

Giving Legal Rights to Fertilized Eggs, Embryos, and Fetuses Threatens Access to Fertility Care

In February 2024, the Alabama Supreme Court held that embryos created through in vitro fertilization (or “IVF”) were “extrauterine children” under Alabama’s laws and state constitution, temporarily ending IVF care in the state.¹ In response, Alabama lawmakers passed legislation in an effort to restore access to IVF care by granting civil and criminal immunity for embryo destruction in the IVF process.² Specifically, the legislation prohibits lawsuits and criminal prosecutions against IVF providers and patients for the destruction of embryos.³ However, the legislation did not, and could not, repeal the language in the amendment to the Alabama Constitution, which affirms the “sanctity of unborn life” and “the rights of unborn children, including the right to life.”⁴ Nor does it overrule the Alabama Supreme Court’s decision, which resolved the ambiguity in the constitutional amendment surrounding the term “child” in favor of including “extrauterine children” “from fertilization”⁵—a stance that remains fundamentally incompatible with the standard medical practices involved in IVF care.⁶ Consequently, while the legislation seemingly shields IVF providers and patients from immediate liability, it does not eliminate the risk of future lawsuits related to embryo destruction under Alabama’s constitutional framework, which could once again upend access to IVF care in the state.

The following analysis examines how a combination of state laws and judicial decisions could put IVF care at risk in other states because of the dangerous ideology that grants fertilized eggs, embryos, and fetuses full legal rights, known as embryonic and fetal personhood. For more information, please consult Pregnancy Justice’s report, [“Unpacking Fetal Personhood: The Radical Tool That Undermines Reproductive Justice.”](#)

What is legal “embryonic personhood”?

Broad embryonic personhood laws or constitutional amendments establish that embryos are “people” under state laws and regulations, and can take the following forms depending on the state:

- (1) State constitutional amendments granting an inalienable right to life from the moment of fertilization or conception.
- (2) Anti-abortions laws that statutorily expand legal and constitutional rights to fertilized eggs and embryos.
- (3) Legal definitions of “person” in general definitions statutes that include fertilized eggs and embryos, applying across all state laws.

For more on each of these states:

1. Alabama: broad embryonic personhood constitutional amendment⁹ and wrongful death law¹⁰
2. Utah: broad embryonic personhood law;¹¹ wrongful death law;¹² and “fetal homicide” law¹³
3. Missouri: broad embryonic personhood law;¹⁴ wrongful death law;¹⁵ and “fetal homicide” law¹⁶
4. Louisiana: broad embryonic personhood law¹⁷ and wrongful death law¹⁸
5. Pennsylvania: broad embryonic personhood law¹⁹ and “fetal homicide” law²⁰
6. Tennessee: broad embryonic personhood law²¹
7. Arkansas: broad embryonic personhood constitutional amendment²²
8. Kansas: broad embryonic personhood law²³
9. Montana: broad embryonic personhood law²⁴
10. Oklahoma: wrongful death law²⁵ and “fetal homicide” law²⁶
11. South Dakota: wrongful death law²⁷ and “fetal homicide” law²⁸
12. Michigan: wrongful death law²⁹
13. Texas: wrongful death law³⁰
14. Minnesota: “fetal homicide” law³¹

Endnotes

¹ *LePage v. Ctr. for Reprod. Med., P.C.*, No. SC-2022- 0515, 2024 WL 656591 (Ala. Feb. 16, 2024) (citing Ala. Const. art. I, § 36.06).

² See Ala. Code § 6-5-810; Ala. Code § 6-5-811.

³ Ala. Code § 6-5-810; see also Ala. Code § 6-5-811 (prohibiting criminal prosecutions against manufacturers of IVF-related goods and caps compensatory damages in cases against manufacturers to the cost of the impacted IVF cycle).

⁴ Ala. Const. art. I, § 36.06.

⁵ *LePage v. Ctr. for Reprod. Med., P.C.*, No. SC-2022-0515, 2024 WL 656591, at *6 (Ala. Feb. 16, 2024), *reh'g denied* (May 3, 2024), *cert. denied sub nom. Ctr. For Reprod. Med., P.C. v. Burdick-Aysenne*, 145 S. Ct. 280 (2024).

