryopreservation is a scarce good, and is incredibly costly. For instance, one California cryopreservation bank charged clients $375 a year, prepaid, to store embryos. After many years, this can become incredibly burdensome on the progenitors. When the fees become too burdensome, there is a higher chance for couples to stop paying their fees, and eventually fall out of contact with the clinic. As embryos are abandoned, and storage fees are not paid, cryopreservation banks will likely need to raise the costs of the fees to other customers in order to compensate." (footnotes omitted)); Beth E. Roxland & Arthur Caplan, Should Unclaimed Frozen Embryos Be Considered Abandoned Property and Donated to Stem Cell Research?, 21 B.U. J. Sci. & Tech. L. 108, 109 (2015)

regulation of the entire IVF industry.[32] Ultimately, it is the Legislature that possesses the constitutional authority and responsibility to be the final arbiter concerning whether a frozen embryo is protected by the laws of this State. Without such guidance, I fear that there could be unfortunate consequences stemming from today's decision that no one intends.

("'As science races ahead, it leaves in its trail mind-numbing ethical and legal questions.'" (quoting Kass v. Kass, 91 N.Y. 2d 554, 562, 696 N.E.2d 174, 178, 673 N.Y.S. 2d 350, 354 (1998) (citing John A. Robertson, Children of Choice: Freedom and The New Reproductive Technologies (1994))).

[32]See, e.g., Valerie A. Mock, Getting the Cold Shoulder: Determining the Legal Status of Abandoned IVF Embryos and the Subsequent Unfair Obligations of IVF Clinics in North Carolina, 52 Wake Forest L. Rev. 241, 257 (2017) (observing that "IVF centers are largely a self-regulated industry, meaning that for better or for worse, they receive little governmental oversight. There are no federal regulations for the disposition of abandoned embryos, and very few states have addressed it legislatively." (footnotes omitted)); Roxland & Caplan, 21 B.U. J. Sci. & Tech. L. at 115 (noting that "[n]o federal statutory law or regulation generally governs the classification of frozen embryos. In fact, only three states have enacted legislation concerning the disposition of frozen embryos more generally: Louisiana, Florida, and New Hampshire." (footnotes omitted)).

SELLERS, Justice (concurring in the result in part and dissenting in part).

These cases are not about when life begins, nuances of statutory construction, or the definition of "minor child" or "person." And, contrary to the main opinion, there is no black-letter law in Alabama, or any other state, to help us.[33] Regrettably, these cases use the specter of destroying human life to craft a narrative involving the protection of unborn children to cynically inflame worries about the sanctity of life under Alabama law.

In reality, these cases concern nothing more than an attempt to design a method of obtaining punitive damages under Alabama's Wrongful Death of a Minor Act, § 6-5-391, Ala. Code 1975, by concluding that frozen embryos, negligently destroyed, are entitled to the same protections as a fetus inside a mother's womb. Parsing the Brody Act, Act No. 2006-419, Ala. Acts 2006, codified as § 13A-6-1, Ala. Code 1975 (which is a part of Alabama's criminal-homicide statutes), and employing any sequence of linguistic gymnastics, cannot yield the conclusion that embryos developed through in vitro fertilization were intended by the legislature to be included in the definition of "person," see § 13A-6-

[33]Otherwise, the duration of oral argument would not have approached two hours.

1(a)(3), much less the definition of "minor child," see § 6-5-391(a). It is clear from the four corners of the Brody Act that the legislative intent was to protect unborn life, regardless of viability, from violence perpetrated against the mother. Previously, to impose criminal sanctions for the murder of an unborn child was impossible. See Act No. 77-607, § 2001(2), Ala. Acts 1977 (amended in 2006 by the Brody Act) ("'Person,' when referring to the victim of a criminal homicide, means a human being who had been born and was alive at the time of the homicidal act." (emphasis added)). The Brody Act eliminated not only this born-alive requirement but also any viability threshold to create the bright-line rule that, if a woman is pregnant, an embryo in utero receives all the protections that a viable life would be afforded under the laws of Alabama. See § 13A-6-1(a)(3). Thus, and in light of Justice Houston's special writings in Gentry v. Gilmore, 613 So. 2d 1241, 1245 (Ala. 1993) (Houston, J., concurring in the result), and Lollar v. Tankersley, 613 So. 2d 1249, 1253 (Ala. 1993) (Houston, J., concurring in the result), which "emphasized the need for congruence between the criminal law and our civil wrongful-death statutes," Mack v. Carmack, 79 So. 3d 597, 611 (Ala.

2011), this Court held "that the Wrongful Death [of a Minor] Act permits an action for the death of a previable fetus." Id.

But interpreting the Brody Act as we are asked to do here is a judgment call. In short, we must determine whether to constrain ourselves to the clear intent of the Act or whether to inform our interpretation using extraneous means to reach a result clearly contrary to anything the Act ever intended. The majority's conclusion that an action may be maintained under the Wrongful Death of a Minor Act for the negligent destruction of an in vitro embryo -- an atextual conclusion purportedly reached by utilizing the Brody Act's definition of "person" to inform the Wrongful Death of a Minor Act's definition of "minor child" -- is clearly contrary to the intent of the legislature. To equate an embryo stored in a specialized freezer with a fetus inside of a mother is engaging in an exercise of result-oriented, intellectual sophistry, which I am unwilling to entertain.

Furthermore, I am puzzled by the majority and concurring opinions' references to Article I, § 36.06, of the Alabama Constitution of 2022. We have repeatedly stated that "'[a] court has a duty to avoid constitutional questions unless essential to the proper disposition of the case.'" Lowe v.

Fulford, 442 So. 2d 29, 33 (Ala. 1983) (quoting trial court's order citing other cases). The majority believes the word "child" is unambiguous, yet it opines in dicta, without any citation to authority, that if the word "child" were ambiguous, § 36.06 acts "as a constitutionally imposed canon of construction, directing courts to construe ambiguous statutes in a way that 'protect[s] ... the rights of the unborn child' equally with the rights of born children." __ So. 3d at __. Respectfully, § 36.06 neither operates in such a fashion nor commands this Court to override legislative acts it believes "contraven[e] the sanctity of unborn life." __ So. 3d at __ (Parker, C.J., concurring specially). Section 36.06 states, in relevant part, "that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate." § 36.06(b). Because all policy determinations are vested in our legislature, this includes those determinations regarding the sanctity of unborn life. Therefore, § 36.06 merely reaffirms that "the judicial branch may not exercise the legislative or executive power." Art. III, § 42(c), Ala. Const. 2022. Accordingly, this Court has no authority to determine whether legislation concerning or relating to unborn life defies § 36.06;

that authority lies only with the People of this State, acting through their elected representatives.

Any public-policy ramifications of any decision in these cases are outside the purview of this Court, and they are more appropriately reserved for the legislature. Should the legislature wish to include in vitro embryos in the definition of "minor child," it may easily do so. Absent any specific legislative directive, however, we should not read more into a legislative act than the legislature did so itself. Thus, as to the majority opinion's conclusion regarding the Wrongful Death of a Minor Act, I respectfully dissent.

Insofar as the majority opinion affirms the trial court's dismissal of the plaintiffs' negligence and wantonness claims, I concur in the result. I must necessarily disagree with the majority opinion's mootness rationale on account of my dissent as to the majority opinion's analysis and conclusion regarding the Wrongful Death of a Minor Act.

COOK, Justice (dissenting).

I respectfully dissent. The first question that this Court is being asked to decide in these appeals is whether Alabama's Wrongful Death of a Minor Act ("the Wrongful Death Act"), see § 6-5-391, Ala. Code 1975, as passed by our Legislature, provides a civil cause of action for money damages for the loss of frozen embryos. This is a question of the meaning of the words in that Act, as it was originally passed and understood in 1872.

My sympathy with the plaintiffs and my deeply held personal views on the sanctity of life cannot change the meaning of words enacted by our elected Legislature in 1872. Even when the facts of a case concern profoundly difficult moral questions, our Court must stay within the bounds of our judicial role.

Limiting our role to interpreting the existing words in a statute and letting the Legislature decide changes is one of the basic teachings of the United States Supreme Court's recent decision in Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022). In that case, the United States Supreme Court overruled Roe v. Wade, 410 U.S. 113 (1973), and returned the hotly disputed issue of abortion to the citizens

in each state, so that their elected representatives could pass laws addressing that issue. In concluding that the authority to regulate abortion "must be returned to the people and their elected representatives," the Supreme Court in Dobbs explained that "respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance." 597 U.S. at 292 and 302. The Supreme Court further explained that it "'has neither the authority nor the expertise to adjudicate those disputes'" and that "'courts do not substitute their social and economic beliefs for the judgment of legislative bodies.'" Id. at 289 (quoting Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963)).

Over the years, our Court has repeatedly said the same thing. Specifically, our Court has made clear that we are "not at liberty to rewrite statutes or to substitute [our] judgment for that of the Legislature." Ex parte Carlton, 867 So. 2d 332, 338 (Ala. 2003). Further, our Court has repeatedly made clear that "public-policy arguments should be directed to the legislature, not to this Court." Ex parte Ankrom, 152 So. 3d 397, 420 (Ala. 2013) (emphasis added).

Statutes Do Not Evolve. The Legislature Amends Them.

