

## HOW STATES' ABORTION REGULATIONS HAVE A DETRIMENTAL IMPACT ON IVF THERAPY

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### I. INTRODUCTION

For forty-nine years abortion was considered a protected right in the United States.<sup>1</sup> This right was previously deemed a privacy interest found within the Due Process Clause of the Fourteenth Amend-

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1. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2240 (2022).

ment.<sup>2</sup> Since the beginning, this right has been controversial across political party lines.<sup>3</sup> Many states began passing statutes outlawing abortion despite their unenforceability due to the Constitutional protections<sup>4</sup> provided by *Roe v. Wade*<sup>5</sup> and *Planned Parenthood v. Casey*.<sup>6</sup> In 2021, *Dobbs v. Jackson Women's Health Organization*<sup>7</sup> was granted certiorari by the United States Supreme Court which signaled the possibility for change regarding the right to abortion.<sup>8</sup> The Supreme Court ultimately overruled its prior case law, returning the right to determine abortion protections to the states.<sup>9</sup> In the wake of these decisions, some states implemented laws against abortion, including pre-existing "trigger laws" and subsequent laws.<sup>10</sup> The vast majority of state laws limiting abortion overlooked an important area: in vitro fertilization ("IVF").<sup>11</sup> This lack of protection for IVF therapy has led to incompatible judicial rulings regarding the status of an embryo.<sup>12</sup>

When states were crafting new laws or implementing "trigger laws," most included exceptions for the life of the pregnant person or had specific cutoffs, such as at viability, but only two explicitly exempt IVF therapy.<sup>13</sup> In IVF therapy, there is a need to create multiple embryos while recognizing that many, if not all, of the viable embryos will not implant and make it to full term.<sup>14</sup> Additionally, IVF therapy is a process with a high risk of loss of the embryo.<sup>15</sup> Many times, if the patient is lucky, they are left with too many viable embryos that will not be needed.<sup>16</sup> There are currently over one million unused, frozen

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2. *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

3. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022).

4. *See, e.g.*, TENN. CODE ANN. § 39-15-211 (2019).

5. 410 U.S. 113 (1973).

6. 505 U.S. 833 (1992).

7. 142 S. Ct. 2228 (2022).

8. *See generally Dobbs*, 142 S. Ct. at 2284.

9. *Id.*

10. NICOLE DUBE ET. AL, STATE ABORTION LAW ENACTED POST-DOBBS DECISION 3-6 (2022), <https://cga.ct.gov/2022/rpt/pdf/2022-R-0227.pdf> [hereinafter DUBE].

11. *Id.* at 10 (noting Indiana contains an IVF exception); *see also* W. VA. CODE § 16-2R-3 (2022).

12. *See, e.g.*, *Penniman v. Univ. Hosp. Health Sys.*, 130 N.E.3d 333 (Ohio Ct. App. 2019).

13. *See generally Penniman*, 130 N.E.3d at 333; *see, e.g.*, IND. CODE § 16-34-1-0.5 (2022); *see also* W. VA. CODE § 16-2R-4-a-5 (2022). Statutes limit abortion at various weeks or at gestation and provide certain exceptions such as for medical emergencies, rape or incest, or fatal fetal abnormalities. *See e.g.*, W. VA. CODE § 16-2R-4-a-5 (2022).

14. *In vitro fertilization (IVF)*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716#:~:text=IVF%20involves%20several%20steps%20%E2%80%94%20ovarian,one%20cycle%20may%20be%20needed> (last visited Dec. 3, 2022) [hereinafter *In vitro fertilization*].

15. *Id.* (discussing embryo loss).

16. *Id.* (discussing extra embryos).

embryos in the United States.<sup>17</sup> The question lies with how courts will treat these unused embryos if forced to apply the laws as they are currently written.<sup>18</sup> If embryos are treated as people, many laws may have a chilling effect on patients and doctors that do not wish to find themselves in legal trouble while engaging in IVF therapy.<sup>19</sup>

This Note will highlight the lack of an exception for IVF therapy in state abortion laws causing a legal gray area between court interpretations and a physician's actions throughout IVF therapy.<sup>20</sup> The second portion of this Note will review the Supreme Court cases that led to the states gaining control of the right to abortion.<sup>21</sup> This Note will also discuss the process of in vitro fertilization and how the process creates fertilized embryos that either must be used or discarded for various reasons.<sup>22</sup> Additionally, this Note will give examples of current state laws and the specific language they are using regarding abortion.<sup>23</sup> Finally, this Note will analyze the concerning intersection between states' definitions of an embryo within abortion restrictions and the necessary process of IVF.<sup>24</sup>

## II. BACKGROUND

### A. A ROAD MAP OF *ROE*, *CASEY*, AND *DOBBS* AND THEIR RATIONALES REGARDING ABORTION.

There are three primary cases governing abortion rights in the United States: *Roe v. Wade*,<sup>25</sup> *Planned Parenthood v. Casey*,<sup>26</sup> and now *Dobbs v. Jackson Women's Health Organization*.<sup>27</sup> *Roe* was first, which deemed abortion was a protected interest and was later strengthened by the ruling in *Casey*.<sup>28</sup> Both of these cases were overturned by *Dobbs* in 2022.<sup>29</sup>

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17. Beth Kowitt, *If you can move them, move them: Fertility experts say the end of Roe raises huge questions about the fate of frozen embryos in red states*, FORTUNE (June 24, 2022), <https://fortune.com/2022/06/24/roe-v-wade-abortion-ivf-embryos-red-states/>.

18. Sean Tipton & Jared Robins, *Not Just Abortion: How the demise of Roe v Wade may impact fertility care*, 67 CONTEMP. OB/GYN J. 9, 10 (2022) [hereinafter Tipton].

19. *Id.* (discussing the hesitation physicians may feel due to the possible legal outcomes).

20. *See infra* notes 111-131 and accompanying text.

21. *See infra* notes 30-59 and accompanying text.

22. *See infra* notes 60-85 and accompanying text.

23. *See infra* notes 115-141 and accompanying text.

24. *See infra* notes 152-193 and accompanying text.

25. 410 U.S. 113 (1973).

26. 505 U.S. 833 (1992).

27. 142 S. Ct. 2228 (2022).

28. *See generally* *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (giving constitutional protection to the right to access abortion).

29. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022).