⁶ Janet Shamlian, *Tammy Duckworth says Alabama's new law protecting IVF "does not go far enough"*, CBS NEWS (Mar. 7, 2024), <https://www.cbsnews.com/news/alabama-ivf-law-does-not-go-far-enough-tammy-duckworth/>; Pregnancy Justice, *A Statement From Pregnancy Justice President Lourdes A. Rivera on Alabama Law that Removes Liability for IVF* (Mar. 7, 2024), <https://www.pregnancyjusticeus.org/press/a-statement-from-pregnancy-justice-president-lourdes-a-rivera-on-the-alabama-ivf-law/>.

⁷ Here, the term “unborn child” may be vague and undefined or explicitly defined as beginning at fertilization or conception without limiting recovery to in utero losses.

⁸ “Fetal homicide” laws, if interpreted expansively, could extend beyond in utero pregnancies to include frozen embryos, creating new avenues for criminalization of both providers and patients. To date, our research has not identified “fetal homicide” prosecutions against people for the destruction of embryos, but we remain concerned. Some states with “fetal homicide” laws—Missouri, Minnesota, and Pennsylvania—exempt people from being charged in connection to their own losses. However, Utah and South Dakota do not.

⁹ Ala. Const. art. I, § 36.06.

¹⁰ Alabama’s Supreme Court interpreted wrongful death statute to include claims for “extrauterine” embryos (see discussion on *LePage* above).

¹¹ Utah Code Ann. § 76-7-301.1; Utah Code Ann. § 78B-3-109.

¹² In *Carranza v. United States*, the Utah Supreme Court interpreted the state’s wrongful death statute to encompass unborn children, without providing a definition or limiting the scope of what would be considered an “unborn child.” 267 P.3d 912 (Utah 2011).

¹³ Utah’s “fetal homicide” law does not limit its definition of “unborn child” to in utero embryos, extending coverage to “any stage of the unborn child’s development.” Utah Code Ann. § 76-5-201 (1)(a)(ii). Utah Code Ann. § 76-5-201(3)(b) and (c) limits exemptions against prosecutions to cases where a person’s own pregnancy loss is neither intentionally or knowingly caused or resulting from refusing medical treatment or advice.

¹⁴ Mo. Rev. Stat. § 1.205.

¹⁵ In *Connor v. Monkem Co.*, the Missouri Supreme Court held “a wrongful death claim may be stated for a nonviable unborn child.” 898 S.W.2d 89, 93 (Mo. banc 1995).

¹⁶ Missouri’s “fetal homicide” law does not limit its definition of “unborn child” to in utero embryos. State courts have upheld murder and manslaughter convictions, and wrongful death judgments against third parties for causing the death of an “unborn child” and have relied on Missouri’s broad fetal personhood law to find an unborn child is a person. See, e.g., *State v. Holcomb*, 956 S.W.2d 286, 290 (Mo. Ct. App. 1997) (murder); *State v. Knapp*, 843 S.W.2d 345, 350 (Mo. 1992) (en banc) (manslaughter) (citing Mo. Rev. Stat. § 1.205). Additionally, Missouri limits charges in connection to losses resulting from a pregnant person’s own conduct. Mo. Ann. Stat. § 1.205. 24 (“[n]othing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.”)

¹⁷ La. Stat. Ann. § 40:1061.1 (couched in the abortion section of its code but has sweeping language that states, “every unborn child is a human being from the moment of conception and is, therefore, a legal person for purposes under the laws of this state and Constitution of Louisiana”).

¹⁸ *Danos v. St. Pierre*, 402 So.2d 633 (La.1981) (finding on rehearing that wrongful death recovery may apply to an “unborn child,” however, it is unclear whether the injury needs to occur in utero for recovery).

¹⁹ 18 Pa. Cons. Stat. § 3202.

