

April 3, 2024

Dear UVA Law Community,



On April 4, the Federalist Society at UVA Law is hosting Justice Jay Mitchell of the Alabama Supreme Court for an event titled “Textualism in State Constitutions.” While Justice Mitchell has recently published a law review article on this topic, he is more recently known as the author of the majority opinion in *LePage v. Center for Reproductive Medicine, P.C.*, in which the Alabama Supreme Court held that a frozen embryo is a child and thereby subject to the state’s Wrongful Death of a Minor Act.<sup>1</sup> If/When/How at UVA Law, American Constitution Society at UVA Law, Lambda Law Alliance, and The National Lawyers Guild at UVA Law would like to bring attention to this Justice, this opinion, and their place in the larger ongoing attack on reproductive health taking place in courts, legislatures, and communities throughout the United States.

Let us be clear: frozen embryos are not children.<sup>2</sup> No amount of “textual” analysis or invocations of antiquated legal definitions can establish such an outlandish<sup>3</sup> and unnecessary<sup>4</sup> conclusion as a reasonable interpretation of state law. Court commentators point out that this case could have been decided on much less radical grounds.<sup>5</sup> Instead, Mitchell’s opinion employs an 18th-century understanding of the law to analyze the marvels of modern medicine. Such an approach to the law jeopardizes long-accepted medical practices, exposes medical providers to extreme degrees of criminal liability, and squashes the dreams of hopeful parents seeking to build a family through IVF treatment.

Once again, textualism, which proclaims the seemingly noble ideal of “judicial restraint,” delves into the realm of overt judicial activism. “Textualism” in this case is a mask for the larger “pro-life” movement’s long-term goal of establishing “fetal personhood” under the law.<sup>6</sup> Responses from traditional anti-abortion groups praising the decision<sup>7</sup> demonstrate that Justice Mitchell’s opinion is part of a larger, coordinated movement to establish “fetal personhood” under the law, and through this, continue to roll back reproductive freedom. Textualists need to understand that when they use their dusty dictionaries this way, they are harming people.

We must acknowledge that the logic of Mitchell’s opinion has much larger implications. By elevating frozen embryos to the status of full personhood, Mitchell’s opinion symbolizes the

<sup>1</sup> — So.3d —, 2024 WL 656591 (Ala. 2024).

<sup>2</sup> Roni Caryn Rabin & Azeen Ghorayshi, *Alabama Rules Frozen Embryos Are Children, Raising Questions About Fertility Care*, N.Y. TIMES (Feb. 20, 2024), <https://www.nytimes.com/2024/02/20/health/ivf-alabama-abortion.html>, (“We have three embryos. We don’t have three children.”).

<sup>3</sup> *LePage* at \*23 (Sellers, J., concurring in the result in part and dissenting in part) (“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.”).

<sup>4</sup> *Id.* at \*24 (Cook, J., dissenting) (“Limiting our role to interpreting the existing words in a statute and letting the Legislature decide changes is one of the basic teachings of . . . *Dobbs*.”).

<sup>5</sup> Mary Ziegler, Naomi Cahn & Sonia Suter, *The Massive Legal Fallout from Alabama’s IVF Ruling Is Just the Beginning*, MSNBC (Feb. 22, 2024), <https://www.msnbc.com/opinion/msnbc-opinion/alabama-ivf-supreme-court-consequences-rcna140004>.

<sup>6</sup> Odette Yousef, *How ‘Fetal Personhood’ in Alabama’s IVF Ruling Evolved from Fringe to Mainstream*, NPR (Mar. 14, 2024), <https://www.npr.org/2024/03/14/1238102768/fetal-personhood-alabama-ivf> (“The movement that’s referred to as ‘personhood,’ . . . was always going here.”).

