

American Society for Reproductive Medicine
Written Testimony for the Senate Judiciary Committee Hearing on
“The Continued Assault on Reproductive Freedoms in a Post-*Dobbs* America”
March 20, 2024

Introduction

The American Society for Reproductive Medicine (ASRM) thanks the Senate Judiciary Committee for its ongoing efforts to spotlight the fallout from the *Dobbs* decision and its devastating impact on women and reproductive rights. This is especially important as we approach the second anniversary of the U.S. Supreme Court ruling and as Congress considers ways to respond to the February 16 Alabama Supreme Court ruling in *LePage v. The Center for Reproductive Medicine and Mobile Infirmary Clinic, Inc.* This case leveraged the *Dobbs* decision to threaten access to fertility treatment, specifically in vitro fertilization (IVF).

For almost a century, ASRM has been the global leader in multidisciplinary reproductive medicine research, ethical practice, and education. ASRM impacts reproductive care and science worldwide by creating funding opportunities for advancing reproduction research and discovery by providing evidence-based education and public health information and by advocating for reproductive health care professionals and the patients they serve. Our members include more than 9,000 scientists, OB/GYN physicians, and health care support personnel.

ASRM is pleased to contribute to the record for the committee’s hearing on “The Continued Assault on Reproductive Freedoms in a Post-*Dobbs* America.” With more than 35 employees located at our offices in Birmingham, Alabama, ASRM is especially grateful for the opportunity to provide written testimony as the committee works to elucidate the impacts of the recent Alabama Supreme Court ruling, to share the stories of our members impacted by the decision, and to offer guidance on actions Members of Congress and this committee can take to ensure we do not see the restrictions on IVF in Alabama replicated in other states.

LePage v. Mobile Infirmary Clinic

As committee members are aware, IVF is a method of assisted reproductive health care essential to modern fertility care and helps individuals and couples build the families of their choice. Its goal is to help patients achieve a live birth. According to the U.S. Centers for Disease Control and Prevention (CDC), around 2 percent of children¹ in the U.S. are born from IVF every year. As a routine matter of care, and to give patients the best chance of achieving a pregnancy and live birth, patients and providers fertilize as many eggs as are retrieved. Not all these fertilized eggs will continue to grow and develop into embryos. To avoid the increased risks associated with fatal genetic conditions or even a twin pregnancy, the embryos are evaluated, and the most suitable are transferred one at a time into the patient in hopes of creating a pregnancy. This evidence-based standard of care allows patients and their providers to

¹ <https://www.cdc.gov/art/artdata/index.html>

determine which embryo may have the best chance of resulting in a pregnancy and a live birth, ultimately helping patients to achieve their family building goals.

On February 16 — in *LePage* — the Alabama Supreme Court issued an extreme and medically and scientifically unfounded decision stating that frozen embryos, cryopreserved by medical providers as patients seek to build their family, should be treated as the legal equivalent of living children. While limited to Alabama’s Wrongful Death of a Minor Act, this decision immediately cast uncertainty on the future of IVF in Alabama and other states. However, even before *Dobbs*, Alabama case law set a precedent that fetuses and embryos in utero are considered children. In 2013, the Alabama Supreme Court decided that fetuses and embryos are children under the state’s child abuse laws, allowing prosecutors to charge pregnant women with crimes for behavior during their pregnancies.

The Alabama Supreme Court’s opinion in *LePage* undermines critical reproductive health care. Treating frozen embryos as legal persons restricts access to IVF and undermines the rights of people in this country to make decisions about family building, including what to do with frozen embryos created via IVF. Treating embryos as legal children has many serious practical implications for patients and providers. It means that patients could face significantly increased costs and additional unnecessary or risky procedures. For providers, this legal standard could be leveraged to force them to perform embryo transfers where the embryos have a low probability of implanting or leading to a live birth. Patients would then have to suffer the physical and emotional anguish of facing a pregnancy that would never lead to a living child. ASRM’s concern is that the Alabama Supreme Court’s ruling could lead to other states following suit, meaning that fewer people will be able to access the full range of care they want and need, including if, when, and how to have children.

