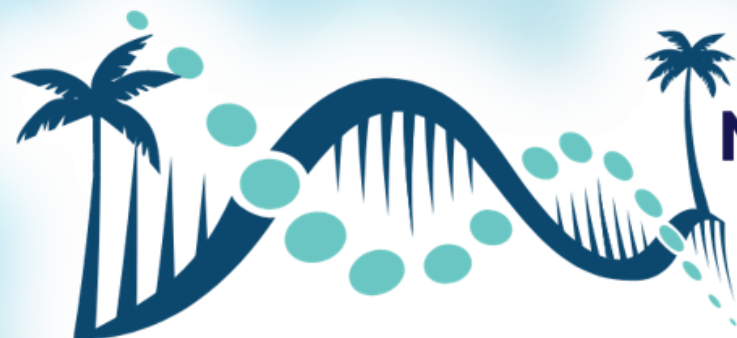




PACIFIC COAST
REPRODUCTIVE
SOCIETY



March 20–23 | Indian Wells, CA

PCRS 2024

INNOVATION AND INTEGRATION

THE FUTURE OF REPRODUCTIVE MEDICINE

Reversing course: Where we have come after the Dobbs decision and what comes next



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Disclosure Slide

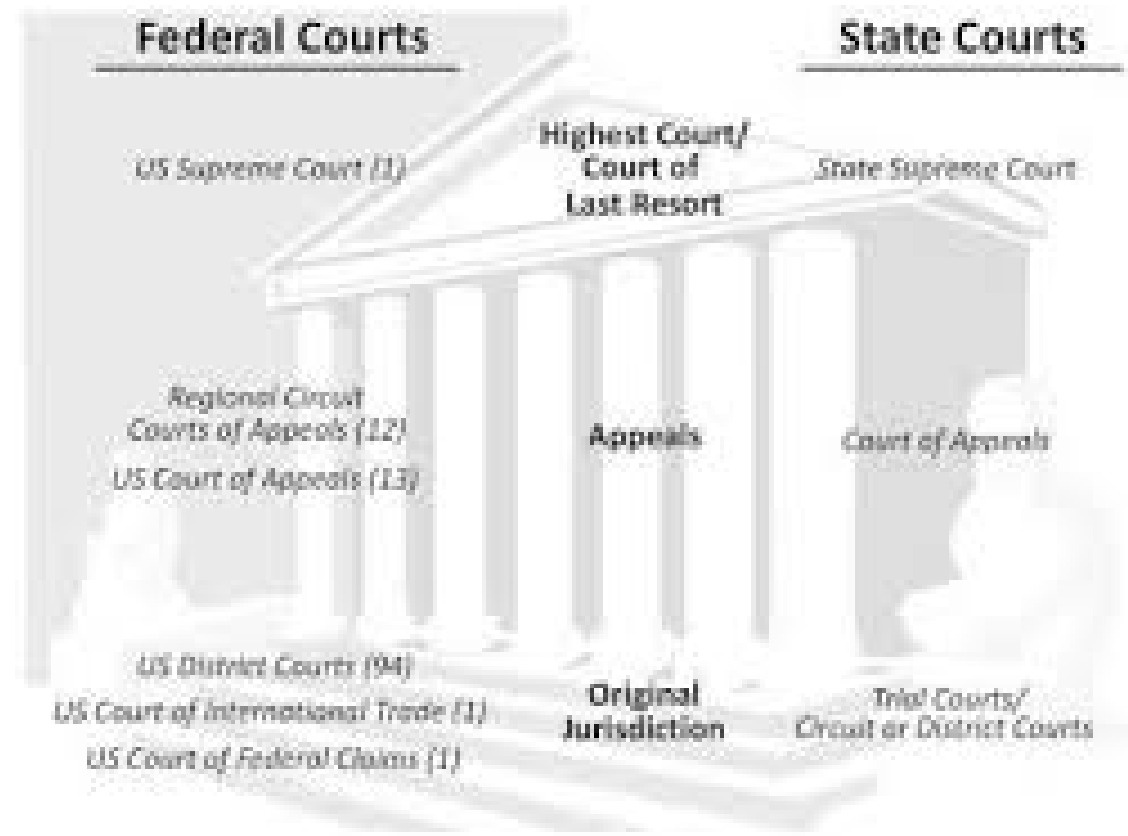
- Neither I nor members of my immediate family have any actual or potential financial interests to disclose relating to the content of this presentation.

