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Arizona's *Torres v. Terrell* and Section 318.03: The Wild West of Pre-Embryo Disposition

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INTRODUCTION

A husband and wife, reeling from the wife's cancer diagnosis, decide to undergo in vitro fertilization (IVF). Cancer treatment will make her infertile, unless steps are taken now, so they undergo egg retrieval and cryopreserve the resulting pre-embryos. As the couple fills out the clinic's paperwork, they initial a standard pre-embryo disposition clause. The wife survives, but the marriage does not. In divorce proceedings, the court dissolves their relationship and divides their property—and must decree whether the frozen pre-embryos should go to the wife, who wants to have them transferred to her uterus, or the husband, who no longer wants biological children and would like to destroy them. Based on prior decisions from around the country, there are strong arguments in favor of each spouse. And yet, this court chooses an entirely different path: the frozen pre-embryos will go to a completely unknown third party.

This is exactly what happened in a recent Arizona case, *Torres v. Terrell*. The Arizona trial court took the quintessential Solomonic approach to judicial decision-making to a new extreme when it held that a divorcing couple with cryopreserved pre-embryos must donate their cryopreserved pre-embryos to a third party.[1] On the heels of *Torres*, the Arizona legislature then passed a related law, title 25, section 318.03 of the Arizona Code, specifying that when divorcing spouses disagree on pre-embryo disposition, courts should award the pre-embryos to whichever spouse will "provide[] the best chance for the in vitro human embryos to develop to birth."[2] While the statute may give cryopreserved pre-embryos—frozen, undifferentiated genetic material only a few days old—a slight chance at life, it sacrifices substantial individual interests.

Arizona's recent lawmaking on pre-embryo disposition promises far reaching legal and policy ramifications. Assisted reproductive technology (ART), a series of medical procedures that create cryopreserved pre-embryos, is an industry worth an estimated $4.5 billion[3] and helps to conceive about 1.5% of U.S. babies born annually.[4] Over 300 fertility clinics in the United States assist tens of thousands of couples who seek fertility treatment every year, resulting in what could be more than

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1. *See infra* Section II.A.

2. ARIZ. REV. STAT. ANN. § 25-318.03 (Supp. 2018).

3. Indlieb Farazi, *The Price of Life: Treating Infertility*, AL JAZEERA (June 3, 2016), http://www.aljazeera.com/indepth/features/2016/05/price-life-treating-infertility-160524081956257.html [https://perma.cc/5T4V-B4R3].

4. Jen Christensen, *Record Number of Women Using IVF to Get Pregnant*, CNN (Feb. 18, 2014, 2:36 PM), https://www.cnn.com/2014/02/17/health/record-ivf-use/index.html [https://perma.cc/SSV7-6JRD].

one million frozen pre-embryos in storage.[5] At the same time, the debate about when life begins continues to fuel some of the most contentious contemporary political issues.[6] Thus, if the *Torres* ruling and section 318.03 come to be considered settled law, it would likely result in a sea change in other areas that implicate a view of embryonic personhood like abortion jurisprudence.[7] An intermediate appeals court recently vacated the *Torres* trial court's order[8], and the parties have appealed to the Arizona Supreme Court.[9] Section 318.03 has yet to be adjudicated although constitutional challenges seem likely.[10] However, even if both the trial court ruling and statute are definitively rejected, they nonetheless highlight a stark reality about ART: so far, legal innovations have not kept pace with medical innovations.[11]

In this Note, Part I examines the three main approaches used in other state supreme court decisions to decide pre-embryo disposition disputes, as well as three perspectives on the legal status of the pre-embryo, and compares them with Arizona's emerging law. Part II summarizes Arizona's *Torres* trial court order and opinion and section 318.03. Part III then analyzes whether the *Torres* orders and Arizona's new statutory "most likely to lead to birth standard"[12] present constitutional issues and concludes that the trial court's order, if reinstated by the Arizona Supreme Court, and section 318.03 can be challenged on substantive due process and equal protection grounds. Finally, this Note concludes that, because the initial *Torres* ruling and section 318.03 create significant legal and policy concerns, in addition to constitutional concerns, patients considering IVF in Arizona should be very cautious.

Before getting into the substance of the Note, it is necessary to understand the technology involved. First, pre-embryos are created through ART, namely, a procedure called in vitro fertilization. In IVF, an egg and sperm are combined outside of the body to form a pre-embryo, which is then transferred to a woman's uterus. If the pre-embryo implants, a woman becomes pregnant.[13] For thirty years, patients

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5. Jody Lyneé Madeira, "Eggs"ploding the Boundaries of Contract Law?: Current Perspectives on Embryos and Genetic Material upon Progenitors' Divorce 5 (Oct. 2015) (citation omitted) (unpublished manuscript on file with the *Indiana Law Journal*).

6. John Ehrenreich, *Why the Abortion Debate Feels Like Such a Stalemate*, SLATE (Aug. 1, 2018, 9:00 AM), https://slate.com/technology/2018/08/why-the-abortion-debate-feels-like-such-a-stalemate.html [https://perma.cc/L3ZE-GHTN].

7. *See, e.g.*, Ariana Eunjung Cha, *Arizona Embryo Law Could Alter Abortion Debate*, PRESS HERALD (July 17, 2018), https://www.pressherald.com/2018/07/17/arizona-embryo-law-could-alter-abortion-debate/ [https://perma.cc/ECQ6-VKRY] ("If a days-old embryo in a freezer has a right to life, why not a days-old embryo in utero?").

8. Terrell v. Torres, 438 P.3d 681 (Ariz. App. Div. 2019) , *review granted in part*, CV-19-0106-PR, 2019 Ariz. LEXIS 226 (Ariz. Aug. 27, 2019).

9. *Id.*

10. *See* Gary A. Debele & Susan L. Crockin, *Legal Issues Surrounding Embryos and Gametes: What Family Law Practitioners Need to Know*, 31 J. AM. ACAD. MATRIMONIAL LAW. 55, 106 (2018).

11. *See* Charles P. Kindregan, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 VILL. L. REV. 169, 181 (2004).

12. *See* ARIZ. REV. STAT. ANN. § 25-318.03 (Supp. 2018).

13. *See, e.g.*, *In Vitro Fertilization*, MAYO CLINIC, https://www.mayoclinic.org/tests

have been able to cryopreserve, or freeze, any surplus pre-embryos that are not transferred.[14] Because egg retrieval is expensive and invasive, and less than half of all transfers result in live births,[15] cryopreservation allows patients to undergo IVF once and use the resulting pre-embryos in subsequent cycles, thus avoiding repeated retrievals.[16]

To avoid inaccuracy, this Note uses the word "pre-embryo" throughout. Depending upon how many days after fertilization transfer or cryopreservation occurs (usually two to five days), "pre-embryo" describes the fertilized egg that ranges in development from a four-to-eight-cell organism to a blastocyst with hundreds of cells, ripe for implantation.[17] At any point past the blastocyst stage, the embryo's next generation of development is wholly dependent upon interaction with the uterus.[18] Thus, cryopreservation must occur at an earlier stage of development, before the pre-embryo is ready to implant and this critical interaction with the uterus takes place; in other words, before the pre-embryo becomes an embryo.[19] This scientific distinction, observed here and causing the *Davis v. Davis* court, adjudicating an early pre-disposition dispute, to conclude that "[i]t is for this reason that it is appropriate to refer to the developing entity up to this point as a preembryo, rather than an embryo,"[20] is nonetheless not universally followed in legal contexts, including statutory law.[21] The use of "pre-embryo" here only reflects a desire for accuracy and is not meant to imply that pre-embryos do not have a special potential.

This Note also uses the term "gamete providers" to describe the individuals who provide the egg and sperm that form the pre-embryo. Finally, "pre-embryo donation" refers to the process by which gamete providers donate their surplus pre-embryos to a third party,[22] essentially providing the opportunity for a woman to "give birth to an 'adopted' child."[23]

-procedures/in-vitro-fertilization/about/pac-20384716 [https://perma.cc/P9DF-A42N].

14. *See* COMM. TO CONSIDER SOC., ETHICAL & LEGAL ISSUES ARISING FROM IN VITRO FERTILIZATION, STATE OF VICTORIA, REPORT ON THE DISPOSITION OF EMBRYOS PRODUCED BY IN VITRO FERTILIZATION 11–12 (1984) [hereinafter STATE OF VICTORIA].

15. NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, 2015 ASSISTED REPRODUCTIVE TECHNOLOGY NATIONAL SUMMARY REPORT 44 (2017). Success rates differ substantially by age. For instance, for transfers of fresh nondonor eggs, the rate of live birth is 46.5% for women under thirty-five while at thirty-seven and forty, the rates are 38.4% and 27.4%, respectively. *Id.* at 5. For the same ages, the respective rates of live births are 48.7%, 44.5%, and 40% for frozen transfers. *Id.*

16. Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1259 n.2 (Ariz. Ct. App. 2005); Kindregan & McBrien, *supra* note 11, at 171 & n.5.

17. Davis v. Davis, 842 S.W.2d 588, 594 (Tenn. 1992) (citing the American Fertility Society); Sarah A. Weber, *Dismantling the Dictated Moral Code: Modifying Louisiana's In Vitro Fertilization Statutes to Protect Patients' Procreative Liberty*, 51 LOY. L. REV. 549, 551 n.3 (2005).

18. *Davis*, 842 S.W.2d at 594.

19. *See id.*

20. *Id.* (quoting the American Fertility Society) (emphasis omitted).

21. *See* ARIZ. REV. STAT. ANN. § 25-318.03 (Supp. 2018).

