

## ***LEPAGE: THE ALABAMA SUPREME COURT’S IVF DECISION HEARD (AND FEARED) AROUND THE NATION***

*Jennifer Beck, Digital Media Editor, Vol. 31*<sup>1</sup>

On February 16, 2024, the Alabama Supreme Court decided a case that has profound implications for individuals who are hoping to start their families through in-vitro fertilization, or “IVF.” The concerns that this case has raised for businesses and families alike are widespread and genuine, with the decision swiftly impacting how IVF clinics in the state of Alabama conduct business. Within one week of the decision in *LePage v. Center for Reproductive Medicine, P.C.*,<sup>2</sup> three Alabama IVF providers suspended their services in order to determine how to proceed in the wake of potential legal consequences.<sup>3</sup>

The *LePage* case arose when parents of several embryos sued the fertility clinic in which those embryos were being kept in a “cryogenic nursery.”<sup>4</sup> They initiated the action after a patient wandered into the cryogenic nursery, removed several embryos, and dropped them onto the floor after the subzero temperatures burned his hand, which killed them.<sup>5</sup> In its majority opinion, the Alabama Supreme Court held that the wrongful-death law in Alabama applied to “extrauterine embryos” because “the text of the Wrongful Death of a Minor Act is sweeping and unqualified[.]” and thus “[i]t applies to all children, born and unborn, without limitation.”<sup>6</sup> The Court also left open the possibility that individuals could be “convicted of criminal homicide for causing the death

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<sup>2</sup> *LePage v. Ctr. for Reprod. Med., P.C.*, —So.3d—; SC-2022-0515 and SC-2022-0579, 2024 WL 656591 (Ala. 2024).

<sup>3</sup> Aria Bendix, *Three Alabama clinics pause IVF services after court rules that embryos are children*, NBC NEWS (Feb. 21, 2024), <https://www.nbcnews.com/health/health-news/university-alabama-pauses-ivf-services-court-rules-embryos-are-children-rcna139846>.

<sup>4</sup> *LePage*, 2024 WL 656591, at \*1.

<sup>5</sup> *Id.* at \*1–2.

<sup>6</sup> *Id.* at \*6–8.

of extrauterine embryos.”<sup>7</sup> Although the majority opinion is relatively short, there are multiple concurring opinions and one dissenting opinion, which are longer.

The holding of the Alabama Supreme Court in *LePage* grants embryos the same legal status as living, breathing human children, and allows people to be held responsible for destroying them. This decision was based on the Wrongful Death of a Minor Act, which was enacted in 1872.<sup>8</sup> The American College of Obstetricians and Gynecologists (“ACOG”) released a statement after *LePage* was decided, expressing significant concerns for families attempting to have children through the IVF process.<sup>9</sup> Verda J. Hicks, MD, FACOG, serves as the President of ACOG, and in a statement, she explained: “The Alabama Supreme Court’s decision in *LePage v. Mobile Infirmary Clinic* will severely limit or effectively remove access to in vitro fertilization from the people of Alabama. . . . This dangerous decision sets an incredibly concerning precedent for IVF access across the United States.”<sup>10</sup>

Dr. Hicks also reflected the uncertainty regarding criminal liability for IVF patients and clinicians, placing them “in danger of civil and potentially criminal liability in Alabama, a state that already leads the nation in pregnancy criminalization.”<sup>11</sup> She further expressed concerns for the “training, recruitment, and retention of obstetrician-gynecologists and fertility experts in Alabama.”<sup>12</sup> Dr. Hicks is not alone in her worries, as numerous obstetrician-gynecologists and reproductive specialists, as well as medical organizations, have expressed their disdain for the

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<sup>7</sup> *LePage*, 2024 WL 656591, at \*7.

<sup>8</sup> *Id.* at \*8.