1. *Roe v. Wade*, 410 U.S. 113 (1973)

*Roe v. Wade* was decided in 1973 and held abortion, prior to the viability of the embryo, is a protected liberty interest within the Due Process Clause.<sup>30</sup> *Roe*, the plaintiff, argued a Texas Statute banning abortion except when saving the life of the mother, should be declared unconstitutional because it did not differentiate between the states of viability and thus violated the Due Process Clauses of the Ninth and Fourteenth Amendments.<sup>31</sup> The United States District Court for the Northern District of Texas held the statute violated both the Ninth and Fourteenth Amendments on the basis of privacy rights.<sup>32</sup> The United States Supreme Court reasoned that until viability, a state does not have an interest in preventing the mother from having an abortion.<sup>33</sup> Once the fetus is viable, the state does have an interest in the fetus and the power to step in and protect it.<sup>34</sup> The Supreme Court created a trimester test to determine the cutoff for a state's interest to apply.<sup>35</sup> After the first trimester, a state has an interest in the potential life and may limit abortion except to save the life of the mother.<sup>36</sup> The Supreme Court affirmed the decision, holding the Texas Statute was unconstitutional.<sup>37</sup>

2. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)

*Planned Parenthood v. Casey* was decided in 1992 and reaffirmed *Roe's* central holding.<sup>38</sup> The plaintiffs in this case, a physician, a group of doctors, and five local abortion clinics, claimed the Pennsylvania Abortion Control Act (the "Act") of 1982 was unconstitutional, and the District Court of Pennsylvania agreed.<sup>39</sup> The Act required a woman to give informed consent and be given certain information prior to the procedure, required parental notification if the patient was a minor, and required a married woman to notify her husband of the intended abortion.<sup>40</sup> The United States Court of Appeals for the Third Circuit affirmed the *Roe* opinion in part and re-

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30. *Roe*, 410 U.S. at 164 (relying on the Due Process Clause of the 14th Amendment. This clause protects rights that are directly listed in the Constitution and rights that are determined to be fundamental though not directly listed).

31. *Id.* at 120.

32. *Id.* at 153.

33. *Id.* at 163.

34. *Id.*

35. *Id.* at 163.

36. *Id.*

37. *Id.* at 164.

38. *Casey*, 505 U.S. at 846.

39. *Id.* at 845 (ultimate holding of the Court).

40. *Id.* at 844.

versed it in part, holding that only the husband notification requirement was unconstitutional.<sup>41</sup>

The Supreme Court granted certiorari and created a new undue burden test to be applied rather than the former trimester test from *Roe*.<sup>42</sup> States could now limit abortion as long as there was a medical exception for the life of the mother and any limitations on access to abortion did not create an undue burden for the mother to access an abortion.<sup>43</sup> For example, the Court held the provision requiring a married woman to explain why she could not give notice to her husband was an undue burden and thus needed to be struck down.<sup>44</sup> Alternatively, the Court upheld that the medical emergency provision did not create an undue burden.<sup>45</sup> By creating the undue burden test, the Court rejected *Roe*'s original trimester test due to it being too rigid to apply.<sup>46</sup> Beyond this, the central reasoning of *Roe*—that abortion was a protected right which may only be regulated by states in limited circumstances—was affirmed.<sup>47</sup>

### 3. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)

*Dobbs v. Jackson Women's Health Organization* was brought to the Supreme Court in 2021.<sup>48</sup> The case began as a challenge to a Mississippi state law, called the Gestational Age Act (the "Act"), passed in 2018<sup>49</sup> which attacked the validity of the Constitutional protections given to abortion.<sup>50</sup> The Act banned abortion after fifteen weeks with limited exceptions.<sup>51</sup> However, the Court chose to abandon the precedent of *Roe* and *Casey* from decades prior and give the decision regarding abortion back to the states.<sup>52</sup> Both *Roe* and *Casey* previously relied on the Due Process Clause of the 14th Amendment which protects rights that are directly listed in the Constitution and rights that

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41. *Id.* at 833 (affirming *Roe*'s central holding, overruling its trimester test, and implementing an undue burden test).

42. *Id.* at 874.

43. *Id.* at 878.

44. *Id.* at 879.

45. *Id.* at 878.

46. *Id.*

47. *Id.* at 845-46.

48. *Dobbs*, 142 S. Ct. at 2244.

49. See *Dobbs v. Jackson Women's Health Organization* (2022), LEGAL INFO. INST., (June 2022), [https://www.law.cornell.edu/wex/dobbs\\_v.\\_jackson\\_women%27s\\_health\\_organization\\_%282022%29](https://www.law.cornell.edu/wex/dobbs_v._jackson_women%27s_health_organization_%282022%29); see also MISS. CODE ANN. § 41-41-191 (2022).

50. *Dobbs*, 142 S. Ct. at 2243 (2022) (describing the criminalization of laws throughout American common law history).

51. *Dobbs v. Jackson Women's Health Organization* (2022), LEGAL INFO. INST., (Jun 2022), [https://www.law.cornell.edu/wex/dobbs\\_v.\\_jackson\\_women%27s\\_health\\_organization\\_%282022%29](https://www.law.cornell.edu/wex/dobbs_v._jackson_women%27s_health_organization_%282022%29) (including exceptions for medical emergencies and severe fetal abnormalities); see also MISS. CODE ANN. § 41-41-191 (2022).

52. *Dobbs*, 142 S. Ct. at 2279.

are determined to be fundamental though not directly listed.<sup>53</sup> To be considered fundamental, a right must be “deeply rooted” in the history of the nation.<sup>54</sup> The Court reasoned that abortion was not explicitly referenced in the Constitution nor was it protected through the nation’s history or traditions which would thus qualify it as a “fundamental right.”<sup>55</sup> Since the Court no longer considered abortion a constitutionally-protected right, the decision for how to handle abortion was given to the states.<sup>56</sup> States began passing a variety of laws—some protecting and others prohibiting abortion.<sup>57</sup> Thirteen states already had trigger laws from decades prior that were to be enacted immediately if *Roe* was ever overturned.<sup>58</sup> The *Dobbs* opinion thus allowed these trigger laws, as well as new laws, to be implemented following the release of the decision.<sup>59</sup>

#### B. IN VITRO FERTILIZATION AND HOW IT IS IMPACTED BY STATE LAWS.

In vitro fertilization (“IVF”) is defined by Mayo Clinic as a series of intricate procedures to assist with fertility or genetic concerns leading to the conception of a child.<sup>60</sup> During this process, the egg donor goes through ovarian stimulation to produce multiple eggs.<sup>61</sup> Multiple medications are used to produce the eggs and prepare the uterus for implantation.<sup>62</sup> Once it is determined there are multiple eggs to retrieve, the egg donor is sedated and a needle is used to retrieve the prepared eggs.<sup>63</sup> Sperm is then collected to fertilize the eggs.<sup>64</sup> Fertilization can occur in two ways: conventional insemination and intracytoplasmic sperm injection.<sup>65</sup> Once fertilized, a doctor may assist in

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53. *Id.* at 2245.

54. *Id.* at 2242.

55. *Id.* at 2248.

56. *Id.* at 2279 (indicating the overruling of *Roe* and *Casey*).

57. *See e.g.*, N.J. STAT. ANN. § 10:7-2 (2022); TENN. CODE ANN. § 39-15-211 (2019).

58. *See e.g.*, TENN. CODE ANN. § 39-15-211 (2019); TEX. HEALTH & SAFETY CODE ANN. § 171 (West 2022); MO. REV. STAT. § 188.026 (2022); W. VA. CODE § 16-2R-4-a-5 (2022); IND. CODE § 16-34-1-0.5 (2022); N.D. CENT. CODE § 14-02.1-02 (2022).

59. *Dobbs*, 142 S. Ct. at 2279 (indicating the overruling of *Roe* and *Casey*).