On rare occasions, our Court's decisions have included language that departed from the rule that the Legislature -- and not this Court -- updates statutes. For example, in Eich v. Town of Gulf Shores, 293 Ala. 95, 99, 300 So. 2d 354, 357 (1974), this Court wrote that "it is often necessary to breathe life into existing laws less they become stale and shelfworn" "in order that existing law may become useful law to promote the ends of justice." This is both dicta and fundamentally wrong.

It is not our role to expand the reach of a statute and "breathe life" into it by updating or amending it. It is also not our role to consider whether a law has become "stale" or "shelfworn."[34] This is the same error made by those commentators who advocate for a living constitution and argue that the words in our Constitution should evolve over time.[35]

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[34]See Craft v. McCoy, 312 So. 3d 32, 37 (Ala. 2020) (recognizing that """"""when determining legislative intent from the language used in a statute, a court may explain the language, but it may not detract from or add to the statute""""""") (citations omitted)); and Ex parte Coleman, 145 So. 3d 751, 758 (Ala. 2013) (recognizing that "'[t]he judiciary will not add that which the Legislature chose to omit'" (quoting Ex parte Jackson, 614 So. 2d 405, 407 (Ala. 1993))).

[35]See generally Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 403-10 (Thomson/West 2012); Joe Carter, Justice Scalia Explains Why the "Living Constitution" is a Threat to America, Action Inst. (May 14, 2018) (at the time of this decision, this

Instead, it is the role of the Legislature to determine whether a law is outdated (for instance, because of new technology) and, thus, requires updating. If our Court does "breathe life" into a law by expanding its reach, we short-circuit the legislative process and violate the Alabama Constitution's separation-of-powers clause. That clause provides that, "[t]o the end that the government of the State of Alabama may be a government of laws and not of individuals, … the judicial branch may not exercise the legislative or executive power." Ala. Const. 2022, Art. III, § 42(c). Substituting our own meaning "turn[s] this Court into a legislative body, and doing that, of course, would be utterly inconsistent with the doctrine of separation of powers." DeKalb Cnty. LP Gas Co. v. Suburban Gas, Inc., 729 So. 2d 270, 276 (Ala. 1998).

Separation of powers is part of our Constitution for a reason -- there are real advantages to the Legislature -- and not this Court -- making such decisions. See Jay Mitchell, Textualism in Alabama, 74 Ala. L. Rev. 1089, 1097 (2023) (explaining that "[t]here is a reason that the people elected legislators to formulate public policy, and there is every reason to

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article could be located at: https://rlo.acton.org/archives/101616-justice-scalia-explains-why-the-living-constitution-is-a-threat-to-america.html).

think they are better at it and better situated to be accountable for their choices than judges are" (emphasis in original)). In fact, the drafters of the Alabama Constitution felt the separation-of-powers principle was so important that they made it an express clause in our Constitution, whereas the drafters of the Constitution of the United States did not.[36] The facts of these cases certainly illustrate why the Legislature is best suited to weigh competing interests and write comprehensive legislation, after full input from the public and thorough study.

Why I Dissent

I dissent because the main opinion violates this fundamental principle -- that is, that the legislative branch and not the judicial branch updates laws -- by expanding the meaning of the Wrongful Death Act beyond what it meant in 1872 without an amendment by the Legislature. I also dissent because I believe the main opinion overrules our recent Wrongful Death Act caselaw that requires "congruence" between the definition of "person" in Alabama's criminal-homicide statutes and the

[36]Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham, 912 So. 2d 204, 212 (Ala. 2005) (explaining that "[t]he Constitution of Alabama expressly adopts the doctrine of separation of powers that is only implicit in the Constitution of the United States").

definition of "minor child" in the Wrongful Death Act. Both the original public meaning and this recent caselaw indicate the same result here -- that the Wrongful Death Act does not address frozen embryos.

Moreover, there are other significant reasons to be concerned about the main opinion's holding. No court -- anywhere in the country -- has reached the conclusion the main opinion reaches. And, the main opinion's holding almost certainly ends the creation of frozen embryos through in vitro fertilization ("IVF") in Alabama. The plaintiffs themselves explained in oral argument:

> "But today we're here advocating on behalf of plaintiffs who are supporters of in vitro fertilization. It worked for them. They have two beautiful children in each family because of in vitro fertilization. The notion that they would do anything to hinder or impair the right or access to IVF therapy is flat wrong. That's not why we're here."

Supreme Court of Alabama, Supreme Court O/A Mobile Alabama, YouTube 19:14 (Sep. 21, 2023) (at the time of this decision, this oral-argument session could be located at: https://www.youtube.com/watch?v=L08KGhNSDME) (emphasis added). It is not my role to judge whether ending this medical procedure is good or bad -- but it doubtless will have a huge impact on many Alabamians. And it underscores the need to have

the Legislature -- not this Court -- address these issues through the legislative process.

In addition to the reasons stated above, I also dissent because the main opinion does not reach the second question presented in these appeals -- that is, whether the trial court prematurely dismissed the plaintiffs' negligence and wantonness claims at the pleading stage. Those claims present an alternative pathway to protect frozen embryos, a pathway without many of the problems presented by the Wrongful Death Act claims.

There is no dispute in these cases about when life begins. All parties agree on that issue. I specifically asked the defendants at oral argument: "[s]o, is it your position that … these were lives?" And they responded: "It is, Justice Cook. I think that the … embryo is a life, but the issue today is whether an embryo is a child protected under the [Wrongful Death Act]." Supreme Court of Alabama, Supreme Court O/A Mobile Alabama, YouTube 1:17:49 (Sep. 21, 2023).

The defendants nevertheless present a "catch-22" argument in support of the dismissal of those claims. On the one hand, they allege that the plaintiffs' wrongful-death claims were properly dismissed

because their frozen embryos are not "minor children" under the Wrongful Death Act. On the other hand, they allege that the trial court properly dismissed the plaintiffs' negligence and wantonness claims because their frozen embryos each represent "a life." I am deeply troubled by this argument and the consequences that could result from adopting this position.

However, as explained below, there is no need for this Court to reach this "catch-22" argument at this time because it is simply too soon to dismiss those claims under Alabama's liberal pleading rules. It is for this reason that I would reverse the trial court's dismissal of the plaintiffs' negligence and wantonness claims.

I. The Plaintiffs' Wrongful-Death Claims

A. The Wrongful Death Act -- A Purely Statutory Claim

This Court has previously observed that wrongful-death actions "are purely statutory," meaning "[t]here was no such action or right of action at common law." Kennedy v. Davis, 171 Ala. 609, 611-12, 55 So. 104, 104 (1911) (emphasis added). The Alabama Legislature, therefore, has the responsibility of declaring who is covered by this private right of action.

The Legislature originally passed the Wrongful Death Act in 1872, and the Act was later codified in the Code of Alabama in 1876. See Ala. Code 1876, § 2899. The Act states, in relevant part, that "[w]hen the death of a minor child is caused by the wrongful act, omission, or negligence of any person, … the father, or the mother, ... of the minor may commence an action." § 6-5-391(a) (emphasis added).

Unfortunately, the Wrongful Death Act does not define the term "minor child." Although the Act was last amended in 1995, see Ala. Acts 1995, Act No. 95-774, § 1, the phrase "[w]hen the death of a minor child is caused by the wrongful act … of any person" has remained unchanged from the Act's initial inception in 1872, and no change has ever been made to it bearing on the meaning of the term "minor child."

B. We Should Use the Original Public Meaning of the Wrongful Death Act's Words

With no definition of "minor child" having been provided by the Legislature, this Court must decide how to interpret the meaning of that term as used in the Wrongful Death Act. I believe in originalism, which means that we should apply the original meaning of the words as those words were used in the Act when it was passed in 1872. In other words, I apply the "original public meaning" of the words. As Justice Mitchell

has observed, "the meaning of a law is its original public meaning, not its modern meaning." Mitchell, supra, at 1092 (some emphasis added; some emphasis in original); see also Barnett v. Jones, 338 So. 3d 757, 768 (Ala. 2021) (Mitchell, J., concurring specially); Ex parte Pinkard, 373 So. 3d 192, 207 (Ala. 2022) (Mitchell, J., concurring specially); Gulf Shores City Bd. of Educ. v. Mackey, [Ms. 1210353, Dec. 22, 2022] __ So. 3d __, __ (Ala. 2022) (Mitchell, J., concurring in part and concurring in the result).[37]

One of the leading scholars on this approach has undoubtedly been Justice Antonin Scalia. In Reading Law: The Interpretation of Legal Texts 33 (Thomson/West 2012), Justice Scalia and Bryan A. Garner explain that when a court is required to interpret the words in a statute, it should consider "how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued." (Emphasis added).[38] See also id. at 78-92 (referring to this as the "fixed-

[37]See also Mitchell, supra, at 1103 (explaining that "[w]hen judges say words should be given their 'ordinary' meaning, we do not mean that each word in a text always takes its literal meaning or its most statistically common meaning. We mean instead that words must be given the meaning that an ordinary reasonable person would ascribe to them after reading them in context.").