<sup>9</sup> Verda J. Hicks, *ACOG Statement on Alabama Supreme Court IVF Decision*, ACOG: THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (Feb. 21, 2024), <https://www.acog.org/news/news-releases/2024/02/acog-statement-on-alabama-supreme-court-ivf-decision#:~:text=%E2%80%9CIndividuals%20and%20families%20seeking%20out,the%20nation%20in%20pregnancy%20criminalization.>

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

ruling and its detrimental impacts on their fields and their patients. The President of the American Society for Reproductive Medicine stated, “We cannot [] allow this dangerous precedent of judicial overreach with national implications to go unchecked.”<sup>13</sup>

Society as a whole also has concerns about the *LePage* decision, with a poll conducted by Axios/Ipsos showing that approximately two-thirds of Americans oppose the ruling.<sup>14</sup> One of the most glaring problems with the opinion is the Chief Justice’s clear reliance on religion in deciding the case. Chief Justice Parker wrote in his concurring opinion that:

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.<sup>15</sup>

This language, while not part of the binding majority opinion, raises serious questions. Chief Justice Parker’s words elicit fears that other judges in various states may carry religious reasoning into their opinions as well, despite the notion of separation of church and state.<sup>16</sup> Rachel Laser, the CEO of Americans United for Separation of Church and State, explained that “we’re in a place where government officials feel emboldened to say the quiet part out loud, and directly challenge the separation of church and state, a foundational part of our democracy.”<sup>17</sup>

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<sup>13</sup> Paula Amato, *ASRM Condemns Profoundly Misguided and Dangerous Court Decision in Alabama*, ASRM: AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE (Feb. 18, 2024), <https://www.asrm.org/news-and-events/asrm-news/press-releasesbulletins/asrm-condemns-dangerous-court-decision-alabama/>.

<sup>14</sup> Ipsos, *Majority of Americans oppose Alabama Supreme Court ruling around IVF*, IPSOS (Feb. 28, 2024), <https://www.ipsos.com/en-us/majority-americans-oppose-alabama-supreme-court-ruling-around-ivf#:~:text=Washington%2C%20DC%2C%20February%2028%2C,a%20week%20after%20the%20ruling>.

<sup>15</sup> *LePage*, 2024 WL 656591 at \*13 (Parker, J., concurring).

<sup>16</sup> Peter Smith and Tiffany Stanley, *Chief justice’s Christian Reasoning in IVF Opinion Sparks Alarm Over Church-State Separation*, ASSOCIATED PRESS, (Feb. 23, 2024), <https://apnews.com/article/alabama-frozen-embryos-conservative-christian-views-ruling-d9b7f720b5ef865ab35205ad36061f2d>.

<sup>17</sup> *Id.*

Alabama’s Legislature heard the public’s concerns and passed a bill in early March that restarted IVF clinics in the state.<sup>18</sup> The bill was signed into law by Alabama’s Governor, Kay Ivey, and “aims to provide civil and criminal immunity to providers and patients for the destruction or damage to embryos.”<sup>19</sup> However, even with this enhanced protection, many are worried that these measures are not enough. Gabbie Price, an IVF patient who “uprooted her life and career in order to afford IVF” explained that she believes the law is a “band-aid,” and that the time-sensitive nature of IVF makes it difficult for families to know how to proceed.<sup>20</sup> The law also fails to “nullify the [Alabama] Supreme Court’s analysis that says the law ought to treat embryos just like people,” as explained by Katherine Kraschel, an assistant professor at Northeastern University of Law.<sup>21</sup> Barbara Collura, the President and CEO of RESOLVE: The National Infertility Association, also explained that “[the March Alabama] legislation does not address the underlying issue of the status of embryos as part of the IVF process.”<sup>22</sup>

The Alabama Legislature has recognized that there is a need for more action, as Representative Terri Collins explained that lawmakers are “still trying to come up with a long-term solution, and a [State] constitutional amendment is one of the potential solutions.”<sup>23</sup> These solutions also include looking to other states and their interpretations of embryonic status. For example, Louisiana “considers an embryo a ‘judicial person’ with limited rights;” an embryo that

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<sup>18</sup> Alander Rocha, *Alabama Passed a New IVF Law. But Questions Remain.*, ALABAMA REFLECTOR: PART OF STATES NEWSROOM (Mar. 11, 2024), <https://alabamareflector.com/2024/03/11/alabama-passed-a-new-ivf-law-but-questions-remain/#:~:text=The%20bill%20passed%20on%20Wednesday,destroyed%2C%20though%20not%20civil%20immunity.>

<sup>19</sup> Lauren Mascarenhas & Isabel Rosales, *Alabama clinics resume treatment under new IVF law, but experts say it will take more work to protect fertility services*, CNN (Mar. 7, 2024), <https://www.cnn.com/2024/03/06/us/alabama-ivf-fertility-protection/index.html>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

does not continue developing within a period of 36 hours loses that ‘judicial person’ status.<sup>24</sup> However, as it currently stands, Alabama’s treatment of embryos varies greatly from that of Louisiana and other states and is based upon a law that was enacted over 150 years ago.<sup>25</sup>