Needs Assessment Statement and Expected Learning Outcomes

- Describe the foundation that the Supreme Court decision laid in DOBBS for current state legislative and judicial action
- Identify the application of state and federal law to IVF and parentage protections
- Interpret the key steps to be considered when confronted with threats to family building



Court System in the U.S.A.



US Constitution 10th amendment

- “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”
 - These historically include Family law
 - Enforcement of state criminal statutes



- Surrogacy
- Gamete Donation
- Provider liability
- IVF (legal status of an embryo)

Embryos through a legal lens

- State dependent
- Most courts see embryos somewhere between property and having “special status”
- LA defines embryo as “juridical person”

Impact of terminology on courts

- “Preembryo is a medically accurate, if awkward, term for a zygote, or fertilized egg, that has not been implanted in a uterus; the embryo proper develops only after implantation” *J.B. v. M.B (NJ APPELLATE CT)*
- Lower court in *Davis v. Davis* eight-cell entities at issue were not preembryos but were “children in vitro. [Davis v. Davis, 842 S.W.2d 588, 601 \(Tenn. 1992\)](#)
- Reversed by higher court based on scientific testimony

Relevant concepts in Roe v Wade (1973)

(Roe v. Wade, 410 U.S. 113)

- Definition of life
 - “In short, the unborn have never been recognized in the law as persons in the whole sense” (Roe at 162)
- Viability
- Right to Privacy [Griswold v. Connecticut, 381 U.S. 479, 484, 486 \(1965\)](#)
- Implications for REI practice

Personhood Amendments

- What is a personhood amendment?
- Post Roe, in 1974 a proposed bill in Congress reads: "Neither the United States nor any State shall deprive any human being, from the moment of conception, of life without due process of law; nor deny to any human being, from the moment of conception ... equal protection of the laws." Part I: Hearings on S.J. Res. 119 and S.J. Res. 130 Before the Subcomm. on Constitutional Amendments of the S. Judiciary Comm., 93rd Cong. 2 (1974)
- Early State proposals: Mississippi – surprisingly did not pass (2011)

Dobbs (2022)

- The question: Is the MS law prohibiting pre-viability (15-week) elective abortions unconstitutional?
- The answer (6-3 decision) : “No, and...”
- Majority opinion:
 - No U.S. history or tradition of abortion
 - No constitutional right to privacy re: abortion
 - Set aside precedent; ignore stare decisis
 - States can determine abortion rights



Post Dobbs

-
- IVF
 - Embryo Disposition
 - Contraception



Potential Causes of Action

Depends on the wording of the state law

Negligence, criminal misconduct

Treatment of cryopreserved embryos?

Treatment of implanted embryos?

Facts leading to the Alabama Ct decision

- *LaPage v Rep Health Services*
- 3 couples bring suit against after a patient unrelated to the case wanders into lab, opens the cryotank
- He then picks up the embryos and promptly drops them after burning his hands due to handling these vials with his bare hands

What did the Plaintiff's want?

Sought relief under theories of negligence and wrongful death

Did not allow the negligence claims to to forward as

“Alabama's longstanding prohibition on the recovery of compensatory damages for loss of human life”

Also dismissed the emotional distress claims because they require plaintiffs to sustain a physical injury