60. *In vitro fertilization*, *supra* note 14; Mark P. Connolly, et al., *Long-term Economic Benefits Attributed to IVF-conceived Children: A Lifetime Tax Calculation*, AM. J. OF MANAGED CARE (Sept. 15, 2008), <https://www.ajmc.com/view/sep08-3583p598-604> (discussing the long-term economic impacts of children conceived through IVF).

61. *Id.* (discussing stimulation).

62. *Id.*

63. Janelle Martel, *In Vitro Fertilization (IVF)*, HEALTHLINE (Feb. 10, 2016), <https://www.healthline.com/health/in-vitro-fertilization-ivf> (discussing retrieval).

64. *In vitro fertilization*, *supra* note 14 (discussing fertilization).

65. *Id.* (conventional insemination sperm and eggs are mixed and incubated whereas the intracytoplasmic process requires sperm to be directly injected into the egg).

hatching the eggs or perform genetic testing.<sup>66</sup> Preimplantation testing looks for genetic diseases or the correct number of chromosomes.<sup>67</sup> Embryos that are deemed to have health issues are generally discarded to reduce the likelihood of the continuation of genetic issues.<sup>68</sup> Healthy embryos are then transferred to the uterus by syringe.<sup>69</sup>

If the eggs implant successfully, one will become pregnant.<sup>70</sup> Alternatively, if the process is unsuccessful and no embryos implant in the uterus, another round of IVF may be recommended.<sup>71</sup> Unused embryos may be frozen indefinitely, donated to another individual hoping to conceive, donated for scientific research, or destroyed.<sup>72</sup> Frozen embryos need to be cryopreserved which costs several hundred to thousands of dollars per year, adding to the overall cost of an individual's IVF journey.<sup>73</sup> If a couple chooses to destroy an embryo, the IVF lab will warm the embryo and then discard it.<sup>74</sup> Depending on the definitions used by the states, a fertilized embryo may be considered an unborn human being.<sup>75</sup> Because of this, it is reasonable to conclude states with "trigger laws" and newly enacted legislation have, possibly unintentionally, ended their allowance for IVF therapy.<sup>76</sup>

IVF is invasive, expensive, and time consuming for those involved and is only used as a last resort treatment.<sup>77</sup> IVF is recommended for those over the age of forty or for individuals known to have prior complications or damage to internal structures.<sup>78</sup> Risks include multiple embryos being conceived and a heightened risk of miscarriages.<sup>79</sup> Miscarriages occur in fifteen to twenty-five percent of IVF implanta-

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66. *Id.* (discussing hatching).

67. *Id.* (discussing preimplantation testing).

68. *Id.*

69. Martel, *supra* note 63.

70. *In vitro fertilization*, *supra* note 14 (discussing implantation and possible outcomes).

71. *Id.*

72. *Id.* (discussing possible outcomes for unused embryos).

73. Rachel Gurevich, *Options for What to do with Extra Frozen Embryos After IVF*, VERYWELLFAMILY (Feb. 19, 2023), <https://www.verywellfamily.com/extra-embryos-after-ivf-what-are-your-options-1960215> (discussing leftover frozen embryos).

74. *Id.* (discussing the thawing and disposal of unused embryos).

75. *See, e.g.*, LA. STAT. ANN. § 40:1061(I)(2) (2022).

76. Tipton, *supra* note 18, at 10 (discussing the hesitancy of physicians who may no longer feel comfortable performing IVF in states with unclear laws because they may be prosecuted).

77. *See* Marissa Conrad, *How Much Does IVF Cost?*, FORBESHEALTH, (Jan. 23, 2023, 12:40PM) <https://www.forbes.com/health/family/how-much-does-ivf-cost/> (stating that a single cycle of IVF therapy can range from \$15,000 to \$30,000 and most patients require multiple rounds); *see also In vitro fertilization*, *supra* note 14 (discussing treatment attributes); *See* Gurevich, *supra* note 73.

78. *In vitro fertilization*, *supra* note 14 (discussing typical patients).

79. *Id.* (discussing the risks of IVF therapy).

tions with the frequency increasing with the age of the individual carrying.<sup>80</sup> This is compared to a ten to fifteen percent chance of miscarriage during naturally conceived pregnancies.<sup>81</sup> Extra embryos produced prior to implantation can be frozen, though not all fertilized embryos will survive the freezing and thawing process.<sup>82</sup>

Ultimately, IVF therapy is performed to assist people in creating fertilized eggs.<sup>83</sup> These eggs are then implanted to increase the likelihood of conception.<sup>84</sup> Extra fertilized eggs are then destroyed, donated, or frozen indefinitely.<sup>85</sup>

### C. STATE RESPONSES TO *DOBBS*

#### 1. *Trigger laws*

A “trigger law” is an informal moniker used to describe a law that “go[es] into effect if a specific event or condition occurs.”<sup>86</sup> The law is passed prematurely and is automatically codified once the specific conditions are met.<sup>87</sup> Trigger laws have become a popular phrase used to describe the laws many states had in place involving abortion access; however, the term is not limited to this topic.<sup>88</sup> These laws wait dormant for their triggering events to take place, and once the event occurs, the laws are implemented quickly, sometimes within a few weeks or immediately.<sup>89</sup>

80. *Id.*

81. *Miscarriage*, MARCHOFDIMES, [https://www.marchofdimes.org/find-support/topics/miscarriage-loss-grief/miscarriage#:~:text=for%20women%20who%20know%20they,1%20to%205%20percent\)%20pregnancies](https://www.marchofdimes.org/find-support/topics/miscarriage-loss-grief/miscarriage#:~:text=for%20women%20who%20know%20they,1%20to%205%20percent)%20pregnancies) (last visited Jan. 20, 2023).

82. *In vitro fertilization*, *supra* note 14 (discussing extra embryos); The Associated Press, *\$15million awarded to five people who lost eggs, embryos at fertility clinic*, NBC NEWS, <https://www.nbcnews.com/news/us-news/15m-awarded-five-people-who-lost-eggs-embryos-fertility-clinic-n1270439> (June 11, 2021, 7:04AM); Holly Yan, *A Cleveland fertility clinic that lost 4,000 eggs and embryos just got hit with two more lawsuits*, CNN (Feb. 5, 2020, 5:57PM), <https://www.cnn.com/2020/02/05/us/ohio-fertility-clinic-lost-eggs-embryos-lawsuits/index.html#:~:text=A%20Cleveland%20fertility%20clinic%20that,hit%20with%202%20more%20lawsuits&text=almost%20two%20years%20ago%20a,spoke%20out%20about%20their%20grief> (a lab in California lost 3,500 fertilized embryos and a lab in Ohio lost 4,000 fertilized embryos).

83. *See generally id.*

84. *Id.* (discussing implantation).

85. *Id.* (discussing extra embryos).

86. *Trigger Law*, DICTIONARY.COM, <https://www.dictionary.com/e/politics/trigger-law/> (last visited on Dec. 7, 2022).

87. *Id.*

88. *Id.*; *see e.g.*, Elaine S. Povich, *Without Obergefell, Most States Would Have Same-Sex Marriage Bans*, PEW, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/07/without-obergefell-most-states-would-have-same-sex-marriage-bans> (last visited Jan. 20, 2023) (showing that trigger law terminology may also be applied to same-sex marriage within the states).