The *LePage* decision sets a dangerous precedent that infringes upon the constitutionally recognized principles of (1) the right to have and raise a family, and to procreate,<sup>26</sup> as well as (2) the separation of Church and state.<sup>27</sup> *Meyer v. Nebraska* established that the Fourteenth Amendment guarantees the right to “establish a home and bring up children.”<sup>28</sup> Additionally, *Skinner v. Oklahoma* held that mandatory sterilization laws for criminals violated the Fourteenth Amendment’s Equal Protection Clause because marriage and procreation are “the basic civil rights of man.”<sup>29</sup>

Couples like Gabby and Spencer Goidel worried that while going through the IVF process in Alabama, they may be forced to save embryos that are “not going to be genetically normal,” instead of allowing those embryos to pass naturally.<sup>30</sup> Meghan Cole, who is an Alabama-based attorney, formulated a plan to move her remaining embryos to a different state in order to avoid “open[ing herself] up to liability” in the wake of the *LePage* decision.<sup>31</sup> While Cole had the foresight to prepare for potential liability, those without a comparable legal education who live in Alabama may not understand the implications of this ruling, up to and including potential criminal

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<sup>24</sup> Mascarenhas & Rosales, *supra* note 19.

<sup>25</sup> *LePage*, 2024 WL 656591, at \*8.

<sup>26</sup> *Meyer v. Nebraska*, 262 U.S. 390, 390 (1923); *Skinner v. Oklahoma ex. Rel Williamson*, 316 U.S. 535, 541 (1942).

<sup>27</sup> *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 15-16 (1947).

<sup>28</sup> *Meyer*, 262 U.S. at 399 (internal citations omitted).

<sup>29</sup> *Skinner*, 316 U.S. at 541.

<sup>30</sup> Aria Bendix, *Doctors and Patients Fearfully Proceed With IVF After Alabama Court Rules Embryos are Children*, NBC NEWS (Feb. 20, 2024), <https://www.nbcnews.com/health/health-news/ivf-doctors-patients-fearful-alabama-court-rules-embryos-are-children-rcna139636>.

<sup>31</sup> *Id.*

penalties.<sup>32</sup> In holding that embryos are the legal equivalent of children, the Alabama Supreme Court ignored the rights set forth in *Skinner* and *Meyer*, to procreate and to bring up children, leaving the door open for the criminalization of people like Gabby and Spencer Goidel, and invalidating their wishes to let embryos that they will not implant pass away in a natural manner.<sup>33</sup> This runs contrary to the principles set forth in those cases.

Further, the concept of separation of church and state has existed in American jurisprudence since the era of the Founders and was further explained in *Everson v. Board of Education of Ewing Township*.<sup>34</sup> There, the United States Supreme Court stated that “In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’”<sup>35</sup> Although the issue in *LePage* was not one regarding the First Amendment, the language utilized by Chief Justice Parker in his special concurrence raises significant concerns that religious ideology is influencing how those who are part of the judiciary reach their decisions. While the First Amendment guarantees the freedom to exercise one’s religion,<sup>36</sup> and Chief Justice Parker is certainly free to do so, stating that “human life cannot be wrongfully destroyed without incurring the wrath of a holy God” in a judicial opinion clearly runs contrary to the Constitutional principle of separation of church and state.

Therefore, if this case is appealed to the United States Supreme Court, that Court should reverse the Alabama Supreme Court’s decision; their reversal should be based on the Constitutional principles of the right to procreate and raise children as well as the separation of church and state. For those same reasons, as well as in response to the widespread public and

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<sup>32</sup> *LePage*, 2024 WL 65659, at \*7.

<sup>33</sup> *Id.*

<sup>34</sup> *See Everson*, 330 U.S. at 8.

<sup>35</sup> *Id.* at 16.

<sup>36</sup> U.S. CONST. amend. I.

professional concerns regarding the *LePage* decision, the Alabama State Legislature should take additional steps to limit the detrimental impact of this holding. The courts and legislatures in other states should also take note of the response to *LePage*, not just in Alabama, but in the rest of the United States. The nation is watching; the general consensus is clear: *LePage* leaves too much uncertainty for medical practitioners and those trying to start families through IVF and should not stand.