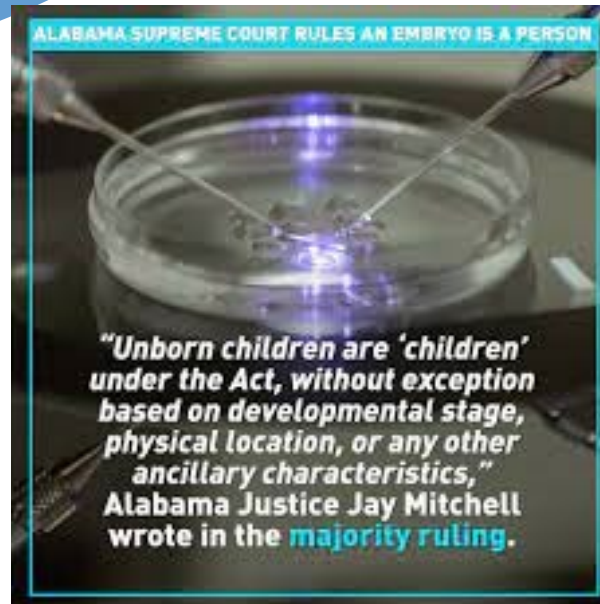
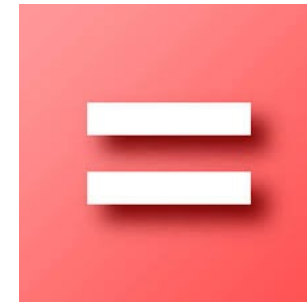
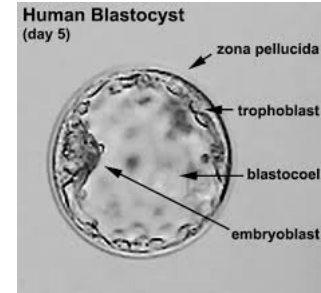
The lower court threw out the wrongful death claims as:

"[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

Statements from La Paige Brief to the Supreme Court

- The only difference between embryos implanted inside the body, which would be covered under Alabama's wrongful death statute, and those stored in a cryogenic freezer *is the location*

Alabama Supreme Court Decision: for purposes of the wrongful death Statute



The Introduction of the Majority Decision

2024 Ala. LEXIS 60 *; 2024 WL 656591

- The Facts:
 - 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.

- Analysis:

the relevant statutory text is clear: the Wrongful Death of a Minor Act applies on its face to all unborn children, without limitation

The Wrongful Death Act

- The court was interpreting a text from an Act 1st passed in **1872**
- 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."
- 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.**

Reaction after ALA Decision



Status of IVF shaken by Alabama supreme court decision that embryos are 'children'



Small text captions for the three women's portraits.

reedsmith.com

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Recently passed Alabama Legislation

- Related to in vitro fertilization and notwithstanding any provision of law, no criminal prosecution may may be brought for the damage or *the death of an embryo*
- This may allow clinics to resume, but does nothing to address the fundamental status of the embryo.



Where are we now?