[38]As Justice Mitchell notes in Textualism in Alabama, supra, "[o]ur court, along with the U.S. Supreme Court and courts within the United

meaning canon" and as the "original public meaning" of a statute); New Prime Inc. v. Oliveira, 586 U.S. ____, ____, 139 S. Ct. 532, 539 (2019) (noting that "'[i]t's a "fundamental canon of statutory construction" that words generally should be "interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute."' Wisconsin Central Ltd. v. United States, 585 U.S. ____, ____, 138 S. Ct. 2067, 2074, 201 L. Ed. 2d 490 (quoting Perrin v. United States, 444 U.S. 37, 42, 100 S. Ct. 311, 62 L. Ed. 2d 199 (1979))."). [39]

Because "[w]ords change meaning over time, and often in unpredictable ways," Justice Scalia and Garner explain that it is important to give words in statutes the meaning they had when they were adopted to avoid changing what the law is. Scalia & Garner, supra, at 78 (emphasis added). "By anchoring the meaning of a text to the objective indication of its words at a fixed point in time, … a judges'

States Court of Appeals for the Eleventh Circuit, has cited Reading Law numerous times." 74 Ala. L. Rev. at 1107.

[39]Consistent with applying original public meaning, this Court has explained that "'[t]he court knows nothing of the intention of an act, except from the words in which it is expressed, applied to the facts existing at the time, the meaning of the law being the law itself.'" Maxwell v. State, 89 Ala. 150, 161, 7 So. 824, 827 (1890) (citation omitted).

abilities to 'update' laws as they go along" is constrained. Mitchell, supra, at 1096.

Again, because this Court is in the judicial branch, its role is limited, and applying the "original public meaning" of the words in a statute helps this Court to stay within its constitutional role, which is a fundamental part of democracy. See Scalia & Garner, supra, at 82-83 (recognizing that "[o]riginalism is the only approach to text that is compatible with democracy. When government-adopted texts are given a new meaning, the law is changed; and changing written law, like adopting written law in the first place, is the function of the first two branches of government -- elected legislators and … elected executive officials and their delegates."). After all, if judges could freely invest old statutory terms with new meanings, this Court would risk amending legislation outside the "single, finely wrought and exhaustively considered, procedure" the Constitution commands. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1953).

1. The Original Public Meaning of "Minor Child" Can Be Found in the Common Law -- "The authorities … are unanimous."

The common law answers the question whether the term "minor child" as used in the Wrongful Death Act was broad enough in 1872 to

reach a frozen embryo today. In Alabama, it is a well-settled principle of law that the common law governs unless expressly changed by the statutes passed by our Legislature. Our Court has repeatedly held that "'[a]ll statutes are construed in reference to the principles of the common law; and it is not to be presumed that there is an intention to modify, or to abrogate it, further than may be expressed, or than the case may absolutely require.'" State v. Grant, [Ms. 1210198, Sept. 9, 2022] ____ So. 3d ____, ____ (Ala. 2022) (quoting Beale v. Posey, 72 Ala. 323, 330 (1882)) (emphasis added); see also Ex parte Christopher, 145 So. 3d 60, 65 (Ala. 2013) (observing that "'statutes [in derogation or modification of the common law] are presumed not to alter the common law in any way not expressly declared'" (quoting Arnold v. State, 353 So. 2d 524, 526 (Ala. 1977) (emphasis added)).[40]

[40]See also Holmes v. Sanders, 729 So. 2d 314, 316 (Ala. 1999) ("'[T]he common law is the base upon which all of the laws of this State have been constructed, and when our courts are called upon to construe a statute, … they must read the statute in light of the common law.'") (citation omitted); Ivey v. Wiggins, 276 Ala. 106, 108, 159 So. 2d 618, 619 (1964) (recognizing that "[l]egislative enactments in modification of the common law should be clear and such as to prevent reasonable doubt as to the legislative intent and of the limits of such change"). Further "statutes being in derogation of the common law, must be strictly construed, and cannot be extended in their operation and effect by

The Alabama Code also expressly mandates that the common law remains in effect absent actual changes by the Legislature. See § 1-3-1, Ala. Code 1975 ("The common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this state, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, except as from time to time it may be altered or repealed by the Legislature." (emphasis added)).

Similarly, Justice Mitchell has previously recognized that "[a] statute that uses a common-law term, without defining it, adopts its common-law meaning." Mitchell, supra, at 1130 (emphasis added). Other authorities agree that we must "presume the legislature retained the common-law meaning." 3A Norman J. Singer and J.D. Shambie Singer, Statutes and Statutory Construction § 69:9 (7th ed. 2010) (quoted approvingly by Mitchell, supra, at 1130).

So, what did the common law indicate in 1872? There is no doubt that the common law did not consider an unborn infant to be a child capable of being killed for the purpose of civil liability or criminal-

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doubtful implication." Mobile Battle House, Inc. v. Wolf, 271 Ala. 632, 639, 126 So. 2d 486, 493 (1961) (emphasis added).

homicide liability. In fact, for 100 years after the passage of the Wrongful Death Act, our caselaw did not allow a claim for the death of an unborn infant, confirming that the common law in 1872 did not recognize that an unborn infant (much less a frozen embryo) was a "minor child" who could be killed.

For example, in 1926, this Court, for the first time, addressed the issue whether the Wrongful Death Act permitted claims for the death of an unborn fetus who died from prenatal injuries. Citing cases from other jurisdictions, this Court in Stanford v. St. Louis-San Francisco Railway Co., 214 Ala. 611, 612, 108 So. 566, 566 (1926), held that the Wrongful Death Act did not permit recovery for injuries during pregnancy that resulted in the death of the fetus.

In support of that holding, our Court wrote:

> "'The doctrine of the civil law and the ecclesiastical and admiralty courts … that an unborn child may be regarded as in esse … is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth. If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it. We are of opinion that the action will not lie.'"

214 Ala. at 612, 108 So. at 567 (quoting Allaire v. St. Luke's Hosp., 184

Ill. 359, 368, 56 N.E. 638, 640 (1900)) (emphasis added). We emphasized: "The authorities, however, are unanimous in holding that a prenatal injury affords no basis for an action in damages, in favor either of the child or its personal representative." 214 Ala. at 612, 108 So. at 566 (emphasis added).

For many years afterwards, this Court maintained this position. See, e.g., Birmingham Baptist Hosp. v. Branton, 218 Ala. 464, 467, 118 So. 741, 743 (1928) (recognizing that "[t]his court has established a general line of demarcation between the civil rights of the mother and child to be born. It is concurrent with separate existence of the mother and child by the birth; and parental injury before the birth is no basis for action in damages by the child or its personal representative."); Snow v. Allen, 227 Ala. 615, 619, 151 So. 468, 471 (1933) (recognizing that "[s]o long as the child is within the mother's womb, it is a part of the mother, and for any injury to it, while yet unborn, damages would be recoverable by the mother in a proper case").

Thus, the common law in Alabama before 1872, and for 100 years afterward, was clear: "'The doctrine of the civil law … that an unborn child may be regarded as in esse … is a mere legal fiction, which … has

not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth.'" Stanford, 214 Ala. at 612, 108 So. at 566 (citation omitted; emphasis added).[41]

2. The Main Opinion's Responses to the Common-Law are Mistaken

The main opinion provides four responses to the position that the common law did not consider an unborn infant to be a minor child capable of being killed for the purpose of civil liability or criminal-homicide liability: (1) that the common-law homicide rule was merely an "evidentiary rule," (2) that a dictionary from the 1800s includes a definition of "child" that did not provide an "exception" for unborn infants, (3) that William Blackstone (among other things) "grouped" the "rights" of unborn children with the "Rights of Persons," and (4) that the defendants' argument seeks an "exception" to the definition of "minor child" for frozen embryos. Each of these arguments is mistaken. I will address them one at a time.

First, the main opinion notes that "[i]t is true, as Justice Cook

[41]Again, we must follow the original public meaning of the statute, even if we might believe that the meaning is ill-informed, unwise, or outdated. If a meaning of a statute is, in fact, ill-informed, unwise, or outdated, the Legislature -- not this Court -- must amend or update that statute.

emphasizes, that the common law spared defendants from criminal-homicide liability for killing an unborn child unless the prosecution could prove that the child had been 'born alive' before dying from its injuries." ____ So. 3d at ____ n.6. Nevertheless, the main opinion goes on to assert that the common-law "born-alive" rule was "an evidentiary rule rather than … a substantive limitation on personhood." Id.[42]

The main opinion cites no Alabama authority in support of its "evidentiary rule" argument. The only authority cited is a law-review article from 2009, which in turn relies on a second law-review article from

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[42]The main opinion also asserts that we can ignore the common-law criminal-law rule that it admits existed, because the criminal law has always been "'out of step with the treatment of prenatal life in other areas of law.'" ____ So. 3d at ____ n.6 (quoting Dobbs, 597 U.S. at 247). It does not cite any Alabama law for this assertion.

Regardless, this assertion is directly contrary to our Court's repeated holdings that there should be "congruence" between the Wrongful Death Act and Alabama's criminal-homicide statutes (as discussed more fully below). See Mack, 79 So. 3d at 611. Even if it were not, this argument is nevertheless irrelevant given that the common-law rule in the civil-law context in Alabama was the same rule as the criminal-law rule. See, e.g., Stanford, 214 Ala. at 612, 108 So. at 566.

Further, Dobbs did not say that the criminal law could be ignored in determining the meaning of the common law. Instead, the main opinion's quote from Dobbs merely concerned a debate over the "basis" for a different common-law rule (the quickening rule) -- an issue that the Dobbs Court did not even decide. 597 U.S. at 247.