Following the Alabama Supreme Court’s ruling, the three largest fertility clinics in the state paused fertility health care because of substantial risks of civil penalties and overall uncertainty. Since the ruling, the situation on the ground has remained fluid. However, ASRM has been encouraged to see democracy in action, with our Alabama members and their patients quickly activating and continuing to motivate their local elected officials to protect IVF.

On March 6, Alabama Governor Kay Ivey (R-AL) signed SB159, a state bill that provides civil and criminal immunity for any individual or entity for the “damage or death of an embryo” when providing or receiving services related to IVF. ASRM acknowledges that these are heartbreaking times for our members and their patients in Alabama. We are pleased that the legislation passed into law will at least allow some of our members in the state to reopen their clinics to care for patients. However, to be clear, this law is only a temporary solution, as it fails to correct the underlying mistake the Alabama Supreme Court made when it conflated an in vitro fertilized egg with a child.

ASRM has yet to see a complete legislative solution that provides the assurances Alabama’s fertility physicians need to confidently and indefinitely provide the best standard of care to their patients without subjecting themselves, their colleagues, and their patients at legal risk.

While some of the providers in the state have lifted their pause on IVF services since enactment of SB159, others, have not yet restarted IVF services. The reality is that granting cryopreserved embryos legal personhood means that routine IVF care like thawing cryopreserved embryos, conducting pre-implantation genetic testing, and even transferring thawed embryos renders fertility doctors and other clinic staff open to risks of civil, criminal, or professional penalties. It also undermines their ability to provide patient-centered, evidence-based care to patients.

ASRM continues to work with our members, their patients, and Alabama government officials towards a holistic solution that ensures everyone in the state has access to standard of care medicine and that the law is clear that embryos are not children and essential health care should not be criminalized. Until there is a permanent and more thorough legislative fix, ASRM is concerned this ruling will continue to have unintended negative consequences, including making Alabama a less attractive place for physicians to build their practices and train so that providers can continue to provide the best possible care to Alabamans.

Driven by our desire to set the record straight and to clarify that embryos are not children, on March 1, ASRM submitted an amicus brief² supporting the appellees' request for a rehearing with the Alabama Supreme Court in *LePage*. Aside from the fact that Alabama's Wrongful Death of a Minor Act was enacted in 1872, more than 100 years before IVF was a scientific possibility, ASRM's amicus brief identifies multiple instances in the majority opinion and the chief justice's concurrence that invoke purely hypothetical technology, commit multiple medical and scientific errors, and ignore best practices in reproductive technology. Additionally, ASRM's submission emphasizes how the court's ruling fails to adequately consider the real-world implications of its legally and scientifically erroneous reasoning. While judicial history does not create a reason to believe this request for a rehearing will be effective in overturning the ruling, this is a critical next step in holding the judiciary accountable and weakening the potential for this case to create legal precedent or serve as a model for blocking the availability of IVF in other states.

Testimony from ASRM Alabama Members

The journey of parenthood via IVF is a long one and can mean considerable emotional, physical, and financial hardship. For hopeful Alabama parents who no longer have access to this critical method of family-building, this is a devastating time. IVF's high out-of-pocket costs due to a lack of insurance coverage already put this treatment out of reach for many, and the consequences of the *LePage* ruling could only further increase storage costs to patients, pushing IVF further out of reach. For Alabama providers, including both medical professionals and other clinical staff who handle embryos, such as embryologists and lab technicians, there are ongoing concerns related to their vulnerability to political and ideological whims and the lack of legal protections against civil and criminal charges. This is despite the recent effort by the Alabama legislature to ensure IVF remains legal in the state.

² https://www.asrm.org/globalassets/_asrm/advocacy-and-policy/advocacy-activities/2024/lepage-amicus-brief.pdf

Following the Alabama Supreme Court's ruling in *LePage*, ASRM has remained in constant communication with our members in Alabama, many of whom expressed interest in sharing their experience in the immediate aftermath of the court's decision. ASRM urges the committee to consider the stories of Alabama providers and their patients as it considers federal legislative action to protect IVF. We therefore share the following stories from ASRM Alabama members:

Dr. Janet McClaren Bouknight of Alabama Fertility Services in Birmingham wrote in *The Hill*:³

Following the Alabama State Supreme Court ruling last week that embryos have the same rights as children and that their destruction amounts to wrongful death, my partners and I made the devastating but necessary decision to IVF procedures. I am accustomed to difficult conversations with patients as we together navigate failed treatments and negative pregnancy tests, miscarriages, and ectopic pregnancies.