<sup>7</sup> Dan Rosenzweig-Ziff, *Alabama Supreme Court Rules Frozen Embryos Are Children, Imperiling IVF*, WASH. POST (Feb. 20, 2024), <https://www.washingtonpost.com/politics/2024/02/19/alabama-supreme-court-embryos-children-ivf/> (the ruling [is] a “tremendous victory.”).

next step of the “fetal personhood” movement – an all-out attack on reproductive health in Alabama and beyond.<sup>8</sup> Even though the Alabama legislature acted to protect IVF treatments in the state, this legislation failed to adequately address the implications of the court's ruling that embryos are people.<sup>9</sup> This horrifying conception of “personhood” threatens reproductive rights and healthcare across the country. Fear from patients and medical providers alike will result in a decrease of critical medical services, stripping people of access to the care they need to raise families and enjoy healthy lives.<sup>10</sup> Medical research will be limited, impeding our ability to innovate and develop new, potentially life-saving treatments.<sup>11</sup> Should judges in other courts apply this logic and make similarly disastrous decisions, doctors will shut down fertility treatments and other medical services nationwide,<sup>12</sup> as we have seen with abortion clinics in our post-*Dobbs* world.<sup>13</sup> This opinion demonstrates that the movement to establish “fetal personhood” is not just about blocking access to IVF; it assaults our reproductive health and freedom in this country.

UVA Law student groups and their invited speakers should reject legal arguments that abandon common sense and twist statutory text to achieve draconian, partisan, and religious agendas. Furthermore, as UVA Law students, we should strive to advance a vision of the law that does not actively harm the public. We invite all students and student groups, including members of the Federalist Society, to stand with us, sign below, and join the effort to oppose dangerous judicial activism and promote compassion for all members of our diverse democracy.

We also invite students to stand for reproductive justice instead of attending Justice Mitchell's event. **Please join If/When/How for a lunch to raise funds for SisterSong, a reproductive justice coalition led by women of color, on Thursday, April 4 at 11:30 A.M. in Brown 121.** We encourage students to come and learn more about SisterSong and reproductive justice advocacy at the law school. More information on SisterSong can be found [here](#).

Signed,

If/When/How at University of Virginia School of Law

American Constitution Society at University of Virginia School of Law

National Lawyers Guild at University of Virginia School of Law

Lambda Law Alliance at University of Virginia School of Law

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<sup>8</sup> Kate Zernike, *Is A Fetus A Person? An Anti-Abortion Strategy Says Yes.*, N.Y. TIMES (last updated Jun. 21, 2023), <https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html> (“A long-held and more absolute goal [of the anti-abortion movement is] laws that grant fetuses the same legal rights and protections as any person.”).

<sup>9</sup> Sonia Suter & Naomi Cahn, *Lawmakers rushed to protect IVF in Alabama—Why wasn't abortion afforded the same urgency?*, BMJ (Mar. 8, 2024), <https://www.bmj.com/content/bmj/384/bmj.q581.full.pdf>.

<sup>10</sup> Ziegler, Cahn & Suter, *supra* note 5.

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

<sup>12</sup> Doctors shut down care almost immediately after the Alabama Supreme Court's decision was announced. Maria Godoy, *The Science of IVF: What to Know About Alabama's 'Extrauterine Children' Ruling*, NPR (Feb. 23, 2024), <https://www.npr.org/sections/health-shots/2024/02/23/1233023637/ivf-alabama-frozen-embryo-personhood-abortion-supreme-court>.

<sup>13</sup> Bridget Balch, *What Doctors Should Know About Emergency Abortions in States with Bans*, AAMCNEWS, (Sept. 26, 2023), <https://www.aamc.org/news/what-doctors-should-know-about-emergency-abortions-states-bans> (In the post-Dobbs landscape, “Many physicians fear that if they provide a medically indicated abortion, they will lose their medical license, be sued, or - in some states - be charged with a felony.”).