1987.[43] See id. (citing Joanne Pedone, Filling the Void: Model Legislation for Fetal Homicide Crimes, 43 Colum. J. L. & Soc. Probs. 77, 82 (2009), citing in turn Clarke D. Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 Val. U. L. Rev. 563, 586 (1987)).

Regardless, the main opinion is mistaken. Our caselaw makes clear that this common law was a substantive rule of law -- both in the criminal context and in the civil context. Stanford, 214 Ala. at 612, 108 So. at 567 (concluding that a wrongful-death action for an unborn child "'will not lie'" (citation omitted; emphasis added)); Clarke v. State, 117 Ala. 1, 8, 23 So. 671, 674 (1898) (recognizing that "'[a]n infant in its mother's womb, not being in rerum natura, is not considered as a person who can

[43]Although the main opinion cites to Dobbs in an apparent effort to support these two law-review articles, Dobbs did not hold, or even suggest, that this common-law rule was merely an evidentiary rule and not a substantive rule of law. Instead, as noted above, the page in Dobbs cited by the main opinion contains a discussion of a debate over the possible "basis" for the "quickening rule." Dobbs, 597 U.S. at 247. Moreover, Dobbs concluded that even the debate over the "basis" of the "quickening rule" was "of little importance." Id. In the present appeals, the "basis" for the common-law rule that an unborn infant could not be killed is not at issue. Even if we were to assume that the "basis" for this common-law rule was unwise, it was still the rule in effect at the time the Wrongful Death Act was passed and therefore is part of the original public meaning of that Act unless the Legislature amends it.

be killed within the description of murder ….'" (quoting 3 Russell on Crimes (6th ed.)) (emphasis added)). The main opinion does not cite or distinguish either of these Alabama cases. Nor would it matter if it was an "evidentiary rule" because even an evidentiary rule would still indicate the original public meaning of the statute (that is, what a "reasonable reader" at the time of passage understood the law to be). The main opinion also cites no caselaw holding that an "evidentiary rule" (even if one applied here) should be ignored in determining the original public meaning. Further, even if the common law were a mere evidentiary rule (and it was not), it would be an irrebuttable evidentiary rule as clearly shown by the cases and language cited above.

Second, the main opinion argues that the "leading dictionary of that time defined the word 'child' as 'the immediate progeny of parents' and indicated that this term encompassed children in the womb." ____ So. 3d at ____ (citing Noah Webster et al., An American Dictionary of the English Language 198 (1864) (quoting the first listed definition). However, this Court cannot ascertain the meaning of disputed terms merely by "plugging a string of words into a dictionary and running with the first results that come up." Mitchell, supra, at 1091. Instead, "words

are given meaning by their context." Scalia & Garner, supra, at 56.

Here, the context indicates that the main opinion is mistaken. The cited dictionary does not "indicate[] that this term encompassed children in the womb." Instead, it indicates the opposite. The same first definition of "child" also states: "The term is applied to infants from their birth; but the time when they cease ordinarily to be so called, is not defined by custom." Webster, supra, at 198. (emphasis added).[44] "From their birth"

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[44]The main opinion argues in a footnote that the language in the first definition of "child" merely "contrasts newborns with older children in order to make the point that there is no clear-cut time at which a young person transitions from childhood to adulthood." ____ So. 3d at ____ n.5. But this is not the plain meaning of the language in the definition of "child": "[t]he term is applied to infants from their birth." Webster, supra, at 198. And, our Court is not in a position to speculate about what the subjective intent of the author of an 1864 dictionary might have been -- that is, whether this plain language was included merely "in order to make the point." See Scalia & Garner, supra, at 30 ("Subjective intent is beside the point. … Objective meaning is what we are after ….").

In that same footnote (and in a parenthetical in the text of the main opinion), the main opinion also quotes the last line of the definition in this dictionary (line 41 -- under the seventh definition). ____ So. 3d at ____ n.5. However, this quotation is simply an illustration. Webster, supra, at 198 ("To be with child, to be pregnant"). Again, this illustration does not contradict the common law or Alabama law of the time. In fact, to the extent that this illustration could mean anything in these appeals, it would tend to show that a frozen embryo outside of a mother would not have been part of the public meaning of "minor child" in 1872 because there would be no mother who was "pregnant."

means after they were born.

Further, the language quoted in the text of the main opinion is general in nature ("immediate progeny of parents") and thus fails to answer the question whether a frozen embryo is a "minor child" as that term was understood in 1872. This general definition also does not contradict the common law in any way. As explained above, the common law (and Alabama law) is definite, and it does indicate that, in 1872, the public meaning of "minor child" as used in the Wrongful Death Act did not include an unborn infant (or a frozen embryo).

In the same vein, the main opinion cites Blackstone's Commentaries and argues (1) that it "expressly grouped the rights of unborn children" with the "'Rights of Persons,'" (2) "consistently described unborn children as 'infant[s]' or 'child[ren],'" and (3) spoke of "such children as sharing in the same right to life that is 'inherent by nature in every individual.'" ____ So. 3d at ____ (quoting 1 William

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Finally, the main opinion argues that the definition of a different word --"childbearing" -- "drives home the point" when it "describes 'childbearing' as the act of 'bearing children' in the womb." Id. However, the definition is far less clear. Instead it states that "childbearing" is "[t]he act of producing or bringing forth children; parturition."

Blackstone's Commentaries on the Laws of England *125-26). The main opinion's characterization of these principles in Blackstone's Commentaries is mistaken.

First, none of this contradicts the Alabama caselaw cited above. In fact, the snippets quoted by the main opinion do not state, one way or the other, whether an unborn infant could be killed under the common law (whether for civil or criminal purposes). Second, how a list of rights were "grouped" seems insignificant at best, and the main opinion provides no explanation for why this is even relevant, much less important. Third, although the main opinion's assertion that children share the "same right to life" is certainly true, it does not help explain why a frozen embryo is a "minor child" as that term was understood in 1872 when the Act was adopted.

Finally, the main opinion incorrectly characterizes the defendants' argument as seeking an exception to the definition of "minor child." The very beginning of the main opinion argues:

> "This Court has long held that unborn children are 'children' for purposes of Alabama's Wrongful Death of a Minor Act …. The central question presented … 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."

____ So. 3d at ____ (emphasis added).

In making this assertion, the main opinion assumes the answer to the relevant question -- i.e., whether a "frozen embryo" is a "minor child" as that term was understood in 1872 in the Wrongful Death Act -- by immediately labeling frozen embryos as "extrauterine children" and deeming them "unborn children." In other words, the main opinion assumes that a frozen embryo is a "child" without further context or analysis and does so in the second sentence of the opinion.

The main opinion then asks an irrelevant question -- "whether the Act contains an unwritten exception" for "extrauterine children." ____ So. 3d at ____ (emphasis added). No party has suggested or requested an "exception" to anything in these appeals. Assuming the answer to the question and then framing this debate as whether an "exception" exists is semantics. It does not provide an answer to the relevant question and does nothing to respond to the common-law rule.

In short, the common-law rule as stated by our Court in Stanford is the original public meaning of the term "minor child" as it was understood in 1872 in the Wrongful Death Act. Stanford, 214 Ala. at 612,

108 So. at 567 (1926) (concluding "'that an unborn child may be regarded as in esse … is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth'" (citation omitted)). And, our Court has made clear that "'statutes [in derogation or modification of the common law] are presumed not to alter the common law in any way not expressly declared.'" Ex parte Christopher, 145 So. 3d at 65 (citation omitted). Thus, any update to the Wrongful Death Act must be done by the Legislature and not this Court.

C. Prior Caselaw Interpreting and Applying the Wrongful Death Act Based on Congruence with Alabama's Criminal-Homicide Statutes and Action by the Legislature

What about this Court's more recent caselaw interpreting the Wrongful Death Act? Although the members of this Court believe in originalism and textualism, we should not ignore our prior caselaw unless we are willing to overrule it. After the cases cited above, the next time we tackled these issues was in 1972 when we decided Huskey v. Smith, 289 Ala. 52, 265 So. 2d 596 (1972). In Huskey, for the first time, 100 years after the passage of the Wrongful Death Act, we allowed an action for unborn infant who was viable at the time of a prenatal injury

and thereafter was born alive, but who later died, thus partially overruling Stanford.

Why did we partially overrule Stanford in Huskey? One key reason was our Court's recognition that the purpose and reach of the Wrongful Death Act was tied to the State's criminal-homicide statutes:

> "By the criminal law, it is a great crime to kill the child after it is able to stir in the mother's womb, by an injury inflicted upon the person of the mother, and it may be murder if the child is born alive and dies of prenatal injuries. Clarke v. State, 117 Ala. 1, 23 So. 671 (1897). One of the purposes of our wrongful death statute is to prevent homicides. Bell v. Riley Bus Lines, [257 Ala. 120, 57 So. 2d 612 (1952)]. If we continued to follow Stanford, which followed then existing precedent, a defendant could be responsible criminally for the homicide of a fetal child but would have no similar responsibility civilly. This is incongruous."

Huskey, 289 Ala. at 55, 265 So. 2d at 597-98 (second and third emphasis added).