22. *See* Kindregan & McBrien, *supra* note 11, at 172.

23. *Id.*

I. THREE APPROACHES TO THE LEGAL STATUS OF PRE-EMBRYOS AND PRE-EMBRYO DISPOSITION DISPUTES

Torres and section 318.03 came to life against a backdrop of pre-embryo dissolution disputes in other states over the past thirty years that have considered several issues, including the pre-embryo's legal status and which doctrinal approach should resolve the dispute.[24] Pre-embryo disposition jurisprudence in the United States shows three main perspectives on the legal status of pre-embryos[25] and three main doctrinal approaches.[26]

A. The Legal Status of Pre-Embryos

Courts adjudicating pre-embryo dissolution disputes have employed three different perspectives on the legal status of pre-embryos: (1) pre-embryos as property, (2) pre-embryos as people, and (3) pre-embryos as potential person.[27]

1. Pre-Embryos as Property

Several states employ a pre-embryos-as-property approach, which is also supported by the American Society for Reproductive Medicine (ASRM).[28] Property as a legal concept is a bundle of rights that includes control, possession, use, exclusion, profit, and disposition.[29] Under this approach, pre-embryos are the property of their gamete providers,[30] and so their destruction and use depends completely upon the gamete providers' consent.[31] This approach was applied in *York v. Jones*, when a couple sued a fertility clinic after it refused to release their pre-embryos.[32] Denying the fertility clinic's motion to dismiss, the court held that the clinic was acting as the bailee of the frozen pre-embryos and must return them to their gamete providers.[33]

The pre-embryos as property approach is criticized because, in other doctrinal areas, courts have found that people do not have property rights in their excised tissues. For instance, in *Moore v. Regents of the University of California*, after Moore's spleen was removed during treatment for hairy cell leukemia, doctors learned it was valuable and created a cell line (i.e. a culture of cells) without

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24. *See, e.g.*, *Davis*, 842 S.W.2d at 588.

25. *Cf. id.* at 597.

26. *In re* Marriage of Witten, 672 N.W.2d 768, 774 (Iowa 2003).

27. *See Davis*, 842 S.W.2d at 597.

28. *See, e.g.*, York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989); Kindregan & McBrien, *supra* note 11, at 186.

29. Barry Brown, *Reconciling Property Law with Advances in Reproductive Science*, 6 STAN. L. & POL'Y REV. 73, 75 (1995); *see* Kindregan & McBrien, *supra* note 11, at 186.

30. Kindregan & McBrien, *supra* note 11, at 186.

31. Jennifer P. Brown, Comment, *"Unwanted, Anonymous, Biological Descendants": Mandatory Donation Laws and Laws Prohibiting Preembryo Discard Violate the Constitutional Right to Privacy*, 28 U.S.F. L. REV. 183, 195 (1993).

32. *York*, 717 F. Supp. at 424.

33. *Id.* at 425, 429.

informing Moore.[34] Moore sued his treatment team and the hospital on the grounds that he had a property interest in the cell line, but the California Supreme Court found that he did not have an interest because he did not have a property right in his spleen after its removal.[35] However, some scholars argue that allowing a property right in body parts—or specifically, reproductive matter—simply means acknowledging that responsibility for pre-embryos as property is "a complex bundle of rights, duties, powers and immunities."[36] Under this view, "the pruning away of some or a great many of these elements does not entirely destroy the title."[37] Regardless, viewing pre-embryo disposition through a property lens is complicated because both gamete providers have equal ownership interests in the pre-embryos.[38]

Critics also say that the pre-embryo-as-property approach marginalizes its life potential because likening a pre-embryo to inanimate objects is demeaning to the pre-embryo.[39] This is largely a semantic distinction, however, because even critics of the approach may still agree in the end that decision-making authority rests with the gamete providers.[40]

While the *Torres* trial court engaged in a discussion of whether the pre-embryo is a person under law, the court of appeals avoided any overt mention of this analysis. But, its view on the status of pre-embryos is suggested by a footnote that reads: "In this case, the parties treated the embryos as joint property pursuant to statute, *see* A.R.S. § 25-318(A) (authorizing the court in a dissolution proceeding to divide property held in common equitably, though not necessarily in kind), although they could have simply brought a contract action."[41] The fact that the court identifies the analysis as being one of property division while also pointing out that it could have been resolved as an ordinary contract action is most suggestive of a pre-embryos-as property-approach.

2. Pre-Embryos as People

To date, Louisiana is the only state to explicitly adopt a pre-embryos-as-people approach.[42] This approach views pre-embryos as genetically unique and therefore entitled to full legal rights as persons under the law.[43] A 1986 Louisiana statute

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34. 793 P.2d 479, 480–81 (Cal. 1990).

35. *Id.* at 489. Of course, the California Supreme Court was concerned in part with the policy implications for medical research and organ donation, *see id.* at 487, and the policy interests of pre-embryo disposition are likely different.

36. *E.g.*, Brown, *supra* note 29, at 75 (quoting People v. Walker, 90 P.2d. 854, 855 (Cal. App. 1939)). "[E]ven the possessor of contraband has certain property rights in it against anyone other than the state." (citing Moore v. Regents of Univ. of Cal., 793 P.2d 479, 509–10 (Cal. 1990)).

37. *Id.* (quoting People v. Walker, 90 P.2d. 854, 855 (Cal. App. 1939)).

38. Kindregan & McBrien, *supra* note 11, at 185.

39. Brown, *supra* note 31, at 197.

40. *Id.*; Weber, *supra* note 17, at 563.

41. Terrell v. Torres, 438 P.3d 681, 684 n.2 (Ariz. App. Div. 2019).

42. Shirley Darby Howell, *The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation*, 14 DEPAUL J. HEALTH CARE L. 407, 412 (2013).

43. *See* Weber, *supra* note 17, at 562.

establishes that a pre-embryo is a "juridical person"[44] and a "biological human being."[45] Because Louisiana asserts that personhood begins at conception, it prohibits the destruction of pre-embryos and pre-embryonic research.[46] Using a "best interest of the [pre-embryo]" standard,[47] Louisiana also mandates donation if gamete providers give up their parental rights.[48]

New Mexico has a similar statute, enacted in 1985, but stops short of stating that a pre-embryo is a person. Instead, New Mexico requires that all pre-embryos created through IVF must be transferred.[49] Remarkably, neither Louisiana's nor New Mexico's statutes have been challenged.[50]

Elsewhere, personhood bills, though largely unsuccessful, continue to be proposed in state and federal legislatures. For instance, in the five years between 2013 and 2018, over one hundred personhood bills were proposed by state legislators.[51] Congress last considered a personhood bill expanding the legal definition of a person in January of 2017.[52] The bill, titled the "Sanctity of Human Life Act," provided that life begins at fertilization.[53] However, outside of Louisiana, federal and state personhood bills have consistently failed.[54]

According to scholars, scientists, and jurists, treating pre-embryos as people is deeply problematic because it ignores the scientific fact that pre-embryos are developmentally distinct from persons who are fully protected under the law.[55] This critique largely rests on the fact that pre-embryos, at such an undeveloped stage, are small groups of undifferentiated cells that are incomparable with a developed fetus or baby.[56] When cryopreservation is performed, for instance, a pre-embryo does not have a central nervous system, a brain or any other organs, or the ability to feel pain.[57] These characteristics, requisite for life, cannot develop until implantation.[58]

In addition, critics note that pre-embryos only have a five–to–eight–percent chance of survival[59] and most often stop developing naturally, which is widely considered a cellular loss, not a death.[60] Finally, critics point out that multiple forms

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44. LA. STAT. ANN. § 9:123 (1986).
45. *Id.* § 9:126.
46. *Id.* § 9:129.
47. *Id.* § 9:131.
48. *Id.* § 9:130.
49. N.M. STAT. ANN. § 24-9A-1 (2007).
50. Howell, *supra* note 42, at 413.
51. *Legislative Tracker: Personhood*, REWIRE.NEWS (Nov. 7, 2018), https://rewire.news/legislative-tracker/law-topic/personhood/ [https://perma.cc/VYB7-WYUN].
52. *See* Sanctity of Human Life Act, H.R. 586, 115th Cong. (2017).
53. *Id.* § 2.
54. *See* Maya Manian, *Lessons from Personhood's Defeat: Abortion Restrictions and Side Effects on Women's Health*, 74 OHIO ST. L.J. 75, 77 (2013).
55. *See, e.g.*, Brown, *supra* note 31, at 195.
56. *See id.* at 222.
57. *Id.*
58. *Id.*
59. *Id.*
60. Howell, *supra* note 42, at 413; Weber, *supra* note 17, at 564–65.

of birth control are legally used to destroy "pre-embryos" in the body.[61] For instance, Plan B, a popular birth control, prevents a fertilized ovum from implanting.[62] This causes commentators to question why IVF pre-embryos should be granted legal protections that exceed those granted to corporal "pre-embryos."[63] In fact, in many other contexts, the legal system has largely rejected the extension of all laws to fetuses, which are significantly more developed than pre-embryos.[64] Finally, critics argue that such an approach violates the privacy doctrine established by the U.S. Supreme Court,[65] an idea that will be explored more fully in Part III.

While Arizona stops short of explicitly granting pre-embryos personhood, the *Torres* trial court ruling and section 318.03 implicate a pre-embryo-as-people perspective. Courts that do not employ this view balance only the gamete providers' interests against each other.[66] However, the trial court's reasoning elevates the pre-embryo's interests over the rights of either gamete provider, and section 318.03 grants the state's perception of the pre-embryo's interests more weight than those of the spouse favoring destruction. The only reason why a state would take that approach, especially given that a state's typical interest in marriage dissolution is to give spouses the cleanest separation possible, is to further the premise that pre-embryos are entitled to the same protections as other lives in being.