The phone calls I have made over the past 24 hours to tell my patients that we have to cancel their treatment have been the worst in my career. IVF treatments require weeks if not months of planning and involve medications, injections, and procedures. More importantly, a patient's decision to do IVF requires courage, commitment, and trust in their physician. The abrupt cancellation of IVF in our state has been a tragedy for all. The patients have lost their chance to start or add to their family. Doctors, like me, have been restricted from providing the medical care their patients entrusted them to provide and deserve.

Doctors want and are obliged to provide their patients with safe and effective treatment options. An oncologist would never be expected to treat cancer without chemotherapy or radiation. A surgeon would never be asked to operate without proper surgical equipment. It is unethical to expect a fertility doctor to care for their patients without offering IVF. That is below the standard of our field. No physician would willingly provide care that is substandard. No patient should have to see a doctor that cannot provide them with all of their treatment options.

Dr. Mamie McLean of Alabama Fertility Services in Birmingham wrote in *AL.com*:⁴

When people ask me what it's like to be an infertility specialist, I tell people it's the "highest highs and the lowest lows." Unfortunately, this past week has been the lowest lows of my entire career in medicine. I have never felt so helpless as a physician. If we are unable to use IVF and embryo freezing in my practice, it makes upholding the standard of care for my patients impossible. It also means my patients are having really hard conversations about what this ruling means for them and their families. They are asking themselves, "do we wait and hope this decision is reversed? What options do we have available for our embryos? Do we give up entirely?" Unfortunately, at this juncture, I am unable to give them any clear answers on what comes next and what they should do.

³ [I help people build their families. Now the Alabama Supreme Court's decision won't let me. | The Hill](#)

⁴ [Guest opinion: Alabama Supreme Court ruling 'truly a nightmare' for doctors and patients - al.com](#)

The Alabama Supreme Court ruling is truly a nightmare for the physicians and patients throughout the state. There is no question fewer babies will be born because of this ruling. We are pro-family here in Alabama and we need our state lawmakers to protect our patients' rights to build their families and access the healthcare they need to conceive. Please help us get back to the days when we are anxiously refreshing our computer screen for long-awaited positive pregnancy tests.

Dr. Kathy Miller of Alabama Fertility Specialists, Scientific Laboratory Director, and Chief Scientific Officer at Innovation Fertility wrote to ASRM:

While fertility physicians, nurses, ultrasonographers, and phlebotomists are often recognized for their roles in patient care, it is essential to acknowledge the vital contributions of the laboratory team, which includes andrologists, endocrinology technicians, and embryologists. The laboratory team at a fertility center is one of the most passionate and hardworking groups of professionals found in medicine. They are entrusted with the delicate task of handling, evaluating, and preserving the patients' eggs, sperm, and preimplantation embryos. The work in the IVF laboratory is demanding and requires the utmost attention to detail. One of my responsibilities as the laboratory director is to ensure that my team has a stress and distraction-free environment to perform this important work.

When the medical director notified me of the Alabama Supreme Court ruling, I was not shocked or confused since many states have tried to pass legislation of this type. However, I was shocked, confused, and gravely disappointed when this ruling cast the hard and dedicated actions and work of myself and my fellow laboratorians as unnatural and criminal. While others were debating what "life" or "personhood" meant, I had the unenviable task of meeting with my laboratory team to discuss the ramifications of this ruling for their profession, livelihood, and the standard of care that they so devotedly and diligently provide to infertility patients every day of the week and every day of the year. Witnessing their emotions and hurt as they grappled with the notion that their passion and devotion to assisting patients in building their families could be deemed criminal was truly heart breaking. Despite this, I hoped they would return to work the next day, focused on caring for patients without fear of repercussions.

As we navigate the implications of this ruling, I am deeply concerned about its potential impact on our ability to provide evidence-based care to those in need. I personally vouch that IVF laboratorians approach our responsibilities with the utmost reverence and care, mindful of the importance of our work to our patients and the highly skilled and sensitive care of their preimplantation embryos. It is my hope that you will consider the broader implications and ramifications of this decision and take action to protect the rights of individuals seeking fertility treatment and the medical and laboratory professionals that provide such care.