Then, in 1993, our Court made clear that it would not expand recovery under the Wrongful Death Act beyond that which was expressly provided in the Act absent a clear direction from the Legislature. First, in Lollar v. Tankersley, 613 So. 2d 1249, 1252-53 (Ala. 1993), we explained that, "[w]ithout a clearer expression of legislative intent," we would decline to hold that the Wrongful Death Act "creates a cause of

action for the wrongful death of a fetus that has never attained viability" and noted that "it appears that no court in the United States has, without a clear legislative directive, recognized a cause of action for the wrongful death of a fetus that has never attained a state of development exceeding that attained in this case." Then, in Gentry v. Gilmore, 613 So. 2d 1241, 1244 (Ala. 1993), we repeated this sentiment and explained:

> "We follow the reasoning of a majority of jurisdictions and hold that our statute provides no cause of action for the wrongful death of a nonviable fetus. In so holding, we point out that, with the exception of Georgia, the Gentrys' position [that a wrongful-death action exists for the death of a nonviable fetus] apparently is not the law in any American jurisdiction where there is no clear legislative direction to include a nonviable fetus within the class of those covered by the wrongful death acts. See Miccolis v. AMICA Mutual Insurance Co., 587 A.2d 67, 71 (R.I. 1991); Gary A. Meadows, Comment, Wrongful Death and the Lost Society of the Unborn, 13 J. Legal Med. 99, 107 (1992); and Sheldon R. Shapiro, Annotation, Right to Maintain Action or to Recover Damages for Death of Unborn Child, 84 A.L.R.3d 411, 453-54, § 5[a] (1978 & Supp. 1992)."

(Emphasis added.)

Using language similar to Huskey, Justice Houston wrote specially in both cases and argued for an approach that he believed would be "consistent with the criminal law." Noting the definition of "person" in Alabama's criminal-homicide statutes at that time, Justice Houston

wrote: "There should not be different standards in wrongful death and homicide statutes, given that the avowed public purpose of the wrongful death statute is to prevent homicide and to punish the culpable party and not to compensate for the loss." Gentry, 613 So. 2d at 1245 (Houston, J., concurring in the result); Lollar, 613 So. 2d at 1253 (Houston, J., concurring in the result).

1. The Brody Act and This Court's Reiteration of Congruence Between Alabama's Criminal-Homicide Statutes and the Wrongful Death Act

In 2006, nearly 13 years after Justice Houston's observations in Lollar and Gentry, the Alabama Legislature enacted the "Brody Act," Act No. 2006-419, Ala. Acts 2006, codified as § 13A-6-1, Ala. Code 1975. The Brody Act amended the definition of "person" in Alabama's criminal-homicide statutes to expand who could be deemed a victim of a criminal homicide to include an "unborn child in utero." See § 13A-6-1(a)(3), Ala. Code 1975.

Before that amendment, the definition of "person" in Alabama's criminal-homicide statutes was:

> "[A] human being who had been born and was alive at the time of the homicidal act."

See Act No. 607, § 2001(2), Ala. Acts 1977, formerly codified as § 13A-6-

1(2) (emphasis added). After the passage of the Brody Act, however, the definition of "person" in the criminal-homicide statutes became:

> "[A] human being, including an unborn child in utero at any stage of development, regardless of viability."

§ 13A-6-1(a)(3) (emphasis added).

Following the passage of the Brody Act, our Court decided Mack v. Carmack, 79 So. 3d 597 (Ala. 2011), in which we held that a plaintiff could bring a claim under the Wrongful Death Act for the death of a previable in utero fetus. Our holding in Mack rested, in large part, on the Legislature's adoption of the Brody Act. Specifically, we noted that the Brody Act "constitute[d] clear legislative intent to protect even nonviable fetuses from homicidal acts." 79 So. 3d at 610. We also explained that the public purpose of our wrongful-death statutes, including the Wrongful Death Act, is to prevent homicide and that "this Court repeatedly has emphasized the need for congruence between the criminal law and our civil wrongful-death statutes." 79 So. 3d at 611 (emphasis added).

Thus, we held, after considering "the legislature's amendment of Alabama's homicide statute to include protection for 'an unborn child in utero at any stage of development, regardless of viability,' § 13A-6-1(a)(3)," that the Wrongful Death Act should likewise permit an action

for the death of the plaintiff's previable, in utero fetus given that the purpose of the Act is to prevent the death of a child. Id. In so holding, we quoted with approval Justice Houston's special concurrences from Gentry and Lollar regarding the need for congruence between Alabama's wrongful-death statutes and its criminal-homicide statutes given that the purpose of those statutes is to prevent homicide and "'to punish the culpable party and not to compensate for the loss.'" Id. at 610 (quoting Gentry, 613 So. 2d at 1245 (Houston, J., concurring in the result); and Lollar, 613 So. 2d at 1253 (Houston, J., concurring in the result)).

Five years after this Court's decision in Mack, our Court reached an identical result in Stinnett v. Kennedy, 232 So. 3d 202 (Ala. 2016). In that case, we explained that "borrowing the definition of 'person' from the criminal Homicide Act to inform [us] as to who is protected under the civil Wrongful Death Act made sense." 232 So. 3d at 215 (emphasis added).

In the present appeals, the parties have neither asserted that our holdings or reasoning in either Mack or Stinnett are wrong, nor have they asked us to overrule those decisions. See Clay Kilgore Constr., Inc. v. Buchalter/Grant, L.L.C., 949 So. 2d 893, 898 (Ala. 2006) (noting absence of a specific request to overrule existing authority and stating that,

"[e]ven if we would be amenable to such a request, we are not inclined to abandon precedent without a specific invitation to do so").[45] I therefore see no reason to abandon this precedent in deciding the question at issue in the present appeals.

2. The Main Opinion is Overruling Mack and Stinnett

The main opinion alleges that this Court's decisions in Mack and Stinnett do not "mean that the definition of 'child' in the Wrongful Death of a Minor Act must precisely mirror the definition of 'person' in our criminal-homicide laws." ____ So. 3d at ____. Specifically, the main opinion alleges that, because criminal liability is "more severe than civil liability," the "set of conduct that can support a criminal prosecution is almost always narrower than the conduct that can support a civil suit." ____ So. 3d at ____. According to the main opinion, an argument to the contrary is "not only illogical, it was rejected in Stinnett itself." ____ So. 3d at ____. Based on the foregoing, the main opinion concludes that the definition of "person" in Alabama's criminal-homicide law provides a "floor" for the definition of personhood in wrongful-death actions, not a

[45]See also Alabama Dep't of Revenue v. Greenetrack, Inc., 369 So. 3d 640 (Ala. 2022) (declining to overrule precedent when the parties did not expressly ask this Court to do so).

"ceiling." ____ So. 3d at ____.

Contrary to the main opinion's assertion, our Court in Stinnett expressly stated that it was "borrowing the definition of 'person' from the criminal Homicide Act to inform [us] as to who is protected under the civil Wrongful Death Act." 232 So. 3d at 215 (emphasis added). By using the phrase "borrowing the definition," it is difficult to imagine how much clearer our Court could have been that the definitions of the terms "person" and "minor child" were to be interpreted the same. Thus, the main opinion is simply incorrect when it states that Stinnett "did not say that." ____ So. 3d at ____.

Additionally, in reaching the above conclusion, the main opinion mistakes statutory definitions for liability standards. It is certainly true that criminal law includes additional defenses (and sometimes includes additional elements) and thus contains a "narrower" standard of liability than civil law, but it is also true that definitions of terms can be the same in the criminal-homicide statutes and the civil wrongful-death statutes.

Stinnett illustrates this. In that case, the plaintiff sued a physician for the wrongful death of her unborn fetus pursuant to the Wrongful Death Act. The defendant, emphasizing the congruence discussion in

Mack, argued that an exception to liability for medical personnel in the criminal-homicide statutes also prevented malpractice liability under the Wrongful Death Act. See Stinnett, 232 So. 3d at 214-15 (citing § 13A-6-1(b), Ala. Code 1975, which provides a defense to homicide for a physician providing medical care for a "[m]istake, or unintentional error").

Not surprisingly, our Court disagreed. Relying on Mack, we explained that the liability standard differed between the criminal-homicide statutes and the civil Wrongful Death Act. Therefore, this Court held, the defendant could be liable for medical malpractice even if she were a physician and committed an "unintentional error." We wrote:

> "[Mack's] attempt to harmonize who is a 'person' protected from homicide under both the Homicide Act and Wrongful Death Act, however, was never intended to synchronize civil and criminal liability under those acts, or the defenses to such liability."

232 So. 3d at 215 (emphasis added); ____ So. 3d at ____ (quoting the same language). Thus, contrary to the main opinion's position, our Court in Stinnett made clear that our holding on liability standards had no impact on our decision to "borrow[]" the definition of "person" (that is, the victim) in Alabama's criminal-homicide statutes to determine who a "minor child" was under the Wrongful Death Act.

Moreover, the main opinion's reasoning that the definition of "person" in Alabama's criminal-homicide statutes provides a "floor" for the definition of "child" in wrongful-death actions, not a "ceiling," is also illogical given the changes brought about by the Brody Act.[46] The Legislature made an intentional decision to extend the criminal-homicide statutes beyond the common law when it passed the Brody Act. In sharp contrast, the Legislature has never extended the relevant portion of the Wrongful Death Act, despite the passage of 150 years. Yet, the main opinion now decides that the definition in this unamended civil statute goes further than the definition in the criminal-homicide statutes that the Legislature did extend.