### Additional Individual and Organizational Signatories

Kelly Scrivner, ACS President

Kaleigh Spires, incoming If/When/How President

John Henry Vansant, incoming NLG Co-President

Catie Haddad, incoming NLG Co-President, outgoing Students for Justice in Palestine Vice President

Jackson Martingayle, SBA Senator & ACS Co-Director of Programming

Emily Liu, incoming NLG Off-Grounds Activism Coordinator

Preston Bowden, incoming NLG Treasurer

Ryan Carp, outgoing NLG Speaking Events Coordinator

Io Jones, outgoing ACS, If/When/How, and NLG Board Member

Ariel Vasser, ACS Co-Director of Pro Bono and Voting Rights Outreach

Marissa Varnado, Lambda Law Alliance President, ACS Co-Director of Membership, BLSA Community Service Chair

Anthony Valdez, outgoing ACS President

Delaney Tubbs, outgoing NLG Communications Coordinator

Julia Tayloe, incoming If/When/How Vice President of Communications

Charlotte Karlsen, ACS Co-Director of Membership

Hannah Lu, incoming If/When/How Vice President of Finance

Mary Guardino, ACS Co-Director of Communications

Shahar Pedahzur, If/When/How co-Vice President of Programming

Elizabeth Gilbert, Director of Inclusion, Lambda Law Alliance

Will Collins, ACS Vice President

Kevin Kissinger, ACS Secretary

Netra Rastogi, ACS Co-Director of Resource Development

Matthew Steelberg, outgoing ACS Co-Director of Programming

Kathleen Samuelson, incoming NLG Secretary and Communications Coordinator

Laurel Lehman, Vice President of Community Engagement, Lambda Law Alliance

Derek Furr, Vice President of Career Development, Lambda Law Alliance

Maddie Heimstead-Mercil, Executive Vice President, Lambda Law Alliance

Azalea Lopez, outgoing NLG Co-President

Sabrina Surgil, outgoing NLG Co-President, former Lambda Executive Board member

Alex Webb, Chief of Staff, Lambda Law Alliance

Rachel St. Louis, Social Action Chair, Black Law Students Association

Mason Marché, Treasurer, Lambda Law Alliance

Brendan Markey, ACS Co-Director of Resource Development

Alexandra Hough, outgoing If/When/How Advocacy Chair

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Ella Missan

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Zach Zelenak, outgoing ACS Secretary

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Katherine Poppiti, outgoing NLG board member

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Leah Schwartz, outgoing Lambda Law Alliance Chief of Staff

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Anna Figueroa, President of Immigration Law Society

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Asher Quesenberry, Outgoing ACS Resources Manager  
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Swati Mehrotra  
Mallory Garner  
Ellen Florek  
Carter Farnsworth, incoming NLG Speaking Events Coordinator  
Duncan Hardiman  
Brianna Wainczak  
Maggie Walker  
Austin Mueller, outgoing PILA President  
Lara Chuppe, Advocacy Chair of Immigration Law Society  
Darius Adel  
Cameron Beach  
Sumit Kapur, ACS President 22-23  
Marilyn Hajj, outgoing MENA President  
Julie Ryan, U.S. Marine Corps Veteran  
M. Abigail Justis  
Luci Harris, outgoing Lambda Law Alliance VP of community engagement  
Jordan Kijewski  
Mel Borja  
Roma Sheth, incoming SALSA president  
Lily Lin, incoming WOC vice president  
Madhavi Subramaniam  
Natalie Little  
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Mahi Taban, outgoing WOC President  
Molly Gibson, outgoing Lambda Law Alliance Treasurer  
Divya Sharma, outgoing If/When/How Programming Chair  
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Natasha Holtman, incoming DVP Programming Chair  
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Dorehn Coleman, Outgoing SBA Vice President of DEI  
Ian Roberson  
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Ethan Brown, outgoing Lambda Law Alliance Executive Vice President  
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Brian Cameron  
Sabrina Mato, outgoing Latin American Law Organization President  
Kayla Walczyk  
Molly Keck  
Alejandra Ganoza Muniz, incoming Latin American Law Organization President  
James Pierpoint, husband of an OBGYN  
Kylie Mignat  
Simeon Daferede  
Zachary Pierce  
Jenna Smith  
Andrew Allard  
Elle Ondeck  
Sareen Ishanyan  
Allison Carter  
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Anna Sonju

Lauren McNerney

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