3. Pre-Embryo as Potential Person

The most common of the three approaches to embryo disposition is pre-embryo-as-potential-person, which accords pre-embryos special status because of their potential to develop into humans but does not grant them personhood.[67] This approach was used in deciding such key pre-embryo disposition cases as *Davis v. Davis*[68] and *A.Z. v. B.Z.*,[69] as well as by multiple advisory boards, including the U.S. Ethics Advisory Board.[70]

In *Davis*, the Tennessee Supreme Court did not consider pre-embryos persons because they have not implanted, are not viable, and have not been born.[71] The *Davis* court did not consider the pre-embryos property out of concern that this approach was demeaning,[72] but instead created a middle ground: "special respect because of

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61. Howell, *supra* note 42, at 413.

62. *How Plan B Works*, PLAN B ONE-STEP, https://www.planbonestep.com/how-plan-b-works/ [https://perma.cc/ZGC8-4PFK].

63. Howell, *supra* note 42, at 413.

64. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 157 (1973) (finding that the Fourteenth Amendment does not apply to a fetus).

65. *See, e.g.*, Weber, *supra* note 17, at 584.

66. *See, e.g.*, J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001). One question of interest, albeit one not addressed here, is whether such courts ignore pre-embryos' interests or merely consider them only insofar as those interests are conflated with those of their gamete providers.

67. *See* Brown, *supra* note 31, at 198.

68. *See* 842 S.W.2d 588 (Tenn. 1992).

69. 725 N.E.2d 1051, 1059 (Mass. 2000).

70. *See* Brown, *supra* note 31, at 197–98.

71. *See* Davis v. Davis, 842 S.W.2d 588, 594–95 (Tenn. 1992).

72. *See id.* at 595.

their potential for human life."[73] Using this approach, the *Davis* court gave the gamete provider who wanted to avoid genetic parenthood the right to choose the pre-embryos' disposition.[74] In *A.Z. v. B.Z.*, the Massachusetts Supreme Court agreed with the *Davis* court on this approach because it allowed courts to avoid applying laws involving child custody and personal property, which it considered inapposite areas of law.[75]

Critics of the "special respect" approach argue it lacks utility because it does not dictate an outcome, and pre-embryos should either have rights or should not.[76] Critics also deem this approach vague and fear it may lean too far toward giving pre-embryos personhood, which would be inaccurate since, scientifically, life has not yet begun.[77]

In summary, despite multiple rulings, the legal status of pre-embryos remains unsettled. It will remain so until the U.S. Supreme Court grants certiorari to a pre-embryo case. Since the Supreme Court has rejected the argument that fetuses are entitled to full legal rights,[78] however, and since pre-embryos are radically less developed than fetuses, the Court is not likely to find that pre-embryos are entitled to legal personhood.

B. Approaches to Pre-Embryo Disposition Disputes

Defining a pre-embryo's status is not enough; courts also must decide which doctrinal approach to pre-embryo disposition cases to employ. There are three different approaches here as well: (1) the contract approach, (2) the contemporaneous agreement approach, and (3) the balancing test approach.[79]

1. The Contract Approach

The prevailing view takes a contract approach.[80] Under this view, disposition agreements entered into before IVF are enforceable if they do not violate public policy.[81] For instance, in 1992, the pre-embryo disposition agreement was "critical" to the Tennessee Supreme Court's decision in *Davis v. Davis*, and the court presumptively favored enforcing such agreements.[82] While the court recognized that parties' feelings over personal decisions like pre-embryo disposition might change

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73. *Id.* at 597.
74. *Id.* at 604.
75. *See* 725 N.E.2d 1051, 1059 (Mass. 2000).
76. Brown, *supra* note 31, at 199.
77. *Id.*
78. *See* Roe v. Wade, 410 U.S. 113, 157 (1973).
79. *In re* Marriage of Witten, 672 N.W.2d 768, 774 (Iowa 2003).
80. *Id.* at 776.
81. *Id.*
82. Tracy Haslett, Note, J.B v. M.B.*: The Enforcement of Disposition Contracts and the Competing Interests of the Right to Procreate and the Right Not to Procreate Where Donors of Genetic Material Dispute the Disposition of Unused Preembryos*, 20 TEMP. ENVTL. L. & TECH. J. 195, 203–04 (2001).

over time, it held that absent any subsequent modifications, prior agreements should hold.[83]

A few years later in *Kass v. Kass*, the New York Court of Appeals enforced a consent form, signed by both gamete providers, that transferred possession of their pre-embryos to the fertility clinic if the gamete providers could not agree on disposition.[84] The *Kass* court also ruled that pre-embryo disposition agreements should be presumptively valid, and prioritized them because they "maximize procreative liberty" by limiting the state's involvement in decision-making, and because they avoid litigation costs.[85] Finally, the *Kass* court opined that this approach encouraged parties to be deliberate in using IVF, to be deliberate in making related decisions, and to take their consent seriously.[86]

More recent courts have also used this approach. In the 2002 case *Litowitz v. Litowitz*, the Washington Supreme Court settled a disposition disagreement, relying only on a cryopreservation agreement, by holding that under the contract terms the pre-embryos should have been destroyed after five years.[87] The court so held even though the husband provided sperm and the wife did not provide gametes, specifying that "[a]ny right [the wife] may have to the preembryos must be based solely upon contract."[88]

One problem with the contract approach is that the line between informed-consent documents, disposition agreements, and contracts is blurry. Informed-consent documents are primarily intended for education, disclosure, and recording consent.[89] In a contract, however, the parties exchange bargained-for promises. Conflating an informed-consent document with a contract is problematic because it confuses who is promising what to whom and because it is unclear to what extent consent and disposition documents are contractual, and therefore binding on both parties, especially if the agreements are merely boilerplate or contracts of adhesion.[90]

Such agreements do not mutually affect outcomes, but merely reflect one party specifying what will be done. The fact that patients are typically unable to bargain for changes in standard consent forms suggests that treating the documents as arms-length contracts is problematic, despite its prevalence.[91] It is also unclear whether an informed-consent document between a fertility patient and care provider should bind a third party, even if it is a third-party spouse. For instance, in *Torres*, Torres was the patient, but usually contracts will bind the "nonpatient" spouse who initialed as well.[92] Moreover, should Terrell's initial on the agreement between Torres and the

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83. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

84. *See* 696 N.E.2d 174 (N.Y. 1998).

85. *Id.* at 180.

86. *Id.*

87. 48 P.3d 261, 271 (Wash. 2002) (en banc).

88. *Id.* at 262, 267.

89. JODY LYNEÉ MADEIRA, TAKING BABY STEPS: HOW PATIENTS AND FERTILITY CLINICS COLLABORATE IN CONCEPTION 187 (2018).

90. *See id.* at 196.

91. *See id.*

92. *See infra* Part II.A.1; Rowlette v. Mortimer, 352 F. Supp. 3d 1012, 1024 (D. Idaho 2018) (considering whether giving a sperm sample makes someone a patient of a fertility specialist).

fertility clinic represent a binding agreement between he and Torres? To avoid these questions, exclusive bilateral disposition contracts between the gamete providers (or other prospective parents), representing their "dickered" bargain, would help lend clarity to the parties' wishes, follow them from clinic to clinic, and support the contract approach to disposition disputes.

The *Torres* trial court flirted with a contract approach, although its treatment is ambiguous. On the one hand, there is ample indication in the court's explicit reasoning that if the court had found the contract to be an unambiguous expression of the parties' intent, it would have honored that intent.[93] But, it is unclear whether the trial court correctly concluded that the section H provision was ambiguous and why the court then ultimately resolved the dispute with one of the selected options, pre-embryo donation, if it was not following the contract.[94] In contrast, the *Torres* appeals court situates its analysis from a contracts approach, supplementing with a balancing test when the agreement is ambiguous or when the agreement grants decision-making authority to the courts.[95]

While both courts at least implicated the contract approach, section 318.03 indicates a legislative desire to override, not effectuate, the parties' intent. The relevant section reads, "[i]f an agreement between the spouses concerning the disposition of the in vitro human embryos is brought before the court . . . the court shall award the in vitro human embryos [to the spouse intending to give birth]."[96] In addition, while the *Litowitz* court treated both the gamete-providing spouse and the non-gamete-providing spouse as equals,[97] section 318.03 requires that if both spouses "intend to allow the in vitro human embryos to develop to birth" but only one spouse is a gamete provider, then the gamete-providing spouse will be awarded the pre-embryos.[98]

In large part, the dispute over whether to employ a contractual approach to disposition agreements maps onto the debate about whether such agreements, like contracts pertaining to family relationships, inherently violate public policy.[99] Typically, courts will not enforce marital contracts that deal with matters or relations "essential to the marital relationship," specifically, agreements to bear children, on grounds of public policy.[100] Pre-embryo disposition courts and commentators that

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93. *See* Decree of Dissolution of Marriage at 14, Torres v. Terrell, FN 2016-001785 (Super. Ct. Ariz. Aug. 21, 2017) [hereinafter Dissolution Decree] ("This Court believes that where the parties entered into a written contract regarding the issue, the Court should commence its analysis by applying the contract if possible to assist in determining the disposition of the embryos.").

94. *See infra* Section II.A.1.

95. Terrell v. Torres, 438 P.3d 681, 690 (Ariz. App. Div. 2019).

96. ARIZ. REV. STAT. ANN. § 25-318.03(B) (Supp. 2018).

97. *See supra* text accompanying note 86.