In sum, the main opinion overrules Mack and Stinnett[47] sub silentio

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[46]When construing a criminal statute in a civil action, the Rule of Lenity should be applied because it would be "inconceivable" to give "the language defining the violation ... one meaning (a narrow one) for the penal sanctions and a different meaning (a more expansive one) for the private compensatory action." Scalia & Garner, supra, at 297.

[47]The year after this Court decided Mack, supra, it was once again called upon to address the reach of the Wrongful Death Act in Hamilton v. Scott, 97 So. 3d 728 (Ala. 2021). The main opinion quotes Hamilton for the proposition that a wrongful-death-act claim can be brought for "'any unborn child.'" ____ So. 3d at ____ (quoting Hamilton, 97 So. 3d at 735). This quote is correct, but it does not answer the relevant question in these cases -- that is, whether a frozen embryo is a "minor child" as that term

by decoupling the definitions in the criminal-homicide statutes and the Wrongful Death Act, by removing the reasoning of those decisions, and by overlooking our other caselaw requiring congruence between the definition of "person" in Alabama's criminal-homicide statutes and the definition of "minor child" in the Wrongful Death Act.[48]

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was used in 1872 in the Wrongful Death Act. Further, Hamilton did not change the holding in Mack and instead expressly stated that "Mack is now controlling precedent …. Therefore, we will apply Mack in deciding this appeal." Hamilton, 97 So. 3d at 735. Moreover, to the extent that there is any confusion about whether the homicide statutes' definition of "person" has been "borrow[ed]" (and thus is both a "floor" and a "ceiling" for the scope of the term "minor child" in the Wrongful Death Act), Stinnett governs because it was decided after Hamilton.

[48]The main opinion argues that the "bulk of [my] dissent is animated by the view that Mack was wrongfully decided and that, contrary to its holding, unborn children are not 'children' under the Act after all." ____ So. 3d at ____ n.4. This is inaccurate. The opinions in these cases are settled law, and I have not questioned them or their reasoning. Moreover, as explained above, Mack arose after the Legislature made an express change to the criminal-homicide statutes that broadened the definition of "person" beyond the common law for the first time. So that there is no doubt, the law in Alabama is clear (since the Legislature amended the criminal-homicide statutes) that killing an "unborn child in utero" is both a homicide and actionable under the Wrongful Death Act -- and I agree with this law.

Here, we are called upon to decide a question that this Court has not decided before -- whether a frozen embryo is a "minor child" under the Wrongful Death Act. There are two possible approaches to this: (1) follow the holding of Mack and Stinnett (that is, use the homicide definition of "person" adopted by the Legislature in the criminal-homicide

3. The Plaintiffs' Arguments Regarding the Brody Act are Mistaken

Because I would follow our prior precedent that there must be "congruence" between the definition of "person" in Alabama's criminal-homicide statutes and the definition of "minor child" in the Wrongful Death Act, I must consider whether a frozen embryo is within the definition of "person" in the criminal-homicide statutes, as amended by the Brody Act -- a question that is hotly debated in the briefs. Because the main opinion holds that the definition in the criminal-homicide statutes is merely a "floor," it does not engage on this question.

As noted above, after the passage of the Brody Act, the definition of "person" in the criminal-homicide statutes became: "[A] human being, including an unborn child in utero at any stage of development, regardless of viability." § 13A-6-1(a)(3) (emphasis added). The primary argument between the parties is over the phrase "including an unborn child in utero." On the one hand, the defendants argue strongly that the

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statutes) or (2) independently determine the meaning of that term by following the original public meaning of that term. As explained above, the result is the same under either approach. The main opinion must choose one way or the other. Either Mack and Stinnett were correct and the main opinion is bound by the criminal-homicide statutes' definition for "person," or the main opinion is bound by the original public meaning of the term "minor child."

phrase "including an unborn child in utero" indicates that the Legislature, by adding this phrase to the definition, implied that "human being" would not otherwise include an unborn child in utero (and therefore would not include a frozen embryo, which was not added). On the other hand, the plaintiffs argue just as strongly that this phrase is not intended to be a limiting phrase but, instead, merely provides one example of a "human being," thus implying that "human being" is broad enough to include a frozen embryo.

First, this Court has recognized that both the preamble and the title of an act may be used to resolve any ambiguities in the text. See Newton v. City of Tuscaloosa, 251 Ala. 209, 218, 36 So. 2d 487, 494 (1948) (recognizing that "both the preamble and the title of an act may be looked to in order to remove ambiguities and uncertainty in the enacting clause"); City of Bessemer v. McClain, 957 So. 2d 1061, 1075 (Ala. 2006) (noting that our Court "can also look at the title or preamble of the act"); Scalia & Garner, supra, at 33 (recognizing that the textual purpose of an act is "vital" to its context).

The Brody Act provides that it "shall be known as the 'Brody Act,' in memory of the unborn son of Brandy Parker, whose death occurred

when she was eight and one-half months pregnant." Act No. 2006-419, § 4. Likewise, the title to the Brody Act provides that it is "[a]n act, [t]o amend [Alabama's homicide code], … to define person to include an unborn child … [and] to name the bill 'Brody Act' in memory of the unborn son of Brandy Parker, whose death occurred when she was eight and one-half months pregnant."

Based on the contents of the Brody Act and its title, it seems quite clear to me that the death of Brody Parker -- an unborn, in utero child -- spurred the Legislature to change the definition of a "person" in the criminal-homicide statutes from the common-law meaning to a meaning that now allows a defendant to be charged with murder when he or she causes the death of a "human being" "in utero." In other words, the textual purpose was to expand the definition of "person" to cover victims like Brody Parker who died in utero. Our caselaw makes clear that we must presume that the terms of a statute mean what they were designed to effect, and we are not allowed to enlarge them by construction. See Holmes v. Sanders, 729 So. 3d 314, 316 (Ala. 1999) (explaining that this Court presumes "'that the legislature did not intend to make any alteration in the law beyond what it declares either expressly or by

unmistakable implication'" (quoting Beasley v. MacDonald Eng'g Co., 287 Ala. 189, 197, 249 So. 2d 844, 851 (1971))).[49]

Second, the plaintiffs' proposed statutory construction of the criminal-homicide statutes is contrary to the common law of homicide and is not supported by the history of Alabama's criminal-homicide statutes. In 1852, the Alabama Legislature passed the first criminal-homicide statute, which made clear that only a "human being" could be the victim of a murder. That statute read, in relevant part, that "every homicide perpetrated … to effect the death of any human being" constituted murder. § 3080, Ala. Code 1852 (emphasis added). Although every Code section addressing criminal homicide enacted between 1852 and 1977 used the term "human being" to describe the victim of murder and manslaughter, the Legislature never defined the term.

After the passage of the first homicide statute, this Court held that killing an unborn infant in utero did not constitute a murder, citing a common-law treatise. For example, in Clarke v. State, 117 Ala. at 8, 23

[49]See also Cook v. Meyer Bros., 73 Ala. 580, 583 (1883) (noting the "presumption … that the language … of the statute import[s] the alteration or change it was designed to effect, and [its] operation will not be enlarged by construction ….").

So. at 674, this Court wrote that "'[a]n infant in its mother's womb, not being in rerum natura, is not considered as a person who can be killed, within the description of murder ….'" (Quoting 3 Russell on Crimes (6th ed.) (emphasis added).)[50]

Then, in 1977, the Legislature repealed the previous criminal-homicide statutes and replaced them with the new criminal-homicide statutes. In doing so, the Legislature expressly adopted the common-law rule and defined the term "person" as "a human being who had been born and was alive at the time of the homicidal act." Former § 13A-6-1(2). That definition remained unchanged until the adoption of the Brody Act, at which point the Legislature, as explained above, went beyond the common-law rule to expressly declare that a victim of a homicide or assault (that is, a "human being") included an "unborn child in utero."

[50]The authority cited in Clarke was a leading criminal-law treatise originally written about the common law by an English Justice named William Oldnall Russell. Although this Court cited the sixth edition (published in 1896), the earlier editions contained the same quote, dating back to at least 1826. See, e.g., William Oldnall Russell, A Treatise on Crimes and Indictable Misdemeanors at 424 (2d ed. 1826). In other words, this Court in Clarke correctly stated and followed the content of the common law.

In short, the common law was clear that an unborn infant was "'not considered as a person who can be killed.'" Clarke, 117 Ala. at 8, 23 So. at 674 (citation omitted). The statutory law did not change this until the passage of the Brody Act. Thus, the common-law definition remains, except to the extent that it has been expressly changed by the Brody Act to add an "unborn child in utero" to the definition of "person" in Alabama's criminal-homicide statutes. To conclude otherwise would be inconsistent with our caselaw cited above holding that "'[a]ll statutes are construed in reference to the principles of the common law; and it is not to be presumed that there is an intention to modify, or to abrogate it, further than may be expressed, or than the case may absolutely require.'" Grant, ____ So. 3d at ____ (citing and quoting Beale v. Posey, 72 Ala. at 330).[51]

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[51]I note briefly that, were we to adopt the plaintiffs' proposed construction of the definition of "person" in the criminal-homicide statutes, we risk criminalizing the IVF process. Under the Rule of Lenity, "'criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation, i.e., defendants.'" Ex parte Bertram, 884 So. 2d 889, 891 (Ala. 2003) (quoting Clements v. State, 370 So. 2d 723, 725 (Ala. 1979), overruled on other grounds by Beck v. State, 396 So. 2d 645 (Ala. 1980)). Thus, if there were any reasonable doubts as to the statutory construction of the criminal-homicide statutes, this Court would apply the Rule of Lenity and strictly construe the definition of "person" in favor of those persons sought to be subjected to their

For all of these reasons, it seems clear to me that a frozen embryo does not fit within the statutory definition of "person" as that term is used in Alabama's criminal-homicide statutes and thus cannot be a "minor child" under the Wrongful Death Act.