More generally, as the professional society for reproductive health care providers, ASRM is concerned that the chaos created by the Alabama decision is heightened by uncertainty about how far this dangerous reasoning will be taken. As previously noted, the decision might lead

not only to clinics closing, but fewer medical students deciding to study and/or practice in the state, increasing barriers to care and requiring Alabamans to travel to access care that is no longer available in their state. Further, in the wake of *Dobbs*, [reproductive health care practitioners are already leaving or choosing not to work in states with abortion bans](#)⁵. The *LePage* decision will only exacerbate that trend and leave Alabamans with limited access to care — not just for building their families, but for essential services as well.

If some politicians have their way, pauses on fertility treatments and other reproductive health care like we have seen in Alabama could be the reality for millions more people across the country. Politicians are advancing legislation in states other than Alabama that contains similar personhood language that would jeopardize the ability of families and individuals to build the families of their choice. At both the state and federal levels, personhood language continues to proliferate, putting family planning and family building at risk.

Personhood laws have been advanced to limit abortion, but they do not stop there. As the *Dobbs* decision and now the *LePage* ruling made clear, attacks on abortion cause harm in all manner of sexual and reproductive health care — including IVF and birth control. When personhood language is in criminal codes, not only does it jeopardize standard of care fertility treatment, but it can also be used to investigate and criminalize pregnant people and their medical providers, especially when the person has experienced a negative pregnancy outcome like stillbirth or miscarriage.

ASRM Response and Member Testimony in the Wake of Broader Attacks on Reproductive Rights

Patients and providers across the country are rightfully concerned about the national impact of the shocking and unprecedented Alabama ruling and broader implications of this ruling on access to IVF across the country. This is just the latest attack on the rights of people to make decisions about their own sexual and reproductive health. We must not normalize this deliberate and troubling pattern.

In the wake of *Dobbs*, ASRM encouraged our members to use their voice and to share how abortion restrictions or bans and personhood measures have affected them professionally. What we have found, especially given the deeply personal and intimate nature of the work of fertility physicians and other reproductive health care specialists, is that blatant attacks on reproductive rights have the potential to have serious and far-ranging effects on providers. Considering recent developments, ASRM is compelled to share just a few sentiments from our members who span the country. The following anecdotes come from ASRM members including REIs, embryologists, and licensed clinical social workers in Florida, Iowa, Colorado, Maryland, Washington, Hawaii, California, North Carolina, and Missouri:

⁵ <https://www.aamcresearchinstitute.org/our-work/data-snapshot/training-location-preferences-us-medical-school-graduates-post-dobbs-v-jackson-women-s-health>

- *“I work in the world of fertility and maternal mental health. The women and couples I meet with are extremely emotional and fearful of the upcoming changes and the general sea change of the country after this shocking decision.”*
- *“There is a great deal of apprehension about next steps the legislature will take and its impact on access to reproductive care and scope of legislative intent. The absence of clear guidance going forward is already having the effect that draconian legislation would enact. Providers are reluctant to offer essential services such as management of incomplete and missed abortions and ectopic pregnancies that might soon be construed as illegal. The current environment is already achieving many of the aims of the opponents to access to reproductive care without actually enacting legislation, much to their delight.”*
- *“I am a retired reproductive health care provider. My patients and staff would have been very anxious about how we could continue to help them in their pursuit of family building.”*
- *“Patients are scared for the future of fertility treatments, and they do not deserve to have added stress to the already physical and emotional toll that infertility can cause.”*
- *“Patients are very concerned about the safety of their embryos. A small number of patients are so concerned about being a pregnant person in this country at present that they have stopped treatment and trying to conceive.”*
- *“It [the Dobbs ruling] has caused increased concern at all levels about potential future legal liability for performing IVF procedures and storing gametes and embryos.”*
- *“Patients are concerned about disposition of embryos as well as options available for high order multiples or fetuses with deficits not compatible with life.”*
- *“We have had multiple patients call over the last week concerned this type of bill could be proposed or passed in Virginia. They understand how this would almost eliminate access to IVF procedures and they are very worried.”*
- *“Patients are very concerned about potential future impacts for IVF. They are very concerned about the potential for a federal law restricting IVF or use/disposal of frozen embryos. My staff is anxious as well, as we cannot truly reassure patients.”*
- *“A number of patients have expressed concern regarding their options and are seeking guidance on relocating their cryopreserved embryos.”*
- *“I think this decision is an existential threat to reproductive rights and gender equity and everyone needs to do everything possible to oppose this in every way possible.”*