89. DUBE, *supra* note 10, at 1 (referencing South Dakota’s and Arkansas’ immediately effective laws).

Thirteen states had trigger laws in place prior to the overruling of *Roe* and *Casey*.<sup>90</sup> These statutes were put into effect once *Roe* and *Casey* were overturned by the Supreme Court in *Dobbs*.<sup>91</sup> These states include Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming.<sup>92</sup> These statutes all limit abortion at certain times and provide definitions about what constitutes fertilization, an embryo, and an abortion.<sup>93</sup> These statutes also provide several exclusions such as for the life of the pregnant person or severe fetal abnormalities.<sup>94</sup> States differ on which exceptions to provide but generally include exemptions for saving the life of the pregnant person.<sup>95</sup> None of these states explicitly exclude IVF from the repercussion of their statutes.<sup>96</sup>

One state with a particularly impactful trigger law is Tennessee, which passed legislation in 2019 called the Human Life Protection Act.<sup>97</sup> While the law could not be put into effect until after *Roe* was overturned, Tennessee preemptively passed the law which limits abortion from the moment of fertilization.<sup>98</sup> It recognizes an unborn child as a fertilized embryo.<sup>99</sup> Similarly, Missouri enacted a trigger law called the Right to Life of the Unborn Child Act in 2019 which limits abortion at all stages unless there is a medical emergency.<sup>100</sup> This also includes from the moment of conception.<sup>101</sup> Other states, such as Texas and North Dakota, have passed legislation limiting abortion to a heartbeat cutoff of six weeks.<sup>102</sup> Both states passed their legislation

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90. *Id.* at 3-6.

91. *Dobbs*, 142 S. Ct. at 2240.

92. DUBE, *supra* note 10, at 3–6. For the purposes of this Note, the author has chosen six state statutes which would have a drastic impact on IVF. There are additional statutes which may also have an effect but are outside the scope of this Note because those laws have a lesser impact on IVF therapy.

93. *See e.g.*, TENN. CODE ANN. § 39-15-211 (2019); TEX. HEALTH & SAFETY CODE ANN. § 171 (West 2022); MO. REV. STAT. § 188.026 (2022); W. VA. CODE § 16-2R-4-a-5 (2022); IND. CODE § 16-34-1-0.5 (2022); N.D. CENT. CODE § 14-02.1-02 (2022).

94. DUBE, *supra* note 10, at 2 (discussing exceptions for the life of the mother, fetal abnormalities, or in cases of rape and incest).

95. *Id.*

96. *See id.* at 3-6.

97. TENN. CODE ANN. § 39-15-211 (2019).

98. *Id.* at (a)(2) (discussing the fertilization cut off).

99. *Id.* at (a)(4) (defining an unborn child).

100. MO. REV. STAT. § 188.026 (2022).

101. *Id.*

102. TEX. HEALTH & SAFETY CODE ANN. § 171 (West 2022) (creating a gestational cutoff at six weeks or once a heartbeat is detected); N.D. CENT. CODE § 14-02.1-02 (2022) (creating a gestational cutoff at 6 weeks or once a heartbeat is detected); *Texas “Heartbeat” Abortion Law*, AMERICAN COLLEGE OF PHYSICIANS, <https://www.acponline.org/advocacy/state-health-policy/texas-heartbeat-abortion-law#:~:text=the%20law%2C%20the%20most%20restrictive,makes%20exceptions%20for%20medical%20emergencies> (last visited Jan. 20, 2023).

in 2021 prior to the release of *Dobbs*.<sup>103</sup> Like Tennessee, both states also recognize a fertilized embryo as an unborn child.<sup>104</sup>

## 2. SUBSEQUENT LEGISLATION PASSED

Other than trigger laws, many states began passing new laws after the *Dobbs* ruling on June 24, 2022.<sup>105</sup> Fourteen states legislated changes to abortion access after the release of the leaked *Dobbs* draft on May 2, 2022.<sup>106</sup> Eleven governors issued executive orders in response.<sup>107</sup> States are also putting measures on their ballot to decide their state constitutional direction.<sup>108</sup> Two such new laws restricting abortion access passed in West Virginia and Indiana.<sup>109</sup> As of January 2023, these two states are the only ones to explicitly exempt IVF therapy in their legislation restricting abortion.<sup>110</sup>

## III. ANALYSIS

### A. STATE LEGISLATION LIMITS ABORTION WHEN DEFINING AN EMBRYO AS A HUMAN.

Recent state legislation limiting abortion includes specific definitions regarding embryos and abortion that impact the continuation of IVF therapy.<sup>111</sup> The triggering condition for all thirteen state trigger

103. Compare TEX. HEALTH & SAFETY CODE ANN. § 171 (West 2022) (enacted May 19, 2021), and N.D. CENT. CODE § 14-02.1-02 (enacted Nov. 2021), with *Dobbs*, 142 S. Ct. at 2234, (released June 2022).

104. TEX. HEALTH & SAFETY CODE ANN. § 171 (West 2022); N.D. CENT. CODE § 14-02.1-02 (2022); 2019 TENN. PUB. ACTS 351 (defining an unborn child).

105. See generally DUBE, *supra* note 10.

106. See Ariane de Vogue, *Supreme Court issues report on Dobbs leak but says it hasn't identified the leaker*, CNN POLITICS (Jan. 19, 2023), <https://www.cnn.com/2023/01/19/politics/supreme-court-dobbs-report-leak/index.html>; see also, DUBE, *supra* note 10, at 10-13. The fourteen states include California, Connecticut, Delaware, Indiana, Louisiana, Massachusetts, New Hampshire, New Jersey, New York, Oklahoma, Pennsylvania, South Carolina, Tennessee, and West Virginia. *Id.* These changes include who can perform an abortion, who can refuse to perform an abortion, and outline protections or cause of actions for individuals. *Id.*

107. DUBE, *supra* note 10, at 15-20 (including California, Colorado, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Pennsylvania, and Rhode Island).

108. *Id.* at 12 (referencing Pennsylvania).

109. See IND. CODE ANN. § 16-34-1-0.5 (2022); see also W. VA. CODE § 16-2R-3 (2022); Megan Messerly, *Indiana Supreme Court allows abortions to continue pending January hearing*, POLITICO (Oct. 12, 2022), <https://www.politico.com/news/2022/10/12/indiana-supreme-court-abortion-continue-00061569>; Katie Shepherd & Dan Heyman, *Most abortions stop in West Virginia after lawmakers pass near-total ban*, THE WASHINGTON POST (Sept. 14, 2022), <https://www.washingtonpost.com/nation/2022/09/14/west-virginia-abortion-ban/>.