D. Article I, § 36.06, of the Alabama Constitution of 2022 Has No Impact on the Terms in the Wrongful Death Act from 1872

The main opinion also argues that, even if the word "child" in the Wrongful Death Act were ambiguous, Article I, § 36.06, of the Alabama Constitution of 2022 "operates in this context as a constitutionally imposed canon of construction," which "require[s] courts to resolve the ambiguity in favor of protecting unborn life." ____ So. 3d at ____. That section "acknowledges, 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 and measures lawful and appropriate." § 36.06(b) (emphasis added). The Chief Justice also devotes his special concurrence to this argument.

The first problem with this argument is that there is nothing in the

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operation -- for instance, in a future case, perhaps fertility-clinic workers. This is yet another reason why the plaintiffs' interpretation of the criminal-homicide statutes is mistaken.

text of § 36.06 about resolving ambiguities in statutes (assuming there was one here), and the main opinion cites no authority supporting such a rule of construction. Even if we were to assume such a rule of construction, there is nothing in § 36.06 that tells us how to best protect frozen embryos. Specifically, § 36.06 does not indicate (1) whether we should protect frozen embryos by updating the words in the Wrongful Death Act or (2) whether we should protect frozen embryos via the ordinary common-law route (that is, by allowing the claims of negligence and wantonness to move forward in these actions). Why is one option more constitutionally mandated than another -- especially when one option requires us to discount the original public meaning of the terms in the Wrongful Death Act as it was passed by the Legislature in 1872?

The second problem with this position is timing. The Wrongful Death Act was passed in 1872, whereas § 36.06 was passed in 2018. Section 36.06 cannot retroactively change the meaning of words passed in 1872. The Legislature in 1872 had no idea about a constitutional amendment that would be passed 150 years later. If the Legislature wanted to change the words in the statute, they should have changed the

words in the statute.[52]

Although I agree with much of what Chief Justice Parker so eloquently states in his special concurrence regarding the "sanctity of unborn life," ____ So. 3d at ____ (Parker, C.J., concurring specially), I do not agree with his discussion of the "Effect of Constitutional Policy." ____ So. 3d at ____ (Parker, C.J., concurring specially). In particular, I believe he is mistaken when he asserts that the People of Alabama "explicitly" told "all three branches of government what they ought to do" in § 36.06. ____ So. 3d at ____ (Parker, C.J., concurring specially). The question for these appeals is whether Alabama law provides a private cause of action, for money damages, for the loss of a frozen embryo. There is no language in this constitutional amendment mentioning private causes of action, or money damages, or frozen embryos, or IVF. Compare Dobbs, 597 U.S. at

[52]It is of course true, as the main opinion notes, that the Constitution is the "'supreme law of the state'" and that all statues "'must yield'" to it. ____ So. 3d at ____ n.7. However, the main opinion fails to explain why the original public meaning of the term "minor child" in the Wrongful Death Act violates -- that is, does not "yield" to -- § 36.06. Although the main opinion contends that the definition of "child" that it applies here is "in keeping with the definition that was established by this Court's precedents at the time § 36.06 was adopted," id. (emphasis omitted), I fail to see how that could be true given that, as explained in detail above, the main opinion is overruling Mack and Stinnett.

237 (noting that a right to abortion "is not mentioned anywhere in the Constitution").

The third difficulty with this argument is that it does not rebut any of my conclusions discussed above, including those premised on the common law, the criminal-homicide statutes, and our prior caselaw. It is for all of these reasons that I find this argument unpersuasive.

E. The Suggestion that the Common Law Has Been "Collectively Repealed" Is Mistaken

Justice Shaw argues that it is "well settled" that the meaning of the term "minor child" "includes an unborn child with no distinction between in vitro or in utero." ____ So. 3d at ____ (Shaw, J., concurring specially) (emphasis added). Other than simply referring to the main opinion, Justice Shaw cites no legal authority that this lack of any distinction is "well settled." Regardless, he is mistaken for all the reasons explained above.

As to his assertion that "the legislature, the constitution, and this Court's decisions have collectively repealed the common law's prohibition on … seeking a civil remedy for injuries done to the unborn," ____ So. 3d at ____ (Shaw, J., concurring specially), Justice Shaw provides no analysis on this point either and, instead, simply provides a string

citation to (1) the Wrongful Death Act itself, (2) § 36.06(b) (analyzed in full earlier), and (3) two cases that support my position (as explained earlier). Id. at ____. Regardless, it is well settled that the Legislature -- not this Court -- "repeal[s]" statutes.

Further, the question in these appeals is not whether there is a common-law "prohibition on seeking a civil remedy for injuries done to the unborn" (as Justice Shaw frames the issue). ____ So. 3d at ____ (Shaw, J., concurring specially) (emphasis added). Instead, the question is whether the common law can help this Court determine if a frozen embryo is within the meaning of the term "minor child" in the Wrongful Death Act.

Justice Shaw appears to contend that the common law has a narrower role in providing meaning for words used in Alabama statutes than I have explained above. Relying on a special concurrence to a 1974 plurality opinion from this Court and § 1-3-1, Ala. Code 1975, he contends that Alabama statutory law "'does not provide'" that the "'"common law of England shall be the rule of decisions in Alabama unless changed by the legislature."'" ____ So. 3d at ____ (Shaw, J., concurring specially) (quoting Swartz v. United States Steel Corp., 293 Ala. 439, 446, 304 So.

2d 881, 887 (1974) (Faulkner, J., concurring specially)) (emphasis added). He argues "'[o]n the contrary,'" Alabama law merely provides that the common law applies so long as it is "'[n]ot inconsistent with the constitution, the laws, and the institutions of Alabama.'" Id. (some emphasis omitted); id. at ____ ("But if it is inconsistent, then it need not be first altered or repealed by the legislature.").

I fail to see a distinction between these standards and what our Court has repeatedly (and very recently) broadly stated: "'All statutes are construed in reference to the principles of the common law,'" Grant, ____ So. 3d at ____, and "'statutes [in derogation or modification of the common law] are presumed not to alter the common law in any way not expressly declared,'" Ex parte Christopher, 145 So. 3d at 65 (citation omitted; emphasis added); see also 3A Norman J. Singer and J.D. Shambie Singer, Statutes and Statutory Construction § 69:9 (explaining that we "presume the legislature retained the common-law meaning").

Justice Shaw does not cite or distinguish any of this authority. More fundamentally, Justice Shaw does not explain how using the common-law understanding of the meaning of the term "child" to determine whether a frozen embryo is a "minor child" under the Wrongful

Death Act is "inconsistent" with "'the constitution, the laws, and the institutions of Alabama.'" ____ So. 3d at ____ (Shaw, J., concurring specially) (emphasis and citation omitted). As explained thoroughly above, any changes that have been made in this area of the law have been made incrementally by the Legislature over time and have only gone so far as to encompass unborn, in utero children, as reflected in the holding and language discussed above in Stinnett, 232 So. 3d at 215 (which postdates the two cases cited by Justice Shaw).[53]

Thus, unless and until the Legislature updates Alabama law in such a way that demonstrates that a "frozen embryo" is a "minor child," this Court remains bound by the original public meaning of that term as it was understood in 1872 when the Legislature passed the Wrongful Death Act.

F. Not a Single State Agrees with the Main Opinion

Not a single state has held that a wrongful-death action (or a

[53]Like the main opinion, Justice Shaw argues that the definition of "person" in the criminal-homicide statutes "does not limit the determination whether an in vitro embryo is a 'minor child' for purposes of a civil-law action under the Wrongful Death Act." ____ So. 3d at ____ (Shaw, J., concurring specially). But, he cites no legal authority other than referring to the main opinion, and therefore he is mistaken for all the reasons explained above.

criminal-homicide action) can be brought for the destruction of a frozen embryo. In fact, a number of jurisdictions have rejected such causes of action. See, e.g., Penniman v. University Hosps. Health Sys., Inc., 130 N.E.3d 333, 339 (Ohio Ct. App. 2019) (holding that patients could not bring wrongful-death action against hospital based on destruction of frozen embryos because the embryos had no statutory rights); Jeter v. Mayo Clinic Arizona, 211 Ariz. 386, 400, 121 P.3d 1256, 1270 (Ct. App. 2005) (holding that cryopreserved, three-day-old, eight-cell pre-embryo was not a "person" for purposes of recovery under wrongful-death statute); and Davis v. Davis, 842 S.W.2d 588, 594 (Tenn. 1992) (holding that under Tennessee law pre-embryos could not be considered "persons").

It is certainly true that this Court is not bound by the results in other states; however, when we are the sole outlier, it should cause us to carefully reexamine our conclusions about expanding the reach of a statute passed in 1872 and our understanding of the common law.