98. ARIZ. REV. STAT. ANN. § 25-318.03(A)(3) (Supp. 2018).

99. *See, e.g.*, Howell, *supra* note 42, at 415 ("Professor John Robertson contends that gamete donors who voluntarily and advisedly enter into a contract prior to IVF regarding the disposition of unused embryos should be able to rely upon the enforcement of the agreement. Professor Carl H. Coleman maintains that contracts concerning family relationships violate public policy and are unenforceable upon a change of mind by either party.").

100. THOMAS D. CRANDALL & DOUGLAS J. WHALEY, CASES, PROBLEMS, AND MATERIALS ON CONTRACTS 25 (7th ed. 2016).

favor enforcement advocate a contracts approach and do not see a violation of public policy, whereas those that oppose enforcement are likely to see a violation and favor a contemporaneous agreement approach.[101]

2. The Contemporaneous Agreement Approach

Only a small minority of states have employed the contemporaneous agreement approach to pre-embryo disputes.[102] Like the contract approach, the contemporaneous agreement approach maintains that decisions about pre-embryo disposition belong equally to the gamete providers.[103] However, the contemporaneous agreement approach differs from the contract approach in that it allows the parties to invalidate the prior agreement if one party unilaterally has a change of heart—at any point.[104]

As a result, this approach requires that courts not mandate any further action until the parties reach mutual consent.[105] In *In re Witten*, the Iowa Supreme Court explained that, because procreative decisions are "intensely emotional," people may "act more on the basis of feeling and instinct than rational deliberation."[106] As a result, the court reasoned, it might not be possible to make an informed decision "relinquish[ing] a right in advance of the time the right is to be exercised."[107] The *In re Witten* court, analogizing to the validity of contemporaneous divorce stipulations,[108] opines that doing so avoids problematic policy concerns that would otherwise be implicated, because parties who can change their minds are not being contractually forced into a familial relationship but rather make a mutual decision to be implemented immediately.[109]

Critics lament that this approach undermines the integrity of agreements between gamete providers. Haslett says that even the *J.B. v. M.B.* court's contracts limitation that allows parties to make subsequent modifications up until the point of litigation "eliminat[es] the vital security which contracts provide."[110] As a result, alarm at the

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101. *Compare* Kass v. Kass, 696 N.E.2d 174, 180–81 (N.Y. 1998) (favoring a contracts approach), *with In re* Marriage of Witten, 672 N.W.2d 768, 777–78 (Iowa 2003) (favoring a contemporaneous agreement approach).

102. *See* Michael T. Flannery, "*Rethinking" Embryo Disposition upon Divorce*, 29 J. CONTEMP. HEALTH L. & POL'Y 233, 233 n.3 (2013).

103. *In re Witten*, 672 N.W.2d at 777 (quoting Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 81 (1999)).

104. See *id.* at 778 (quoting Coleman, *supra* note 103, at 110).

105. *See id.*

106. *Id.* at 777 (quoting Coleman, *supra* note 103, at 98). For a discussion of the problematic view of infertility patients as emotional and desperate, see MADEIRA, *supra* note 89, at 71–73.

107. *In re Witten*, 672 N.W.2d at 777 (quoting Coleman, *supra* note 103, at 98).

108. *Id.* at 781–82.

109. *Id.* at 779–83. This is similar reasoning but a different conclusion to that used by the *A.Z. v. B.Z.* court, which avoids public policy violations by allowing parties to subsequently modify their disposition agreements up until the point of the disposition proceedings. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1057–59 (Mass. 2000).

110. Haslett, *supra* note 82, at 196–97.

contemporaneous agreement approach, which not only extends the unilateral right to withdraw from a predisposition agreement to any point but also prohibits the court from acting without mutual agreement, is necessarily greater.

3. The Balancing Test Approach

Other courts have opted to balance the gamete providers' interests. Similar to the contemporaneous agreement approach, courts applying a balancing test recognize that disposition agreements are enforceable until either party changes their mind about disposition prior to the pre-embryos' award to one party.[111] In contrast to the contemporaneous agreement approach, however, courts will not wait for parties to reach a mutual agreement, but will balance the parties' interests to decide the best result.[112] Other courts, like the Colorado Supreme Court in *In re Marriage of Rooks*, only use the balancing approach if there is no contract, or if the contract does not address disposition.[113] In balancing the parties' interests, courts typically give greater weight to the party who wishes to avoid procreation.[114]

For instance, in *J.B. v. M.B.*, where a divorcing husband wanted to use the pre-embryos and the wife did not, the New Jersey Supreme Court avoided the state's limitations on contracts pertaining to family relationships for public policy reasons by recognizing that both parties had a right to change their minds.[115] The court found that the consent form was not a memorialization of the divorcing couple's intentions, allowing the court to determine the pre-embryos' disposition.[116]

The husband and wife also asserted constitutional rights to procreate and not procreate, respectively.[117] The husband argued that his right to procreate outweighed his wife's right not to procreate because her bodily integrity was not implicated by the pre-embryos' transfer to someone else's uterus.[118] The husband also argued that his religious convictions as well as the state's interest in protecting life outweighed the wife's interest.[119] Ultimately, the New Jersey court agreed with the Tennessee court in *Davis* that the party avoiding procreation should usually prevail if the other party can procreate without the pre-embryos.[120] While a few lower courts have sided with the partner who wishes to procreate, this is not the prevailing view, and has not been used by any state supreme courts.[121]

Turning to Arizona, despite the *Torres* court's reliance on *J.B. v. M.B.* in attempting to balance interests, the test in *J.B. v. M.B.* is different because it weighs only the gamete providers' interests, and does not include the state's or pre-embryo's

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111. *See id.* at 201–02.
112. *See id.*
113. 429 P.3d 579, 581, 586 (Colo. 2018).
114. Haslett, *supra* note 82, at 202.
115. 783 A.2d 707, 710, 718–19 (N.J. 2001).
116. *Id.* at 714.
117. *See id.* at 712.
118. *Id.*
119. *Id.*
120. *Id.* at 716.
121. Madeira, *supra* note 5, at 20–24.

interests in making its determination.[122] It is not clear from the *Torres* order why, in contrast to past applications of the balancing test, the Arizona court considered the state's and pre-embryo's interests as equal, or perhaps greater, than the interests of Torres and Terrell. The balancing test used by the Arizona Court of Appeals, however, by discarding the influence of Arizona's "strong family values" statute, used a balancing test that was closer to that employed by other courts undertaking to balance the parties' interests. On the other hand, while the trial court's holding was consistent with the prevailing view that the interests of the party wishing to avoid procreation would normally outweigh the interests of the party wishing to procreate, the court of appeals' holding, by granting the pre-embryos to Torres, clearly favored the interests of the party wishing to procreate.

II. ARIZONA'S *TORRES V. TERRELL* AND SECTION 318.03

The struggle of legal systems to address the challenges that surplus cryopreserved pre-embryos pose dates back to the case of an American couple that died in a plane crash in 1984, leaving two frozen pre-embryos in Melbourne, Australia, and no disposition agreement to guide disposal.[123] Decades later, the interests and issues identified in this incident remain so deeply personal, philosophical, and unresolved that it was perhaps inevitable that cryopreserved pre-embryos would be subject to case law and statutes, like those in Arizona, that bear the marks of a pluralistic society trying to resolve fundamentally conflicting views. This does not mean, however, that the Arizona standards are workable or wise.

A. Torres v. Terrell

As discussed below, the trial court's ruling in *Torres v. Terrell* was highly problematic. Perhaps unsurprisingly, it was challenged, and the Arizona Court of Appeals issued an order in March 2019 to vacate the trial court's ruling.[124] The analyses of both courts are discussed in turn.

1. Trial Court

In the 2017 *Torres* case, the trial judge mandated involuntary donation of the pre-embryos in question to a third party, instead of to the gamete providers,[125] Ruby Torres and John Terrell, a couple with an on-again, off-again relationship of ten years.[126] In 2014, shortly after Torres was diagnosed with breast cancer, the couple decided to undergo IVF in order to cryopreserve their pre-embryos so that Torres could preserve her ability to have genetically related children posttreatment.[127] As part of the routine paperwork outlining their relationship with the fertility clinic, the

122. *See infra* text accompanying note 148.

123. *See* STATE OF VICTORIA, *supra* note 14, at 5.

124. Terrell v. Torres, 438 P.3d 681, 694 (Ariz. App. Div. 2019), *review granted in part*, CV-19-0106-PR, 2019 Ariz. LEXIS 226 (Ariz. Aug. 27, 2019).

125. Dissolution Decree, *supra* note 93, at 21.

126. *Id.* at 7.