110. See generally IND. CODE § 16-34-1-0.5 (2022); see also W. VA. CODE § 16-2R-3 (2022).

111. Compare TENN. CODE ANN. § 39-15-211 (2019) (including embryo when defining an unborn child), with Tipton, *supra* note 18 (highlighting potential legal conse-

laws, in addition to the subsequent legislation, was the overturning of *Roe* and *Casey* and removing constitutional protection from abortion access.<sup>112</sup> Once this occurred, states became free to enact the laws they deemed fit, including implementing their trigger laws that automatically outlawed abortion except in limited circumstances.<sup>113</sup> States were also free to begin enacting their own subsequent laws.<sup>114</sup>

### 1. *Tennessee Human Life Protection Act*

In its trigger law, Tennessee defines abortion as:

[the] use of any instrument, medicine, drug, or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant with intent other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus<sup>115</sup>

This statute continues to define fertilization, pregnant, and unborn child.<sup>116</sup> Fertilization is defined as the “point in time when a male human sperm penetrates the zona pellucida of a female human ovum[.]”<sup>117</sup> Pregnant is defined as when “the human female reproductive condition of having a living unborn child within her body *throughout the entire embryonic and fetal stages of the unborn child from fertilization until birth*” (emphasis added).<sup>118</sup> An unborn child is defined as “an individual living member of the species, homo sapiens, *throughout the entire embryonic and fetal stages of the unborn child from fertilization until birth*” (emphasis added).<sup>119</sup>

### 2. *Texas SB No. 8*

The Texas statute outlaws abortions after a fetal heartbeat is detected.<sup>120</sup> Despite not explicitly defining fertilization, the statute continues on to define unborn child as “a human fetus or embryo in *any stage of gestation from fertilization until birth*” (emphasis added).<sup>121</sup>

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quences relating to embryos use), and *In vitro fertilization*, *supra* note 14 (indicating IVF procedures inherently create extra, unused embryos and destroy embryos).

112. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); see also DUBE, *supra* note 10.

113. DUBE, *supra* note 10, at 3–6.

114. *Id.* at 8–13.

115. TENN. CODE ANN. § 39-15-211 (2019).

116. *Id.* at 1.

117. *Id.* (discussing the definition of fertilization).

118. *Id.* (discussing the definition of pregnant).

119. *Id.* (discussing unborn child).

120. TEX. HEALTH & SAFETY CODE ANN. § 171 (West 2022).

121. *Id.*

Similar to the Tennessee statute, both states limit abortion from fertilization.<sup>122</sup>

### 3. *Missouri Right to Life of the Unborn Child Act*

Missouri outlaws all abortion except to save the life of the pregnant person, stating:

no abortion shall be performed or induced upon a woman, except in cases of medical emergency. Any person who knowingly performs or induces an abortion of an unborn child in violation of this subsection shall be guilty of a class B felony, as well as subject to suspension or revocation of his or her professional license by his or her professional licensing board.<sup>123</sup>

Unborn child is defined as “the offspring of human beings from the moment of conception until birth and at *every stage of its biological development*, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus” (emphasis added).<sup>124</sup> The statute further defines conception as, “the fertilization of the ovum of a female by a sperm of a male.”<sup>125</sup>

### 4. *North Dakota Abortion Control Act*

North Dakota limits abortion once a heartbeat is detected, or at six weeks, similar to Texas.<sup>126</sup> The statute states no one shall “knowingly perform an abortion on a pregnant woman with the specific intent of causing or abetting the termination of the life of the unborn child the pregnant woman is carrying and whose heartbeat has been detected.”<sup>127</sup> Unborn child is defined as “the offspring of human beings from *conception until birth*” (emphasis added).<sup>128</sup> Fertilization is defined as, “the fusion of a human spermatozoon with a human ovum.”<sup>129</sup> Interestingly, North Dakota also includes a definition of postfertilization age which is “the age of the unborn child as calculated *from fertilization*” (emphasis added).<sup>130</sup> It also includes the definition of human being which is “an individual living member of the species of homo sapiens, including the unborn human being during the *entire*

122. TENN. CODE ANN. § 39-15-211 (2019) (defining fertilization); TEX. HEALTH & SAFETY CODE ANN. § 171 (West 2022) (defining fertilization).

123. MO. REV. STAT. § 188.026 (2022).

124. *Id.* (referencing unborn child).

125. *Id.* (referencing conception).

126. TEX. HEALTH & SAFETY CODE ANN. § 171 (West 2022) at 1 (gestational cut off); N.D. CENT. CODE § 14-02.1-02 (2022) (limiting abortion once a heartbeat is detected).

127. N.D. CENT. CODE § 14-02.1-02 (2022) (referencing abortion).

128. *Id.* (referencing unborn child).

129. *Id.* (referencing fertilization).

130. *Id.* (referencing postfertilization age).

*embryonic and fetal ages from fertilization to full gestation*” (emphasis added).<sup>131</sup>

##### 5. *West Virginia Unborn Child Protection Act*

West Virginia was the second state to enact subsequent legislation limiting abortion.<sup>132</sup> The West Virginia statute limits abortion at any stage with exceptions for nonviability, ectopic pregnancy, medical emergency, rape, or incest.<sup>133</sup> Abortion is defined as:

the use of any instrument, medicine, drug, or any other substance or device with intent to terminate the pregnancy of a patient known to be pregnant and with intent to cause the death and expulsion or removal of an embryo or a fetus. This term does not include the terms “intrauterine fetal demise” or “stillbirth” or “miscarriage” as defined in this section.<sup>134</sup>

Fertilization is defined as “the fusion of a human spermatozoon with a human ovum.”<sup>135</sup> Embryo is defined as “the developing human from *the time of fertilization* until the end of the eighth week of gestation” (emphasis added).<sup>136</sup> The West Virginia statute contains an exception clearly exempting an IVF stating an abortion does not include in vitro fertilization.<sup>137</sup>

##### 6. *Indiana Code Ann. § 16-34-2-1*

Indiana was the first state to pass legislation limiting abortion after the *Dobbs* opinion.<sup>138</sup> Indiana restricts abortion in all circumstances except for fatal fetal abnormalities, or rape and incest, or to save the life of the pregnant person.<sup>139</sup> The statute continues on to state, “human physical life begins when a human ovum is fertilized by a human sperm.”<sup>140</sup> While Indiana enacted one of the strictest abortion bans, it did leave a necessary caveat for IVF therapy as section 16-34-1-0.5 states “[t]his article does not apply to in vitro fertilization.”<sup>141</sup>

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131. *Id.* (referencing human being).

132. Amy Simonson, *West Virginia Legislature passes abortion ban with few exceptions*, CNN POLITICS (Sept. 14, 2022), <https://www.cnn.com/2022/09/13/politics/west-virginia-state-legislature-abortion-ban/index.html>.

133. W. VA. CODE § 16-2R-3 (2022).

134. *Id.* at § 16-2R-2.

135. *Id.* (referencing fertilization).

136. *Id.* (referencing embryo).

137. *Id.* at § 16-2R-4-a-5.

138. Messerly, *supra* note 109.

139. IND. CODE § 16-34-2-1 (2022).

140. *Id.* at § 16-34-2-1.1-E (2022).

141. *Id.* at § 16-34-2-1-0.5 (2022).