Call to Action

Building a family is a fundamental right of all people, no matter where they live. We cannot allow the latest dangerous precedent of judicial overreach in Alabama and its national implications to go unchecked. This committee and the U.S. Congress have a role to play and should act immediately to protect the ability of hopeful parents to build the families of their choice. While not entirely within the committee's jurisdiction, ASRM has identified several opportunities for the federal government to act to ensure that fertility treatment remains not only available but accessible to those who need it, regardless of their zip code.

First, federal legislation is needed to ensure that standard of care fertility treatments are protected in this country. Before the court's decision in Alabama, Senators Tammy Duckworth (D-IL), Patty Murray (D-WA), Tammy Baldwin (D-WI), and Kirsten Gillibrand (D-NY), and Representative Susan Wild (D-PA-7), introduced the Access to Family Building Act (S. 3612/H.R. 7056) to help protect access to fertility care. The bill would establish a statutory right for patients to access assisted reproductive services, including IVF, that many hopeful parents require to have children. The legislation would also establish an individual's statutory right regarding the use or disposition of their reproductive genetic materials, including gametes and embryos.

ASRM is disappointed that Senator Duckworth's effort for Senate passage of the Access to Family Building Act by unanimous consent was blocked. We are continuing to collaborate with our Senate and House champions to strengthen the bill in direct response to the Supreme Court ruling in Alabama. We have worked closely with the bill's sponsors to ensure this legislation preempts action at the state level to block the availability of IVF and empowers the U.S. Department of Justice (DOJ) to enforce these statutory rights. As of March 15, 48 Democratic Senators have signed on in support of the Senate bill, while 144 Representatives (137 Democrats and one Republican) have cosponsored its House companion. ASRM thanks every single Democratic member of the Senate Judiciary Committee for their support for the Access to Family Building Act and encourages Congress to swiftly pass the bill.

Second, as the largest employer in the U.S., the U.S. government can set a positive example by mandating insurance coverage of IVF. We must ensure that federal civilian employees and those who serve in our military and their families have insurance coverage for fertility treatment. ASRM urges Congress to encourage the administration to mandate comprehensive insurance coverage as part of the Federal Employees Health Benefits (FEHB) Program, TRICARE and the Department of Veterans Affairs (VA), as well as Affordable Care Act (ACA) plans. Congress can also act by passing the Access to Infertility Treatment and Care Act (S.2386) introduced by Senator Cory Booker (D-NJ). ASRM was also disappointed that Senator Murray's effort to have the Senate pass the Veteran Families Health Service Act of 2023 (S.2801) by unanimous consent was blocked. There is already a parity issue between benefits available for federal civilian employees and those who serve in our military and their families and veterans.

But starting in 2025, federal employees will have more access to comprehensive fertility benefits than military families and veterans.

Finally, it is critical that Congress invest in research in reproductive medicine, especially at the National Institutes of Health (NIH), where funding for key research areas has been slipping for several years. Decisions regarding how to allocate taxpayer dollars illustrate the priorities of an administration. It is time for the Biden Administration and Congress to demonstrate its support for ensuring that the U.S. remains a scientific leader in providing the best care possible to patients looking to become parents by ensuring that reproductive health research is well resourced.

Conclusion

ASRM reiterates its appreciation for the committee's efforts to call attention to the ongoing attacks on sexual and reproductive health care and the opportunity to elevate the voices of our members who provide those in this country who are looking to build the families of their choice with the best care possible. We are eager to work with this committee and the broader U.S. Congress to advance solutions that protect reproductive health care, including fertility treatment, contraception, and abortion. The time to act is now.

Should you have any questions, or if ASRM and our members can serve as a resource to the committee in its work on reproductive rights, please not hesitate to contact Chief Advocacy and Policy Officer Sean Tipton (stipton@asrm.org) and Director of Government Affairs Sarah Bogdan (sbogdan@asrm.org).