G. The Consequences of This Decision and Why That is Relevant

The main opinion's holding will mean that the creation of frozen embryos will end in Alabama. No rational medical provider would

continue to provide services for creating and maintaining frozen embryos knowing that they must continue to maintain such frozen embryos forever or risk the penalty of a Wrongful Death Act claim for punitive damages.[54]

There is no doubt that there are many Alabama citizens praying to be parents who will no longer have that opportunity. And, there is no doubt that there will be fewer babies born. On the other hand, there are powerful moral and policy arguments supporting the notion that ending the creation, use, and destruction of frozen embryos is a good thing and that IVF technology has the potential for grave misuse.

I am empathetic to both sides of this debate; however, it is not my role to take a position one way or another on this issue. Even so, ending the creation of frozen embryos will undoubtedly cause significant consequences that will affect the future lives of thousands of Alabama citizens for years to come and the babies who will not be born. The solemn

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[54]The main opinion notes, but does not reach, the defendants' possible defenses based upon contracts between the IVF provider and the plaintiffs. Like the main opinion, I do not reach the possible defenses. However, no medical provider would depend upon the contract argument to continue creating and maintaining frozen embryos in the future, given this significant legal uncertainty and the potential to incur a significant punitive damage penalty.

significance of these consequences (as well as the need for comprehensive regulation) further illustrates why this question is an issue that should be addressed by the elected representatives of the people of Alabama in the Legislature, not this Court. I thus urge the Legislature to promptly consider these issues to provide certainty to these Alabama parents-to-be and to the medical professionals who are attempting to provide services to them.[55]

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[55]As to the consequences of a contrary ruling, the main opinion discusses, but does not rely upon, a "parade of horribles" that the plaintiffs claim might result from a ruling that the term "minor child" in the Wrongful Death Act does not include frozen embryos. The plaintiffs are mistaken. These cases have no connection to partial-birth abortions, and Alabama's law on partial-birth abortions would not be impacted by a ruling in favor of the defendants in these civil wrongful-death cases. See § 26-23-3, Ala. Code 1975. There are also no facts in the record to support any such argument, and there is no doubt the Wrongful Death Act could reach a partial-birth abortion situation as appropriate.

As to the plaintiffs' second argument (regarding a possible future case involving a yet to be invented artificial womb), the answer to this futuristic hypothetical is simple. These cases are about the facts today and are based upon a statute that has not changed in its relevant terms since 1872. Should the facts change, the Legislature can address future technologies and can do so far better than this Court.

The main opinion alleges that I have conceded that the Wrongful Death Act would not cover such a hypothetical. It is mistaken. I have made no such concession. We decide cases on the facts that are before us

The Chief Justice's special concurrence does not dispute that this will lead to fewer newborn babies. However, Chief Justice Parker insists that the IVF process may still survive in Alabama in some other form (for instance, he suggests: "one embryo at a time") because certain other countries have more regulations on their IVF processes. ____ So. 3d at ____ (Parker, C.J., concurring specially); id. at ___ (stating that he fails to see that "IVF will now end"). In fact, he spends several pages

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-- not hypotheticals. The main opinion also alleges that I have failed to discuss the "constitutional implications" of this hypothetical. ____ So. 3d at ____ n.3. Again, the reason is simple -- it is a hypothetical and we do not reach arguments or facts that are not before us, certainly not hypotheticals about technology that does not even exist. This Court would be in a position to address the alleged "constitutional implications" only if the following circumstances existed: (1) such an artificial womb existed, (2) it was actually used someday in the future, (3) a developing unborn infant was killed in an artificial womb, (4) the Wrongful Death Act had not been modified by the Legislature, (5) and we concluded that this created an Equal Protection Clause conflict. No such circumstances exist in the present appeals; I therefore see no need to address these hypothetical scenarios. See, generally, Ex parte Ankrom, 152 So. 3d 397, 431 (Ala. 2013) (Shaw, J., concurring in part and concurring in the result) ("Some of the arguments made ... are premised on hypothetical situations, different from the facts before us, in which the Code section might be either unconstitutional as applied or seemingly unwise in its application. It goes without saying that we cannot strike down the application of the Code section ... merely because the Code section might be unconstitutionally applied in some other context." (footnotes omitted)).

describing the regulations that currently exist in other countries and suggests that the Alabama Legislature may wish to consider those regulations. The Alabama Medical Association strongly disagrees with the suggestion that IVF in some other, reduced, form is practical, safe, or medically sound and has filed two amicus briefs exhaustively explaining these issues.

It is not the place or time to decide whether the position of the Chief Justice or the position of the Alabama Medical Association is correct, moral, or ethical. It is not the place because these are questions for the Legislature and not this Court. And, even if this Court were the correct forum, it would not be the time because these appeals are at the motion-to-dismiss stage and there is no factual record at this point. Therefore, no party has had the opportunity to investigate and respond to the assertions by the Chief Justice or the Alabama Medical Association.

However, as to the Chief Justice's suggestion that the Legislature consider these issues immediately (including his suggestion that they consider comprehensive regulation), I strongly agree.

II. The Plaintiffs' Negligence and Wantonness Claims

Finally, the main opinion does not reach the plaintiffs' negligence

and wantonness claims because they are pleaded in the alternative and, instead, holds that those claims are now "moot." ____ So. 3d at ____. Because I would affirm the dismissal of the plaintiffs' wrongful-death claims, I must reach this issue. For the reasons stated below, I would reverse the trial court's dismissal of those claims.

The defendants are making a "catch-22" argument. Cline v. Ashland, Inc., 970 So. 2d 755, 772 n.6 (Ala. 2007) (Harwood, J., dissenting) ("'Catch-22: a frustrating situation in which one is trapped by contradictory regulations or conditions.' Random House Webster's Unabridged Dictionary (2d ed. 2001)."). On the one hand, the defendants claim that the frozen embryos are not a "minor child." On the other hand, they claim that because the frozen embryos were "lives," no common-law claim (such as claims of negligence or wantonness) is available because no "damages" are recoverable.

I am concerned that such a rule might allow the destruction of life with no consequence, even for someone who commits an intentionally wrongful act. As explained by the plaintiffs, IVF is used by many parents-to-be in dire circumstances (for instance, because of reproductive issues caused by cancer, age, or infertility). Their frozen embryos are

undeniably precious. Thus, this argument has the potential to be both unjust and to incentivize bad conduct. See Huskey, 289 Ala. at 54, 265 So. 2d at 597 (noting that not allowing a recovery "would give protection to an alleged tort-feasor").

However, I need not reach the question of exactly how our Court should handle this situation because it is too early in these cases. We are only at the pleading stage. The plaintiffs argue, under this Court's prior decision in Raley v. Citibanc of Alabama/Andalusia, 474 So. 2d 640, 642 (Ala. 1985), that the trial court's dismissal of their common-law tort claims in response to a Rule 12(b)(6), Ala. R. Civ. P., motion was improper. Under Raley, they argue, once a pleader has set out a cause of action, the failure of the complaint to allege requisite elements of relief (that is, damages) is not usually a ground for a motion to dismiss for failure to state cause of action but, rather, must be challenged by a motion to strike, by objection to evidence, or by requested charges. Accordingly, they contend that the trial court's dismissal of those claims is due to be reversed.

"Alabama is a 'notice pleading' state." Surrency v. Harbison, 489 So. 2d 1097, 1104 (Ala. 1986) (citing Simpson v. Jones, 460 So. 2d 1282

(Ala.1984)). Rule 8(a), Ala. R. Civ. P., provides:

> "(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded."

"The primary purpose of notice pleading is to provide defendants adequate notice of the claims against them." Cathedral of Faith Baptist Church, Inc. v. Moulton, 373 So. 3d 816, 819 (Ala. 2022) (citing Adkison v. Thompson, 650 So. 2d 859 (Ala. 1994)). "'[P]leadings are to be liberally construed in favor of the pleader.'" Id. (quoting Adkison, 650 So. 2d at 862). As relevant here,

> "'the dismissal of a complaint is not proper if the pleading contains "even a generalized statement of facts which will support a claim for relief under [Rule 8, Ala. R. Civ. P.]" (Dunson v. Friedlander Realty, 369 So. 2d 792, 796 (Ala. 1979)), because "[t]he purpose of the Alabama Rules of Civil Procedure is to effect justice upon the merits of the claim and to renounce the technicality of procedure." Crawford v. Crawford, 349 So. 2d 65, 66 (Ala. Civ. App. 1977).'"

Id. (quoting Simpson, 460 So. 2d at 1285).

In their amended complaints, the plaintiffs alleged that the defendants' negligent and wanton conduct in failing to secure their respective facilities "led to and/or caused the destruction of the plaintiffs'

embryo[s]." As a result of that allegedly negligent and wanton conduct, the plaintiffs "demand[ed] judgment for compensatory damages, including but not limited to, [the] value of embryonic human beings … and for the severe mental anguish …." (meaning that they are seeking any valid compensatory damages). (Emphasis added).

The defendants do not attempt to address this Court's prior decision in Raley, supra. They also do not ask that we: (1) revisit the pleading standard under Alabama law or (2) reconsider our decision in Raley. They also do not point to any caselaw in which we have affirmed a trial court's dismissal at the pleading stage based upon an argument that damages had not been properly pleaded. Based on Raley, supra, I would reverse the trial court's dismissal of the plaintiffs' negligence and wantonness claims.