B. IVF THERAPY CREATES FERTILIZED EMBRYOS AND INCREASES THE LIKELIHOOD OF HARM OCCURRING TO THE EMBRYOS.

IVF therapy is used as a last resort to help individuals increase their chances to conceive children.<sup>142</sup> To do so, one must first create multiple fertilized embryos through the clinical combination of sperm and ovum.<sup>143</sup> Once fertilized, the embryos are tested for any non-viable abnormalities thus leading to them being discarded.<sup>144</sup> Embryos are then implanted within a uterus and if successful, one will become pregnant.<sup>145</sup> There is a high likelihood no embryos will implant and another round of IVF therapy will be recommended.<sup>146</sup> If one is fortunate enough, there will be extra fertilized embryos at the end of the process.<sup>147</sup> Extra embryos may be donated for research or to other individuals, discarded, or frozen indefinitely though they may not survive the thawing process.<sup>148</sup> There are currently over one million fertilized frozen embryos within the United States.<sup>149</sup> Additionally, IVF labs have a history of negligence leading to the unintended destruction of fertilized embryos.<sup>150</sup> The way a state classifies an embryo will impact parents' choices for their extra embryos.<sup>151</sup>

C. HOW STATE RESTRICTIONS ON ABORTION DIRECTLY HARM IVF THERAPY.

While states have the power to regulate abortion, the lack of clarity regarding embryo issues resulting from IVF creates a concern.<sup>152</sup> Many states have legislation limiting abortion with varying degrees of definitions and timelines.<sup>153</sup> Few states explicitly exempt situations involving IVF therapy.<sup>154</sup>

States with laws conflicting with IVF procedures will likely find their courts bombarded with lawsuits over the confusion of different

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142. See *In vitro fertilization*, *supra* note 14.

143. *Id.* (discussing fertilization).

144. *Id.* (discussing preimplantation genetic testing).

145. *Id.* (discussing embryo transfer).

146. *Id.* (discussing results if not pregnant).

147. *Id.* (discussing extra embryos).

148. *Id.*

149. Kowitt, *supra* note 17.

150. See, e.g., The Associated Press, *supra* note 82; Yan, *supra* note 82.

151. Compare TEX. HEALTH & SAFETY CODE ANN. § 171 (West 2022) (protecting embryos at all stages of development, included nonviable embryos), with Tipton, *supra* note 18 (highlighting potential negative legal consequences relating to the use of non-viable embryos).

152. See generally Tipton, *supra* note 18.

153. See, e.g., MO. REV. STAT. § 188.026 (2022); N.D. CENT. CODE § 14-02.1-02 (2022).

154. W. VA. CODE § 16-2R-4 (2022) (exempting IVF therapy from its abortion law); IND. CODE § 16-34-2-1 (2022) (explicitly excluding IVF from its abortion regulation).

statutory interpretations.<sup>155</sup> For example, Ohio classifies a fertilized embryo as an “unborn human”<sup>156</sup> but also proceeds to cut off liability for any embryo that is not viable.<sup>157</sup> This statutory confusion led to a lawsuit brought by the plaintiffs when an IVF lab negligently destroyed their frozen fertilized embryos.<sup>158</sup> In *Penniman v. University Hospital Health System*,<sup>159</sup> the Ohio Court of Appeals reasoned that an embryo cannot be given rights under its wrongful death statute because an embryo does not fall under the definition of a person within the state statute.<sup>160</sup> Ohio’s definition of personhood explicitly did not extend to nonviable fetuses because they could not survive out of the womb.<sup>161</sup> Thus, an IVF embryo has no rights when it comes to a wrongful death claim of a “person” within Ohio.<sup>162</sup> However, states are now expanding statutory definitions to include nonviable fetuses and thus creating a scenario of conflicting definitions.<sup>163</sup>

The differentiating language the Ohio Supreme Court relied on is not included in other states’ current definitions, such as Missouri, which recognizes personhood from the moment of fertilization.<sup>164</sup> Missouri protects an embryo from the moment of conception and explicitly gives the unborn child rights “at every stage of its biological development.”<sup>165</sup> These definitions are used by states to protect the fetus from abortion but also leaves the door open for courts to apply the personhood definitions to IVF embryos, which was the only thing allowing the court in *Penniman* to come to an alternative decision.<sup>166</sup> If Ohio had a personhood definition from the moment of fertilization, which is being passed in states following the *Dobbs* opinion, the *Penniman* decision may have held the other way.<sup>167</sup> This language would

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155. See, e.g., *Penniman v. Univ. Hosp. Health Sys.*, 130 N.E.3d 333 (Ohio Ct. App. 2019).

156. Julie Washington, *Are frozen embryos human life? Fertility treatments present ethical dilemmas*, CLEVELAND.COM (Apr. 11, 2018), [https://www.cleveland.com/healthfit/2018/04/are\\_frozen\\_embryos\\_human\\_life\\_1.html](https://www.cleveland.com/healthfit/2018/04/are_frozen_embryos_human_life_1.html).

157. *Penniman*, 130 N.E.3d at 333; see also Yan, *supra* note 82.

158. Washington, *supra* note 156.

159. 130 N.E.3d 333 (Ct. App.).

160. *Penniman*, 130 N.E.3d at 336.

161. *Id.* at 339.

162. *Id.* at 335–36.

163. Compare *Penniman*, 130 N.E.3d at 336 (finding nonviable fetuses were not distinct human beings and were not protected), with TEX. HEALTH & SAFETY CODE ANN. § 171 (west 2022) (defining an “unborn child” as a human fetus at any point from fertilization until birth).

164. Compare *Penniman*, 130 N.E.3d at 336 (defining a person under the wrongful death statute as a viable fetus), with MO. REV. STAT. § 188.026 (2022) (defining “unborn child” to include every stage of development including as an embryo and fetus).

165. MO. REV. STAT. § 188.026 (2022).

166. See generally *Penniman*, 130 N.E.3d at 336.

167. See, e.g., TENN. CODE ANN. § 39-15-211 (2019) (defining fertilization as the moment that a male sperm penetrates the zona pellucida of a female ovum).

alternatively force a court to find even a nonviable embryo is a person with rights.<sup>168</sup> Language like this is occurring in multiple states such as those elaborated on above.<sup>169</sup>

Similarly, the language of Tennessee's statute will likely also cause legal confusion for the courts.<sup>170</sup> Tennessee gives personhood recognition to a fertilized embryo, stating that an unborn child is defined as "an individual living member of the species, homo sapiens, throughout the entire embryonic and fetal stages of the unborn child from fertilization until birth" (emphasis added).<sup>171</sup> Defining a fertilized embryo as a person from the moment of fertilization, regardless of if that embryo was fertilized in a lab or naturally, will cause repercussions throughout the IVF industry.<sup>172</sup> The concern lies with the possibility of negligence in IVF labs or the parent's or doctor's choice to discard an unviable but fertilized embryo which, under this wording, would lead to the death of an unborn child.<sup>173</sup> Language like this could have caused the court in *Penniman* to determine the IVF lab's negligence was actually homicide despite the embryo's nonviability.<sup>174</sup>

Like Tennessee, Texas implemented a statute that gives personhood to an embryo from the moment of fertilization.<sup>175</sup> The statute states that an unborn child is "a human fetus or embryo in any stage of gestation from fertilization until birth" (emphasis added).<sup>176</sup> Language such as this, without the exception of IVF therapy, will be equally concerning for courts to apply.<sup>177</sup> If a case similar to *Penniman* reaches litigation in Texas, their courts may be forced to give the same rights people have to non-implanted, non-viable embryos that may be damaged or discarded throughout the IVF process.<sup>178</sup>

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168. See, e.g., N.D. CENT. CODE § 14-02.1-02 (2022) (defining a human being).