127. *Id.* at 7–8.

couple signed a predisposition agreement form.[128] A few days later, the couple married.[129]

After undergoing IVF, but before transferring any of their pre-embryos, Torres and Terrell then decided to divorce and disagreed about what to do with the pre-embryos.[130] Terrell wanted the embryos to be discarded or remain frozen unless the parties came to an agreement.[131] Torres wanted to gestate the pre-embryos herself because she was unlikely to be able to have biological children without them following her cancer treatment.[132]

The state trial court, noting that there was no law on point, used both contract principles and Arizona policy concerns to analyze and decide the case.[133] Referencing cases in other states like *Davis v. Davis*,[134] *Kass v. Kass*,[135] and *A.Z. v. B.Z.*,[136] where courts began by interpreting the pre-embryo disposition contract,[137] the Arizona court found that the "Embryo Cryopreservation & Embryo Disposition" agreement between the fertility clinic, Torres, and Terrell was ambiguous and could not be used to resolve the issue.[138] Nonetheless, the court isolated a few sections that informed its decision.[139] The most relevant section reads as follows:

> H. Divorce or Dissolution of Relationship
>
> In the event the patient and her spouse are divorced or the patient and her partner dissolve their relationship, we agree that the embryos should be disposed of in the following manner (check one box only):
>
> A court decree and/or settlement agreement will be presented to the Clinic directing use to achieve a pregnancy in one of us or donation to another couple for that purpose.[140]

The box next to the court decree option was checked and initialed by both Torres and Terrell.[141]

Another clause on page thirteen of the agreement, however, appeared to conflict with this choice. That clause states that after divorce, the pre-embryos cannot be used by either party "without the express, written consent of both parties."[142] The parties

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128. *Id.* at 7.
129. *Id.*
130. *Id.* at 8–9.
131. *Id.*
132. *Id.*
133. *Id.* at 11–16.
134. 842 S.W.2d 588 (Tenn. 1992).
135. 696 N.E.2d 174 (N.Y. 1998).
136. 725 N.E.2d 1051 (Mass. 2000).
137. *See supra* Part I(b)(1).
138. Dissolution Decree, *supra* note 93, at 13–16.
139. *Id.* at 11–12.
140. Notice of Filing of Copy of Contract with Bloom Reproductive Institute at 16, Terrell v. Torres, No. FN 2016-001785 (filed May 12, 2017) [hereinafter Disposition Agreement].
141. *Id.*
142. Dissolution Decree, *supra* note 93, at 16.

made no individualized notation to this part of the agreement although both Torres and Terrell initialed at the bottom of the page, which contained a number of provisions and four separately numbered sections.[143] Despite finding that the contract contained contradictory clauses, the court concluded that the parties did not intend for any surplus pre-embryos to be destroyed.[144]

The court then referenced *Davis* and New Jersey Supreme Court case *J.B. v. M.B.*,[145] and attempted to apply a balancing test.[146] This balancing test, as employed by other courts, has balanced the interests of the two gamete providers.[147] The Arizona court, however, included the pre-embryos' interests under the "best interests of the child" standard, even after acknowledging that a pre-embryo is not a child.[148] The *Torres* court also purportedly based its ruling on statutory language, current scientific knowledge about pre-embryo development, the unresolved debate about when life begins, and judicial restraint.[149]

Despite finding that a pre-embryo is not a child, the *Torres* court muddied the waters by considering three Arizona policies concerning children and families: (1) "promot[ing] strong families"; (2) "promot[ing] strong family values"; and (3) establishing that a child's best interest, in the absence of contrary evidence, is served by "hav[ing] substantial, frequent, meaningful and continuing parenting time with both parents" and "hav[ing] both parents participate in decision making about the child."[150] The court said that giving the pre-embryos to Torres would violate these policies because the parents were unlikely to effectively co-parent, and Terrell did not want to procreate with Torres.[151] Later, the court asserted that, while it would not get involved in co-parenting disputes before a child exists, it would nonetheless be contrary to public policy to rule in such a way that Torres and Terrell would litigate future parenting disputes.[152]

2. Court of Appeals

In October 2017, Torres appealed to the Arizona Court of Appeals, and oral arguments took place in June 2018.[153] On appeal, Torres argued that the disposition agreement was not ambiguous, and that even if it was, the court incorrectly applied

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143. Disposition Agreement, *supra* note 140, at 13.

144. Dissolution Decree, *supra* note 93, at 14.

145. *Id.* at 18.

146. *Id.* at 18–20.

147. *See infra* text accompanying notes 164–69.

148. Dissolution Decree, *supra* note 93, at 19–20. In doing so, the court discussed with approval, although it did not adopt, the court's holding in *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256 (Ariz. Ct. App. 2005), that pre-embryos were not persons under Arizona's wrongful death statute because they were outside the womb. *Id.*

149. *See* Dissolution Decree, *supra* note 93, at 12–13.

150. *Id.* at 18.

151. *Id.* at 19.

152. *Id.* at 20.

153. Appeal Docket, Terrell v. Torres, 1 CA-CV 17-0617 FC (Ariz. Ct. App. Oct. 18, 2017) (on file with the *Indiana Law Journal*).

the balancing test.[154] Torres first asserted that the court erred in finding ambiguity in the agreement because section H was part of the "dickered deal," as demonstrated by the fact that Torres and Terrell selected their chosen option.[155] In contrast, the language in paragraph 10 of the agreement was simply boilerplate language included on behalf of the fertility clinic.[156] Thus, Torres argued, the "dickered" section H should override the boilerplate language in paragraph 10.[157] Torres then claimed that the trial court misapplied the balancing test since,[158] by awarding the pre-embryos to a third party, the court incorrectly included third-party interests when only the spouses' interests should be considered.[159] On appeal, Terrell changed his stance from requesting disposal to third-party donation.[160] In reply, Torres contended that the court erroneously balanced the spouses' interests in giving Terrell's desire not to procreate more weight than Torres's desire to procreate.[161]

Not surprisingly, the Arizona Court of Appeals' decision hinged on how it treated the disposition agreement.[162] It might have been supposed, however, that if the court found the agreement to be unambiguous, it would uphold the lower court's ruling because the trial court opted for one of the options specified in the agreement. While the dissent takes this view, the majority did not.[163] On the other hand, it might be supposed that if the court found the agreement ambiguous, it would grapple with applying a balancing test. Yet, while the majority concluded that under Arizona law, it must give weight to specific contract provisions over general provisions,[164] a point of law with which the dissent agreed,[165] they split on application,[166] with the majority concluding that "[s]ubsection H unambiguously governs disposition of the embryos by providing the written consent to overcome the more general 'Note.' In making the choice to allow the court to determine the disposition, the court was required to employ the balancing approach."[167]

Applying a balancing test anew, the appeals court held that the pre-embryos should be awarded to Torres,[168] one of the two choices specified in section H.[169] After reviewing the three dominant approaches to pre-embryo disputes, the court of appeals adopted the contracts approach with the balancing test resolving situations

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154. Appellant's Opening Brief at 1, *Terrell*, 1 CA-CV 17-0617 FC.
155. *Id.* at 21–23.
156. *Id.*
157. *Id.*
158. *Id.* at 23.
159. *Id.* at 24–25.
160. Appellee's Response Brief at 1, *Terrell*, 1 CA-CV 17-0617 FC.
161. Appellant's Reply Brief at 7, *Terrell*, 1 CA-CV 17-0617 FC.
162. Terrell v. Torres, 438 P.3d 681, 690–91 (Ariz. App. Div. 2019) , *review granted in part*, CV-19-0106-PR, 2019 Ariz. LEXIS 226 (Ariz. Aug. 27, 2019).
163. *See id.* at 690–91 (majority opinion), 695 (Cruz, J., dissenting).
164. *Id.* at 690.
165. *Id.* at 695–96 (Cruz, J., dissenting).
166. *Compare id.* at 690–91 (majority opinion), *with* 695–96 (Cruz, J., dissenting).
167. *Id.* at 690 (internal citation omitted).
168. *Id.* at 694.
169. *See id.* at 685.

where there is "no prior agreement, or if the agreement leaves the decision to the court."[170]

The court of appeals' application of the balancing test was significantly different from the trial court's application. First, the court of appeals explicitly rejected any use of Arizona's family values policies. In a footnote, the court of appeals disagreed with the trial court's conclusion that litigation over any future children was unavoidable and found that the statute containing the policy objective of "promot[ing] strong families [and] . . . strong family values" was "inapplicable."[171] The dissent agreed with the majority on this point.[172]

Second, the court of appeals determined that the trial court erred, as a matter of law, in considering the right of procreational autonomy in the context of the balancing test.[173] Even though the trial court was unclear as to whether there was a right not to procreate, it nonetheless concluded that Terrell's "right not to be compelled to be a parent outweigh[ed] [Torres's] right to procreate."[174] The court of appeals said that this framework was not useful in pre-embryo disposition disputes because "constitutional rights are directed at protecting an individual against government intrusion on personal decisions regarding reproduction."[175] The court justified this statement by saying that Torres and Terrell "empowered the court" to decide their pre-embryo dispute, and thus, the trial court should not have considered these constitutional rights.[176]

At the same, the court of appeals seemingly adopted the prevailing view that the interests of the parent wishing not to procreate would normally outweigh the interests of the parent wishing to procreate. The court said, "we agree with other jurisdictions that the party who does not wish to become a parent should prevail if the other party has a 'reasonable possibility' of becoming a parent without the use of the embryos."[177] The dissent criticized the majority on this point, stating that while this case does not present the typical government intrusion on personal reproductive decisions, the majority "err[ed] by separating the parties' rights from the interests protected by those rights."[178]

Third, the courts differed in how they weighted Torres's interest in having children. The court of appeals pointed out the apparent inconsistency in the trial court finding that Torres had less than a one percent chance of having biological children, but nonetheless concluding that the "mere possibility" of having biological children tipped the balance against Torres.[179] The court of appeals then discussed how unlikely it was that Torres would be able to have biological children even through adoption, both because there was expert testimony that there were a limited number of embryos available for adoption and because Torres's medical history made it

170. *Id.* at 689.
171. *Id.* at 693 n.11 (alteration in original) (citation omitted).
172. *Id.* at 698 n.12 (Cruz, J., dissenting).
173. *Id.* at 693.
174. *Id.* (alteration in original) (quoting trial court).
175. *Id.*
176. *Id.*
177. *Id.* at 690.
178. *Id.* at 698 (Cruz, J., dissenting).
179. *Id.* at 692.