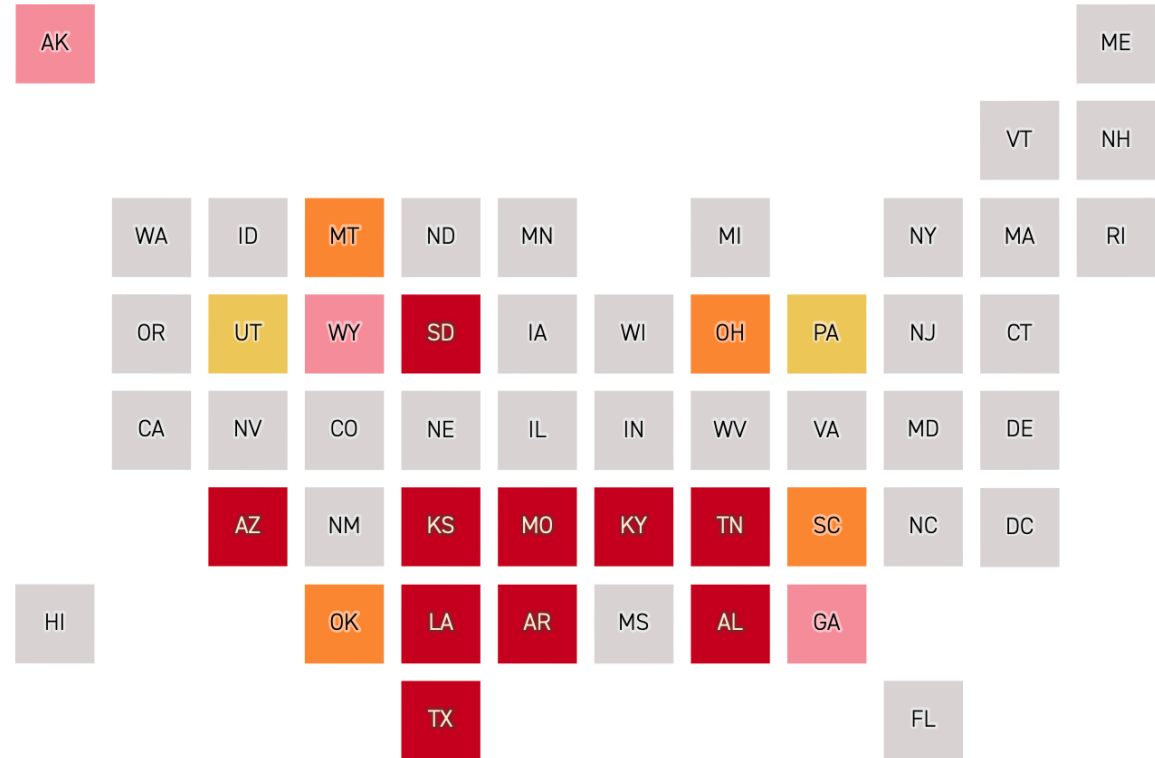
‘Scratching their heads’: State lawmakers take a closer look at personhood laws in wake of Alabama ruling”

- Life begins at . . .
- Fertilization
- Conception
- Viability
- ???

More than a third of states say fetuses are people

Personhood status granted to fetuses by state law or case law at...

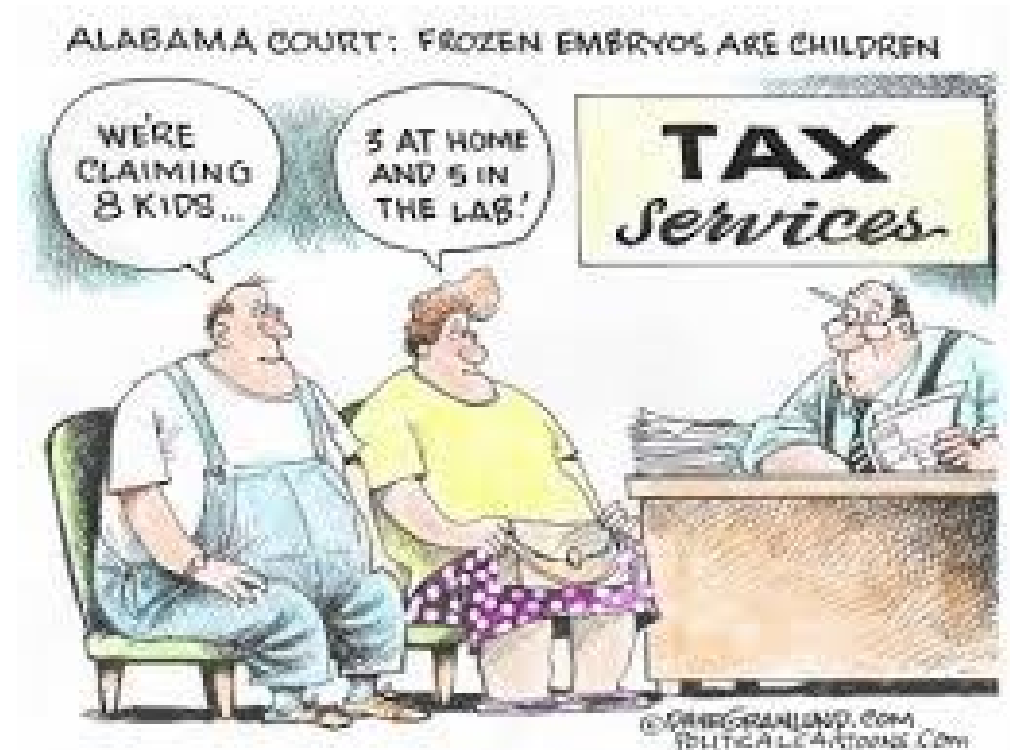
■ Every stage of pregnancy
 ■ Every stage when carried in the womb
 ■ Viability
 ■ An undefined stage
 ■ No stage of pregnancy



Note: Laws include both civil and criminal code.