²⁰ Pennsylvania’s “fetal homicide” law does not limit its definition of “unborn child” to in utero embryos. 18 Pa. Stat. and Cons. Stat. § 2603 (Criminal Homicide of Unborn Child), 18 Pa. Stat. and Cons. Stat. § 2604 (Murder of Unborn Child), and 18 Pa. Stat. and Cons. Stat. § 2605 (Voluntary Manslaughter of Unborn Child) define “unborn child” in accordance with Pennsylvania’s criminal abortion law, which states that an “unborn child” is “an individual organism of the species homo sapiens from fertilization.” 18 Pa. Stat. and Cons. Stat. Ann. § 3203. Pennsylvania exempts people from being prosecuted in connection to their own losses. See 18 Pa. Stat. and Cons. Stat. § 2608(a)(3).

²¹ Tenn. Code Ann. § 39-15-214 (Tennessee claims that “unborn human beings” have rights under the Ninth and Fourteenth Amendments to the U.S. Constitution).

²² Ark. Const. amend. 68 § 2. *But see Knowlton v. Ward*, 889 S.W.2d 721, 726 (Ark. 1994) (holding this provision is not “self-executing” and does not prohibit the state from allowing or increasing access to abortion care as the amendment lacks a mechanism for effectuating the policy).

²³ Kan. Stat. Ann. § 65- 6732.

²⁴ Mont. Code Ann. § 50-20- 102.

²⁵ Oklahoma’s wrongful death law allows recovery for the death of “the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth including the human conceptus, zygote, morula, blastocyst, embryo and fetus.” Okla. Stat. Ann. tit. 12, § 1053. However, it also provides a list of scenarios where a person would be entitled to damages pertaining to the demise of “an unborn person in utero.” *Id.* Still, the statute does not explicitly exclude embryos formed outside the uterus, making Oklahoma a vulnerable state by our estimate.

²⁶ Oklahoma’s “fetal homicide” law does not limit its definition of “unborn child” to in utero embryos. Its homicide statute includes “an unborn child, as defined in Section 1-730 of Title 63 of the Oklahoma Statutes” in its definition of “human being.” Okla. Stat. Ann. tit. 21, § 691(B). Section 1-730 of Title 63 of the Oklahoma Statutes defines “unborn child” as “the unborn offspring of human beings from the moment of conception.” Okla. Stat. Ann. tit. 21, § 63-1-730(4).

²⁷ The statute itself allows recovery for an “unborn child” without providing a limiting definition of “unborn child.” S.D. Codified Laws § 21-5-1; see also *Wiersma v. Maple Leaf Farms*, 1996 S.D. 16, 543 N.W.2d 787, 791 (S.D. 1996).

²⁸ South Dakota’s “fetal homicide” law does not limit its definition of “unborn child” to in utero embryos. Its homicide statute (murder, manslaughter, excusable homicide, justifiable homicide, or vehicular homicide) includes the killing of an “unborn child,” S.D. Codified Laws § 22-16-1, and its criminal code defines “unborn child” as “an individual organism of the species homo sapiens from fertilization.” S.D. Codified Laws § 22-1-2 (50A).

²⁹ The statute was interpreted to apply to non-viable fetuses in *Simpson v. Alex Pickens, Jr., & Assocs., MD*, PC, 874 N.W.2d 359, 364 (Mich. Ct. App 2015) (citing MCL 600.2922a(1)) and *Simpson* even provides that the first requirement for a wrongful-death action is satisfied when the destruction of an “embryo or fetus” occurs without limiting recovery to loss of in utero embryos.

³⁰ An individual under Texas’ wrongful death statute includes, “unborn child at every stage of gestation from fertilization until birth.” Tex. Civ. Prac. & Rem. Code Ann. § 71.001.

³¹ Minnesota’s “fetal homicide” law does not limit its definition of “unborn child” to in utero embryos. Unborn child under Minn. Stat. Ann. § 609.2661 (Murder of Unborn Child in the First Degree), Minn. Stat. Ann. § 609.2662 (Murder of Unborn Child in the Second Degree), and Minn. Stat. Ann. § 609.2663 (Murder of Unborn Child in the Third Degree) is defined as “the unborn offspring of a human being conceived, but not yet born.” Minn. Stat. Ann. § 609.266(a). Minnesota exempts people from being prosecuted in connection to their own losses. See Minn. Stat. Ann. § 609.266(b).