unlikely.[180] Largely because of this fact, despite adopting the general view "that the party who does not wish to become a parent should prevail if the other party has a 'reasonable possibility' of becoming a parent without the use of the embryos," the court of appeals held that Torres's interest in the pre-embryos outweighed Terrell's interest.[181]

B. Section 318.03

Section 318.03, passed in March 2018,[182] provides that pre-embryos will be awarded in divorce dissolutions to the spouse "who intends to allow the in vitro human embryos to develop to birth."[183] When both spouses have this intention but only one donated gametes, the pre-embryos will be awarded to the gamete provider.[184] The law also contains a contract override provision so that "[i]f an agreement between the spouses concerning the disposition of the in vitro human embryos is brought before the court in [divorce proceedings], the court shall award the in vitro human embryos" to the spouse intending to bring the pre-embryos to birth; thus, Arizona has adopted a most likely to lead to birth standard for pre-embryo disposition disputes, notwithstanding contractual agreements to the contrary.[185]

Moreover, section 318.03 takes the additional step of defining parental rights and responsibilities—something that judicial opinions in pre-embryo divorce disputes have not done. The law specifies that whichever spouse is not awarded the pre-embryos loses all parental rights and obligations unless the spouse is a gamete provider and consents in writing to parenthood.[186] This legislative mandate is an update to the *Torres* order, which stated that Torres could not waive a child support claim of Terrell and noted that there was no mechanism in Arizona, such as the Uniform Parentage Act, to relieve a spouse of parental responsibilities.[187] The Arizona legislature goes on to say that without this consent, any resulting children are deprived of all rights and obligations.[188] Finally, gamete providers who do not consent to parenthood are required to provide detailed health and family history information to the spouse who is awarded the pre-embryos.[189]

While section 318.03 has yet to be considered by any court, had it been in effect when the trial court was deciding *Torres*, the court almost certainly would have settled the case by awarding the pre-embryos to Torres because, under section 318.03(A), she is the spouse wanting to give them life. The issue of contractual

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180. *Id.*

181. *Id.* at 690 (citing Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992)).

182. *Bill History for SB1393*, AZLEG.GOV, https://apps.azleg.gov/BillStatus/BillOverview/70559 [https://perma.cc/2PQY-46WR].

183. ARIZ. REV. STAT. ANN. § 25-318.03(A)(1) (2018).

184. *Id.* § 318.03(A)(3).

185. *Id.* § 318.03(B).

186. *Id.* § 318.03(C).

187. Dissolution Decree, *supra* note 93, at 9, 12, 20. *See generally* UNIF. PARENTAGE ACT § 705 (UNIF. LAW COMM'N 2002).

188. tit. 25, § 318.03(D).

189. *Id.* § 318.03(E). While the mandated provision of medical information and examinations is outside the scope of this Note, it raises other significant privacy concerns.

ambiguity would be irrelevant because section 318.03(B) provides for a contractual override. The court of appeals mentions the statute and explains its effect, but notes that because the statute was not in effect when the trial court issued its order, the court of appeals is "not bound by it in reaching a resolution."[190]

Following section 318.03's passage, the open questions now are (1) whether a state legislature and court can override procreative liberty by mandating a categorical "most likely to lead to birth" standard for pre-embryos disposition disputes and (2) whether a court or legislature can now go one step further and mandate donation of pre-embryos when both spouses wish to destroy them. The first may have been made inadvertently easier for Arizona by the *Torres* court of appeals because the court made the point of separating the question of procreative liberty rights from the pre-embryo disposition analysis.[191] The court of appeals also failed to make any mention of the propriety of forced third-party donation in the trial court's order. This, coupled with the removal of assessing procreative rights in the analysis, may have opened the door much wider to mandatory donation.

III. CONSTITUTIONAL ISSUES

Probably the most pressing question that the *Torres* holdings and section 318.03 present is whether they can be successfully challenged as violations of the constitutionally protected right to procreative liberty. From the Arizona courts' perspectives, this right already bears upon this issue; the *Torres* court considered claims of constitutionally protected procreative rights,[192] and the *Jeter* court recognized that any law concerning pre-embryos' legal status is subject to constitutional restraints.[193] While the *Torres* court of appeals declined to use such a "framework" when two individuals are in a disposition dispute and a prior agreement does not resolve the dispute, its reasoning would seem to be either that the individuals contracted away their claims to these rights or that the court, by being granted the power under a contract to decide a disposition dispute, is somehow no longer a government actor.[194] While a discussion of whether individuals can contract their rights away in this manner is outside the scope of this Note, the reasoning of the court of appeals appears flawed. While the unconstitutional conditions doctrine does sometimes permit individuals to give up constitutional rights, the context of pre-embryo disposition disputes does not involve a regulatory actor, nor is the benefit in question, access to the courts to vindicate fundamental rights, a privilege.[195] The effect of this reasoning would be to deprive a small class of people, those with predisposition agreements indicating disputes would be settled in court, of

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190. Terrell v. Torres, 438 P.3d 681, 689, n.7 (Ariz. App. Div. 2019), *review granted in part*, CV-19-0106-PR, 2019 Ariz. LEXIS 226 (Ariz. Aug. 27, 2019).

191. *See supra* notes 184–87 and accompanying text.

192. Dissolution Decree, *supra* note 93, at 19–20.

193. Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1265 (Ariz. Ct. App. 2005).

194. *Torres*, 438 P.3d at 693.

195. *See generally* Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990).

vindicating their procreative rights vis-à-vis their pre-embryos in this court, an effect that is seemingly ripe for an equal protection challenge.

Because of these issues, this Note takes the view that, consistent with prior Arizona court rulings, procreative rights are relevant to pre-embryo disposition disputes. As a result, Section A argues that constitutional challenges should be brought on both substantive due process and equal protection grounds while Section B asserts that procreative liberty protections should include procreation via IVF.

A. Procreative Liberty is a Fundamental Right Protected by Substantive Due Process and Equal Protection

The Supreme Court has articulated fundamental rights protected under substantive due process doctrine in different ways, but there are a few prevalent themes that run throughout this doctrine. First, "fundamental rights" are not just limited to those rights enumerated in the Bill of Rights.[196] Rather, liberties that are "rooted in the traditions and conscience of our people"[197] or "implicit in the concept of ordered liberty" can be fundamental.[198] It was articulated by Justice Harlan as "a rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints and which also recognizes . . . that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."[199]

With this general understanding of fundamental rights, it is very likely that pre-embryo disposition decisions would be protected from state infringement like the *Torres* court's mandatory donation ruling and section 318.03's contractual override provision. In discussing the similar effect of a New Mexico statute requiring implantation of all pre-embryos, scholars have concluded that such regulations implicate fundamental substantive due process rights because they bear upon an individual's reproductive and decision-making rights by entailing a judgment about the legal status of the pre-embryo, which determines the weight of the state's interest.[200] Commentators have also called the Louisiana statute granting pre-embryos personhood "constitutionally questionable."[201]

On the other hand, while the reasoning of the court of appeals vis-à-vis the relevance of procreative rights is questionable, the holding is less vulnerable to attack than either the trial court's holding or section 318.03, because the court, in balancing the parties' interests, weighted the likelihood of Torres ever becoming a parent by any means. It was this fact that the court of appeals relied on in deciding not to follow the general rule of preferencing the interests of the party wishing to avoid procreation

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196. *See* Snyder v. Massachusetts, 291 U.S. 97, 105 (1933).

197. *Id.*

198. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

199. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (internal citations omitted).

200. Cynthia Reilly, *Constitutional Limits on New Mexico's In Vitro Fertilization Law*, 24 N.M. L. REV. 125, 129–30 (1994).

201. Weber, *supra* note 17, at 554 (citing Diane K. Yang, *What's Mine Is Mine, but What's Yours Should Also Be Mine: An Analysis of State Statutes that Mandate the Implantation of Frozen Preembryos*, 10 J.L. & POL'Y 587, 593–94 (2002)).

over the wishes of the party wishing to procreate in a case where two individuals' procreative rights are diametrically opposed to each other—not to the state. Because the court's reasoning is based on the parties' interests (albeit not explicitly on their rights) and not the state's interests, it will be harder for either party to show an unconstitutional infringement.[202] The appeals court's view that parties to a pre-embryo dispute that have agreed to let the court adjudicate the dispute creates a class of people who are unable to bring their fundamental procreative rights to bear in the court's decision, which raises equal protection concerns. But, because this challenge is less likely than those arising from forced pre-embryo adoption or implantation, the below analysis focuses primarily on the trial court's ruling and section 318.03.

If a reviewing court determines that pre-embryo disposition decision-making is a fundamental right, then laws regulating these decisions will likely have to pass strict scrutiny, which is almost always "fatal in fact."[203] In this case, it is likely that the *Torres* court's ruling and section 318.03 would be invalidated under this framework. Strict scrutiny requires a compelling state interest and a narrowly-drawn statute,[204] and it is unlikely that Arizona's interests in mandatory adoption or implantation would outweigh an individual's interest in procreative liberty.

1. State Interests

Based on the court's reasoning in *Lifchez v. Hartigan*, "[s]ince there is no compelling state interest sufficient to prevent a woman from terminating her pregnancy during the first trimester . . . there can be no such interest sufficient to intrude upon these other protected activities [for example, IVF]."[205] While *Lifchez*

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202. It is possible that the Ninth Circuit or U.S. Supreme Court would adopt a per se rule requiring that the party wishing to exercise their right not to procreate should always win in a dispute, but given the unsettled area of the law, the personal nature of the right, and a host of prudential concerns, it seems unlikely that a reviewing federal court would put itself in this kind of corner.

203. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). The exact test to be applied in substantive due process jurisprudence is uncertain because in decisions like *Planned Parenthood v. Casey* and *Lawrence v. Texas* the Court did not apply strict scrutiny. *See* Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting); Planned Parenthood v. Casey, 505 U.S. 833, 876 (1992) (plurality opinion). However, regardless of the label of the test employed by the Court, it will almost certainly require heightened scrutiny, as it did in both *Casey* and *Lawrence*, *see Lawrence*, 539 U.S. at 582–83 (O'Connor., J., concurring); *Casey*, 505 U.S. at 876 (plurality opinion), which will be difficult for the Arizona court order and statute to pass. Also, as noted below, if the Court situates pre-embryo disposition decision-making within abortion jurisprudence, then the test will not be strict scrutiny, but undue burden. *See infra* text accompanying note 257. The precise substantive due process test may not matter, however, because if the Court identifies pre-embryo disposition decision-making as a fundamental right, then challengers can bring an equal protection claim which will require strict scrutiny. *See Equal Protection*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/equal_protection [https://perma.cc/VA6A-J87S].

204. *Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny [https://perma.cc/8KBC-7AL5].

205. 735 F. Supp. 1361, 1377 (N.D. Ill. 1990).

was decided before *Planned Parenthood of Southeastern Pennsylvania v. Casey*, when the Supreme Court discarded *Roe v. Wade*'s trimester test,[206] this reasoning is still valid because abortion—in which there is a protected interest—always necessarily occurs later in fetal development than the pre-embryo stage.[207]

Because none of the states' interests in foundational reproductive rights cases like *Skinner v. Oklahoma*,[208] *Griswold v. Connecticut*,[209] *Eisenstadt v. Baird*,[210] *Carey v. Population Services, International*,[211] *Roe*,[212] and *Casey*[213] were enough to pass heightened review, it is unlikely that Arizona's interest in mandatory pre-embryo donation or implantation will be considered compelling, which would keep the trial court ruling and statute from passing strict scrutiny. The only realistic articulation of Arizona's interest is in protecting human life from the point of conception.[214] In section 318.03, the state's interest dictates the statutory outcome: pre-embryos are awarded to whichever spouse is likeliest to ensure their birth.[215] The *Torres* court's insistence that it was acting in furtherance of strong families and strong family values strongly implies that it considered a pre-embryo a family member. This is especially true since the court did not consider highly relevant factual matters such as the very low statistical likelihood that pre-embryos will actually become viable family members because pre-embryos are most likely to stop developing before the fetal stage.[216] In addition, the court did not consider how many potential adoptive parents would be interested in and able to afford the invasive and expensive process of pre-embryo adoption and implantation.

Arizona's interest runs afoul of cases like *Roe* and *Casey*, which have already put clear parameters around how a state can permissibly infringe on procreative liberty in the name of protecting human life, and to what degree the state's interest begins to trump the mother's interest once the fetus is viable.[217] Because pre-embryos are

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206. *See Casey*, 505 U.S. at 878 (plurality opinion).

207. *See supra* text accompanying notes 17–21.

208. 316 U.S. 535 (1942) (holding that forced sterilization under Oklahoma's Habitual Criminal Sterilization Act was a violation of the Fourteenth Amendment).

209. 381 U.S. 479 (1965) (holding that a Connecticut statute prohibiting the use of contraceptives was an unconstitutional violation of privacy).

210. 405 U.S. 438 (1972) (holding that a Massachusetts law prohibiting the use of contraceptives was a violation of the Fourteenth Amendment).

211. 431 U.S. 678 (1977) (holding, inter alia, that the state's interest in regulating morality to minors was insufficient to defeat a challenge to a state contraception law under the Fourteenth Amendment).

212. Roe v. Wade, 410 U.S. 113 (1973) (holding that a Texas statute prohibiting abortion was an impermissible violation of personal liberty under the Fourteenth Amendment).

213. Planned Parenthood v. Casey, 505 U.S. 833 (1992) (holding that the husband notification provision of a Pennsylvania abortion statute was a constitutional violation).

214. Brown, *supra* note 31, at 234 (discussing Louisiana's assignment of juridical rights to pre-embryos: "The only possible compelling state interest in prohibiting preembryo discard and enacting legislation requiring mandatory donation is the protection of potential human life.").

215. ARIZ. REV. STAT. ANN. § 25-318.03 (Supp. 2018).

216. *See supra* note 15 and accompanying text.

217. *See infra* text accompanying note 248.

not fetuses, viability is impossible, and the state's interest in protecting life cannot override parents' liberty interests.

One possible state justification that will not gain traction is the religious or moral belief in the sanctity of human life at any stage, which has never been strong enough to dictate outcomes in abortion cases. Much of the objection to abortion cases and the driving force behind "pro-life" measures have come from religiously-motivated actors.[218] For instance, Louisiana's heavily Catholic population helps to explain its embryonic personhood approach.[219] And, in Arizona, the Thomas More Society—a national organization professing to "restor[e] respect in law for life, family, and religious liberty"[220]—helped to pass section 318.03.[221] But, in *Carey*, the Court, while recognizing that teenage pregnancy could have devastating effects, would not accept that New York's interest in protecting the morality of its citizens was compelling enough to override the procreative liberty of its citizens vis-à-vis contraception, several forms of which would prevent pre-embryos from implanting.[222]

Morality will prove equally unavailing for Arizona. Justice O'Connor wrote in *Casey* that "[s]ome of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."[223] Furthermore, decisions like *Bowers v. Hardwick* that were premised on purely moral justifications have since been overturned.[224] Since the life-begins-at-conception campaign is largely, perhaps exclusively, concerned with religious and moral tenets and outcomes,[225] a court adjudicating a pre-embryo disposition dispute should avoid prioritizing these interests over those of the gamete providers. While the Supreme Court has recognized that the government can use police powers to protect morality in other

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218. *See, e.g.*, Elizabeth Nolan Brown, *Who Deserves Custody of an Embryo?: Reason Roundup*, REASON (July 20, 2018, 9:30 AM), https://reason.com/blog/2018/07/20/embryo-custody-battles-heating-up [https://perma.cc/4ARH-E64U] (stating that the Thomas More Society, an anti-abortion group, helped get Arizona's new law passed).

219. Howell, *supra* note 42, at 412.

220. *Home Page*, THOMAS MORE SOC'Y, https://www.thomasmoresociety.org/ [https://perma.cc/CT9B-QXL4].

221. Brown, *supra* note 218.

222. Brown, *supra* note 31, at 206, and accompanying text.

223. Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992) (plurality opinion).

224. *See* Lawrence v. Texas, 539 U.S. 558, 575 (2003).

225. For instance, the Thomas More Society, which was involved in the Arizona legislation, is named after Sir Thomas More who is the patron saint of attorneys in the Catholic faith. *Sir Thomas More*, THOMAS MORE SOC'Y, https://www.thomasmoresociety.org/about/sir-thomas-more/ [https://perma.cc/HE9R-KKK7]. The tag line of the Thomas More Society is to "restor[e] respect in law for life, family, and religious liberty." *Home*, THOMAS MORE SOC'Y, https://www.thomasmoresociety.org/ [https://perma.cc/VLF3-23Z9]. *But see* Maureen Condic, *A Scientific View of When Life Begins*, CHARLOTTE LOZIER INST.: ON POINT 1, 5 (June 2014), https://s27589.pcdn.co/wp-content/uploads/2014/06/On-Point-Scientific-View-of-When-Life-Begins-Condic-2014.pdf [https://perma.cc/3LE4-4QJC] (arguing that the premise that life begins at conception is merely understanding how cells and organisms function but tells us nothing of how that fact should be used).

doctrinal areas,[226] the privacy cases make clear that this rationale cannot apply to deeply personal decisions made in protected contexts.

Moreover, while much of the state's interest in *Torres* was articulated as a desire for strong families and strong family values,[227] this interest is unlikely to be viewed as compelling, nor the resultant restrictions appropriately tailored, when weighed against the individual gamete providers' interests in procreative liberty. First, the phrases "strong families" and "strong family values" are likely coded language for the protection of life, addressed above.[228] Second, the State in *Griswold* articulated analogous justifications when it attempted to justify contraception laws because they served its policy interest of discouraging adultery in order to protect the family unit.[229] The Court found that the statute in question would not further the state's interest, which caused it to fail the tailoring requirement of strict scrutiny.[230] Similarly, Arizona's family policy justifications for forced pre-embryo donation and section 318.03 must fail. Given how unlikely it is for pre-embryos to end in live birth and the lack of evidence on the demand for pre-embryo adoption in Arizona,[231] a court is very likely to determine that forced donation or a most-likely-to-lead-to-birth standard is not necessary for Arizona to promote strong families.[232]

2. Individual Interests

In terms of the individual spouses' interests, the right to privacy is the fundamental right most strongly implicated in pre-embryo disputes. Given the Court's privacy jurisprudence on abortion, contraception, and parental decision-making, it is very likely that the question at the heart of pre-embryo disposition disputes, whether to "bear or beget" via ART, can be situated within one of these existing doctrines. While the right to privacy is not explicitly mentioned in the Constitution, it has been understood to protect "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[233] The doctrine began as an understanding of "penumbras" that "emanat[ed]" from enumerated protections in the Bill of Rights.[234] While the Court has moved away from this "zones of privacy" view,[235] personal decision-making in

226. *See, e.g.*, Champion v. Ames (*The Lottery Case*), 188 U.S. 321 (1903).