169. See e.g., *id.* (defining a human being from the moment of fertilization to full gestation).

170. Compare TENN. CODE ANN. § 39-15-211(a)(6) (2019) (defining an unborn child as an individual from fertilization until birth, including a previable fetus), with *Penniman*, 130 N.E.3d at 336 (using viability as the benchmark for legal protection under a statute).

171. TENN. CODE ANN. § 39-15-211(a)(6) (2019) (discussing unborn child).

172. See Tipton, *supra* note 18, at 10 (discussing defining embryos as unborn children and what that means for preservation).

173. *Id.* (discussing possible negligence of embryologists).

174. *Id.* (discussing similar language in a proposed Nebraska statute), see also *Penniman*, 130 N.E.3d at 333.

175. TEX. HEALTH & SAFETY CODE ANN. § 171 (West 2022) (discussing definitions).

176. *Id.*

177. Compare TEX. HEALTH & SAFETY CODE ANN. § 171 (West 2022) (defining an unborn child as an individual from fertilization until birth, including a previable fetus), with *Penniman*, 130 N.E.3d at 336 (using viability as the benchmark for legal protection under a statute).

178. Compare *Penniman*, 130 N.E.3d at 335-36 (describing specific fetus viability language that the court hinged on for the decision), with Tipton, *supra* note 18, at 10 (discussing the future applicability of the statutes in not harming individuals at any

Similar to Texas, North Dakota passed legislation defining fertilization, unborn child, and human being. Within the statute, fertilization is defined as, “the fusion of a human spermatozoon with a human ovum.”<sup>179</sup> The statute goes on to define an unborn child as “the offspring of human beings *from conception until birth*” (emphasis added).<sup>180</sup> This language gives personhood rights to an embryo the moment it is fertilized, regardless of the procedure.<sup>181</sup> North Dakota goes one step further to define a human being as “an individual living member of the species of homo sapiens, including the unborn human being during the *entire embryonic* and fetal ages from fertilization to full gestation” (emphasis added).<sup>182</sup> This additional definition leaves no doubt that North Dakota courts will be forced to recognize embryos as unborn children and human beings from the moment they are fertilized in a lab for IVF therapy.<sup>183</sup> Physicians will be hesitant to perform IVF fertilization and handle embryos when it is likely a court will find them liable for the death of a child if anything happens to the embryos.<sup>184</sup> If this is the case, situations like those in Ohio and California where IVF labs lost 4,000 and 3,500 fertilized embryos, respectively, could result in unprecedented amounts of homicide liability.<sup>185</sup> The prospects of such charges for accidental embryo damage may lead many clinics and physicians to end IVF therapy options to protect their businesses and medical licenses.<sup>186</sup>

Each of these states elaborated on above have concerning language when applied to IVF therapy.<sup>187</sup> Without a distinction for IVF therapy, courts will be forced to apply the same definitions and rights to embryos in a lab.<sup>188</sup> The conflicting definitions lead to questions regarding the ethical implications of discarding fertilized embryos that would never be viable, accidental damage to fertilized embryos in

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stage of development including as an embryo or fetus), and *In vitro fertilization*, *supra* note 14 (noting that some embryos are discarded or damaged during the IVF process).

179. N.D. CENT. CODE § 14-02.1-02 (2022) (referencing fertilization).

180. *Id.* (referencing unborn child).

181. *See generally id.* (referencing unborn child).

182. *Id.* (referencing human being).

183. *See generally id.*

184. *See* Tipton, *supra* note 18, at 10 (discussing physician hesitation).

185. *See generally* Tipton, *supra* note 18, at 10 (discussing the possibility of homicide liability for damaged embryos); *see also* The Associated Press, *supra* note 82; Yan, *supra* note 82.

186. *See* Tipton, *supra* note 18, at 11 (discussing the possibility of homicide liability).

187. *Compare* Tipton *supra* note 18 (stating the conflicting legal interpretations of laws impacting embryos), and *e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 171 (West 2022) (protecting all embryos, at all stages of development, under the statute), with IND. CODE § 16-34-2-1 (2022) (exempting IVF processes entirely from the statute).

188. *See, e.g.*, N.D. CENT. CODE § 14-02.1-02 (2022) (defining a human being from fertilization).

labs, and what to do with extra embryos upon decisions not to implant.<sup>189</sup> Extra embryos may be frozen indefinitely, donated to science, or donated to another individual hoping to conceive.<sup>190</sup> Because of these definitions, the courts will be forced to deal with the implications of freezing an unborn child indefinitely, donating an unborn child to scientific research or, alternatively, *forcing* parents to donate their biological unborn child to strangers to conceive and raise.<sup>191</sup> The language states are using in their abortion protection statutes will have far reaching impacts beyond only abortion.<sup>192</sup> If states wish to exempt IVF therapy from these implications, it is pertinent that they explicitly list IVF as an exception similar to Indiana and West Virginia.<sup>193</sup>

#### D. SOLUTIONS FOR STATE LAWS THAT IMPACT IVF THERAPY

Both Indiana and West Virginia have direct language within their legislation excluding IVF therapy.<sup>194</sup> Indiana was one of the first states to enact a law following the ruling of *Dobbs*.<sup>195</sup> The law does not have the usual gestational cut-off.<sup>196</sup> This limits abortion access virtually from the moment of fertilization.<sup>197</sup> Indiana does allow for exceptions to save the pregnant person's life and if the fetus is not viable.<sup>198</sup> While this type of language would normally be a concern, Indiana is one of the few states to explicitly exclude IVF therapy from their statute.<sup>199</sup>

West Virginia is the second state to pass a law following the *Dobbs* opinion.<sup>200</sup> The statute limits abortion once a fertilized embryo implants in the uterus.<sup>201</sup> This limits abortion from the moment of fertilization.<sup>202</sup> Similar to Indiana, while the language is concerning on its face, the state has taken the liberty to create a caveat for IVF therapy.<sup>203</sup> Clear language excluding the repercussions of IVF ther-

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189. See Tipton, *supra* note 18, at 10–11.

190. *In vitro fertilization*, *supra* note 14.

191. See generally Tipton, *supra* note 18 (discussing conflicting definitions and what that means for IVF preservation such as the use of liquid nitrogen).