Some Questions

- What happens if patients stop paying cryopreservation fees?
- Do you follow your disposition procedures?
- Ectopic Pregnancies
- PGS!
- Beyond IVF:
- Stem cell research
- Contraception
- Liability



And now for some positivity

- Review your safeguards!
- Participate in educating the public and your politicians

Proposed legislation in Mississippi March 11,2024

- Patient Rights
- Liability

States with protective legislation

- Illinois: Reproductive Health Act

Dispositional Agreements

- Limit the amount of time the facility will hold the embryos
- Clearly designate protocol for following up with non-payers
- Outline alternatives such as cryopreserving gametes



Protecting the clinic with informed consent

- Contemplate contingencies
 - Death of a partner
 - Separation
 - Failure to pay and update clinic on patient's whereabouts
- Only allow changes **if** both parties agree at the time

What's on the Federal Horizon?

Access to Family Building Act

HHS/Other regulatory entities?



One Poll reacting to ALA Court Decision

- <https://www.ipsos.com/en-us/majority-americans-oppose-alabama-supreme-court-ruling-around-ivf>

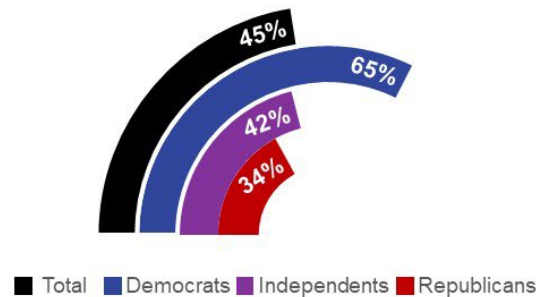
Majority of Americans oppose Alabama Supreme Court ruling around IVF

New Axios/Ipsos poll shows fewer than half are familiar with the ruling, but those who are aware stand in strong opposition

How familiar, if at all, are you with the following?

% selecting very/somewhat familiar

“A ruling by the Alabama Supreme Court that frozen embryos are people and people can be held legally responsible for destroying them”

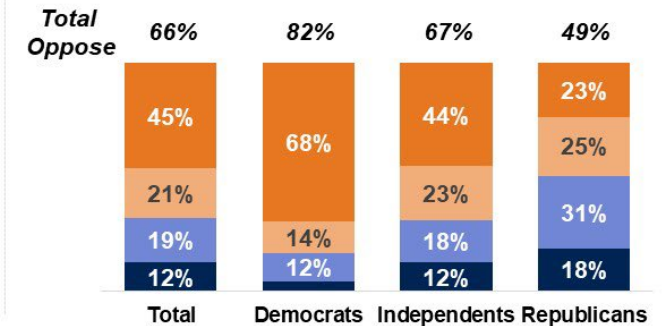


Based on what you may know or feel, how much do you support or oppose the following?

% selecting

- Strongly agree
- Somewhat agree
- Somewhat oppose
- Strongly oppose

“Considering frozen embryos as people and holding those who destroy them legally responsible”



© 2024 Ipsos Source: Axios/Ipsos Poll, fielded February 23-25, 2024
Base: All respondents (n=1,020); Republicans (N=291), Democrats (N=324), Independents (N=301)



What can we do?

- Powerful Voices in this community
- Multidisciplinary
- Maybe an opportunity in some states to be proactive?
 - AAAA & Resolve and ASRM all worked to submit Amicus Briefs on the ALA motion for rehearing



“
We are inspired by the thousands of advocates in Alabama that chose to speak up and take action, and to those brave advocates who shared their stories with the media and with their legislators.

BARBARA COLLURA
President/CEO



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Q&A