192. See Tipton, *supra* note 18.

193. See, e.g., W. VA. CODE § 16-2R-4 (2022); IND. CODE ANN. § 16-34-2-1 (2022).

194. *Id.*

195. Messerly, *supra* note 109.

196. DUBE, *supra* note 10, at 10.

197. IND. CODE ANN. § 16-34-2-1 (2022).

198. DUBE, *supra* note 10, at 10.

199. IND. CODE ANN. § 16-34-1-0.5 (2022).

200. Simonson, *supra* note 132.

201. Sheppard, *supra* note 109.

202. W. VA. CODE § 16-2R-4 (2022) (defining fertilization).

203. W. VA. CODE § 16-2R-4 (2022) (IVF exception language).

apy is key to protecting this procedure from unintended impacts.<sup>204</sup> States may follow the lead of West Virginia and Indiana to add a section simply stating “this does not include IVF therapy.”<sup>205</sup>

States considering implementing similar restrictions should add exclusionary language so they do not end up with the same confusing overload of cases which their justice system will be forced to work through.<sup>206</sup> States should enact amendments adding simple clarification such as “this does not include IVF procedure outcomes such as spontaneous abortions, unintentional damage to embryos, and intentional discarding of fertilized embryos.”<sup>207</sup> Language such as this will allow for physicians to continue to carry out their important work making the dreams of families come true when they may have no other options.<sup>208</sup>

If states choose to consciously include IVF in their abortion laws, they must make that clear to the labs and physicians of the states.<sup>209</sup> States wishing to expand their abortion regulations to limit the destruction of IVF embryos will need to create a process for the current fertilized embryos in the state.<sup>210</sup> They may force couples to implant all fertilized embryos they create, leading individuals to choose to conduct smaller but more frequent IVF rounds, thus increasing costs for IVF procedures for families.<sup>211</sup>

If left unclear, these trigger laws and subsequent legislation may have a wide-reaching impact beyond what the original drafters intended.<sup>212</sup> Physicians are likely to be hesitant to perform any IVF therapy if they have reason to believe they could be charged with an abortion violation under laws that are unclear in their relation to IVF therapy.<sup>213</sup> A physician will not want to take the risk of a large fine

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204. Compare Tipton, *supra* note 18 (discussing the unintended impacts such as homicide charges in state statute with no IVF exceptions), with W. VA. CODE § 16-2R-4 (2022) (listing IVF exception language), and IND. CODE § 16-34-1-0.5 (2022) (using IVF exception language).

205. W. Va. Code § 16-2R-4 (2022) (incorporating an explicit IVF exception); Ind. Code Ann. § 16-34-2-1 (2022) (including IVF as an exception to abortion regulation).

206. Compare Penniman, 130 N.E.3d at 336 (utilizing viability as a benchmark for statutory protection), and TENN. CODE ANN. § 39-15-211(a)(6) (2019) (protecting unborn children under the statute, including all fetal stages from fertilization to birth), with IND. CODE § 16-34-2-1 (2022) (specifically exempting IVF processes from statutory protection).

207. See, e.g., IND. CODE § 16-34-2-1 (2022).

208. See Tipton, *supra* note 18 (discussing antichoice activists and politicians that likely do not want to hinder individuals from having families).

209. See, e.g., IND. CODE ANN. § 16-34-2-1 (2022) (including a specific IVF exemption).

210. See generally Kowitt, *supra* note 17.

211. See Gurevich, *supra* note 73.

212. See Tipton, *supra* note 18.

213. *Id.* (discussing physician hesitancy).

per embryo lost, losing their medical license, or a felony conviction.<sup>214</sup> Because of this, it is likely that physicians in states with abortion restrictive laws will be cautious moving forward, thus limiting many peoples' access to IVF therapy.<sup>215</sup>

#### IV. CONCLUSION

The decision of *Dobbs*<sup>216</sup> overruling *Roe*<sup>217</sup> and *Casey*<sup>218</sup> returned the right to determine abortion access to the states.<sup>219</sup> States began enforcing their own laws, many of which limited abortion and did not exempt IVF therapy.<sup>220</sup> IVF therapy assists in creating fertilized embryos to help increase the chances of an individual becoming pregnant.<sup>221</sup> Throughout this process, fertilized embryos may be damaged, miscarried, or unused.<sup>222</sup> Unused embryos may also be frozen, donated, or discarded, potentially violating state statutes.<sup>223</sup> Statutory definitions giving personhood to all fertilized embryos creates a discrepancy between abortion and IVF therapy that state courts will be forced to address if legislatures are not clear.<sup>224</sup>

States should encourage families to grow to their desired size, not just from their moral standpoint, but also from the fact that each child, even if produced through IVF, has a positive long term economic outcome.<sup>225</sup> While it is more costly for IVF-produced children, their net return to the government is still positive.<sup>226</sup> Minimizing both the financial burdens and legal barriers for these families will result in a positive economic benefit for the area the child and family resides.<sup>227</sup> A single IVF child, equated to the average government costs for a naturally produced child, calculated by full-time employment, produced a positive net tax return just two to five years after a naturally con-

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214. *Id.*

215. *Id.* at 10-11 (discussing caution moving forward).

216. 142 S. Ct. 2228 (2022).

217. 410 U.S. 113 (1973).

218. 505 U.S. 833, (1992).

219. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022).

220. *See, e.g., DUBE, supra* note 10 (showing states that do not have IVF exemptions).

221. *In vitro fertilization, supra* note 14.

222. *Id.* (discussing extra embryos).

223. *Compare id.* (discussing extra fertilized embryos after IVF therapy), with N.D. CENT. CODE § 14-02.1-02 (2022) (including fertilized embryos in the definition of unborn child that must be protected).

224. Mark P. Connolly, et al., *Long-term Economic Benefits Attributed to IVF-conceived Children: A Lifetime Tax Calculation*, AM. J. OF MANAGED CARE (Sept. 15, 2008), <https://www.ajmc.com/view/sep08-3583p598-604>.

225. *Id.* (discussing net return of IVF conceived adults).

226. *Id.*

227. *Id.* (discussing the difference in breakeven age).

ceived child due to the offset of IVF costs.<sup>228</sup> If the language of such statutes leads courts to qualify IVF as an abortion-related procedure, the barriers to grow a family will be increased exponentially.<sup>229</sup> Instead, states should be incentivizing families to grow in whichever way possible for them which can be done with protective IVF exemptions in the statutes listed above.<sup>230</sup>

To protect against misapplication of statutes within the states, representatives must make clear exceptions to the language of the law. If the law is ambiguous it allows for courts to apply the regulation to a wider standard of cases, possibly even to cases the state legislature never intended. For example, states may force couples to donate their embryos to an individual wishing to conceive, entering into an even grayer legal area. Wording explicitly carving out IVF therapy such as, “except in circumstances resulting from in vitro fertilization” similar to Indiana and West Virginia would be a good place to start.<sup>231</sup> If states do not want the questionable application, physician hesitation, or economic repercussions of their laws to impact IVF therapy, they must create stipulations for the courts to apply. None of this can be done without the amendment to these laws.

In conclusion, there is ambiguity in state statutes outlawing abortions and how it may impact IVF therapy. If a state wants to promote the moral obligation of growing a family, they must also protect the procedures some families must rely on to produce children. Because the laws are unclear, courts will be forced to navigate this gray area according to ambiguous language in statutes. This will lead to inconsistent rulings in addition to actions being carried out that were never the intention of the legislature in the first place.

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228. See generally *id.*

229. See generally *id.*; see also IND. CODE § 16-34-1-0.5 (2022), W. VA. CODE § 16-2R-4 (2022).

230. See W. VA. CODE § 16-2R-4 (2022); IND. CODE § 16-34-2-1 (2022).

231. *Id.*

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