227. *See supra* text accompanying note 149.

228. *See supra* text accompanying notes 184–86.

229. Griswold v. Connecticut, 381 U.S. 479, 497–98 (1965); Brown, *supra* note 31, at 204.

230. *Griswold*, 381 U.S. at 497–98.

231. *See supra* note 216 and accompanying text.

232. It is also unclear what family model the state wishes to support, but this is likely to prove problematic as well. In *Moore v. City of East Cleveland*, the Court rejected an application of a zoning law to exclude nonnuclear families by saying "the Constitution prevents [the government] from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns." 431 U.S. 494, 506 (1977).

233. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion) (citation omitted).

234. *Griswold*, 381 U.S. at 484 (1965).

235. *See* Dawn Johnsen, *State Court Protection of Reproductive Rights: The Past, the Perils, and the Promise*, 29 COLUM. J. GENDER & L. 41, 52 (2015) ("The U.S. Supreme Court primarily relies upon the constitutional protections of 'liberty' in the Fifth and Fourteenth

certain contexts has continued to be protected as a fundamental right, and this protection has been extended over time to include marital decisions, procreation, contraception, family relationships, and child-rearing[236]—all issues potentially implicated in a challenge to the *Torres* ruling or section 318.03.

The right to procreate was established by the Supreme Court in *Skinner v. Oklahoma*. At the time, Oklahoma mandated that certain convicts be forcefully sterilized.[237] The Court invalidated the statute on equal protection grounds, recognizing that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[238] Procreative liberty was then extended to protect the use of contraception for married couples.[239] Seven years later, in *Eisenstadt v. Baird*, the right to use contraception was extended via the Equal Protection Clause to single people.[240] According to the Court, states cannot justify differential treatment by class, such as married versus unmarried contraception users, unless the legislation is "reasonable, not arbitrary, and . . . rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation."[241] Furthermore, the Court stated, "[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[242]

The decision on whether to gestate or donate pre-embryos is obviously a "decision whether to bear or beget a child."[243] In *Davis v. Davis*, the Tennessee Supreme Court acknowledged this relationship when it discussed the appellate court's holding that allowing Mrs. Davis to implant the pre-embryos over Mr. Davis's objection was a violation of his "constitutionally protected right not to beget a child where no pregnancy has taken place . . . ."[244]

In addition, several forms of contraception work by preventing pre-embryonic development and implantation, which causes the cells to be passed during the woman's menstrual cycle.[245] Given this, Howell argues that "it is illogical to say she must treat the same embryos as protected human life when they are frozen in nitrous oxide."[246] In fact, it seems likely that it would violate the equal protection clause for a state to require otherwise, as in *Eisenstadt*. An equal protection challenge should be brought because the *Torres* ruling and section 318.03 both mandate that divorcing couples with pre-embryos be treated differently than married couples with pre-

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Amendments, sometimes (though with decreasing frequency) describing the right as one of privacy.").

236. *Casey*, 505 U.S. at 851.
237. Brown, *supra* note 31, at 202.
238. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
239. Brown, *supra* note 31, at 203.
240. 405 U.S. 438, 447 (1972).
241. *Id.* (citing Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).
242. *Id.* at 453 (emphasis omitted).
243. *Id.*
244. 842 S.W.2d 588, 589 (Tenn. 1992).
245. Howell, *supra* note 42, at 413.
246. *Id.*

embryos, and couples who have undergone IVF be treated differently than couples achieving pregnancy coitally.

3. Application of Abortion Jurisprudence

Furthermore, post-*Skinner*, procreative liberty has been extended to the ability to end a pregnancy through abortion. While this protection is subject to restrictions and has been continually controversial since *Roe*,[247] the core protection remains relatively unchanged.[248] Further, even though viability can be used to limit procreative liberty in the abortion context,[249] such concerns are inapposite to cryopreserved pre-embryos because they are undisputedly nonviable. While both the *Roe* and *Casey* courts recognized that a woman's procreative liberty could be outweighed eventually by the state's interest in protecting a viable fetus,[250] the Court concluded that the exact point of fetal viability is still unknown.[251] In contrast, it is known that pre-embryos are not viable.

While abortion doctrine is a useful analogy, abortion and pre-embryo disposition are not the same thing. In abortion, pregnancy has already occurred, but this is not the case with pre-embryos. As a result, any potential "life-in-being" is at a very different stage of development in each procedure, and the woman's physical integrity is implicated in different ways. Moreover, absent any affirmative termination measures, a pregnancy will usually result in a live birth.[252] In contrast, pre-embryos, absent medical intervention, will stop developing; it would take the affirmative step of successful implantation to result in live birth.[253] While this distinction between abortion and pre-embryo disposition may be relevant in determining which constitutional test to analyze Arizona pre-embryo disposition law under,[254] it has also already been used by courts like *Davis* to illustrate the shared decision-making interests of both gamete providers[255]—but not that states like Arizona are free to usurp the reproductive decision-making role.

Scholars in favor of greater personal liberty protections in pre-embryo dispute dispositions are likely to argue that privacy in the context of abortion jurisprudence supports a similar right to privacy in the context of forced pre-embryo donations or transfers of cryopreserved pre-embryos, but should not be imported as a standard.[256] Carrying abortion decisions over wholesale would mean that any challenges would

247. Johnsen, *supra* note 235, at 41.

248. *See* Planned Parenthood v. Casey, 505 U.S. 833, 861 (1992).

249. *See id.*

250. *See Casey*, 505 U.S. at 861; Roe v. Wade, 410 U.S. 113, 162 (1973).

251. *Casey*, 505 U.S. at 870.

252. Mandy Oaklander, *Women Now Have as Many Miscarriages as Abortions*, TIME (Dec. 11, 2015), https://time.com/4144897/birth-rate-abortion-miscarriage/ [https://perma.cc/98M2-JDQN] ("[O]f the pregnancies in 2010, 65% resulted in live births, 17% were miscarried and 18% ended in abortion.").

253. Brown, *supra* note 31, at 236.

254. *See infra* text accompanying note 257.

255. *See* Reilly, *supra* note 200, at 134 n.98.

256. *See* Brown, *supra* note 31, at 225.

be evaluated under an undue burden standard, whereas a strict scrutiny approach would be more appropriate.[257]

Others may argue that a right to procreative autonomy—or privacy in general—is not even implicated in pre-embryo disposition because there is no pregnancy, and thus physical integrity is not a concern.[258] But this view does not address the fact that cryopreservation alone implicates physical integrity because without it, women are likely to have to undergo additional rounds of expensive, invasive, and painful IVF.[259] Furthermore, the outcome is then, in a state that mandates transfer or donation, that a gamete provider could become pregnant and then turn around and have a legal abortion to avoid an unwanted pregnancy.

Finally, the Supreme Court is not only concerned with privacy rights germane to physical integrity, but also with privacy protections for personal autonomy manifested through choice. For instance, in *Casey*, the Court situated abortion decisions within two frameworks: one relating to "personal autonomy and bodily integrity" vis-à-vis the government's constrained authority to force or deny medical treatment; and the other, a privacy doctrine which accords decision-making "liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child."[260] If the right to autonomous decision-making only existed in terms of physical integrity, there would be no need for the Court to include the application of privacy doctrine, which constitutes the bulk of the opinion.

Privacy cases concerning family relationships, child-rearing, and marriage make this clear. For instance, in *Loving v. Virginia*, the Supreme Court concluded that states cannot infringe on individual liberty by prohibiting marriage based on racial distinctions.[261] Sex is usually part of the marital relationship, and this could potentially be used as an argument for why physical integrity is implicated. However, if this attenuated relationship to physical integrity is enough, then the same should be true of the remote, but relevant, physical IVF procedures patients undergo.

The same is true of the Court's approach to family relationships and child-rearing. In discussing a law making it illegal for German to be taught in public schools, the *Meyer v. Nebraska* Court said that liberty under the Due Process Clause, "[w]ithout doubt[,] . . . denotes not merely freedom from bodily restraint."[262] In *Pierce v. Society of Sisters*, the Court applied *Meyer* to invalidate an Oregon law for impermissibly interfering with parents' liberty to bring up and educate their children.[263] In assessing parental rights, the *Pierce* Court stated that "[t]he child is not the mere creature of the [s]tate. . . ."[264] This protection was subsequently extended from parents to those acting as a guardian for a child.[265]

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257. *See id.* at 224–25.

258. Fotini Antonia Skouvakis, *Defining the Undefined: Using a Best Interests Approach to Decide the Fate of Cryopreserved Preembryos in Pennsylvania*, 109 PENN. ST. L. REV. 885, 905 (2005).

259. *See supra* text accompanying notes 15–16.

260. Planned Parenthood v. Casey, 505 U.S. 833, 857 (1992) (citation omitted).

261. 388 U.S. 1 (1967).

262. 262 U.S. 390, 399 (1923).

263. 268 U.S. 510, 534–35 (1925).

264. *Id.* at 535.

265. *See* Prince v. Massachusetts, 321 U.S. 158 (1944).

B. Does Procreative Liberty Include IVF?

While the Supreme Court has not considered the question of procreation by ART, like IVF, in light of privacy rights, it is likely, based on legal scholarship and state jurisprudence, that this type of deeply personal behavior would be protected under a right to privacy.[266] Even as far back as 1979, when IVF was first emerging, the United States Department of Health, Education, and Welfare concluded that "[s]ince these rights are reasonably analogous to those recognized by the Court in *Skinner*, *Griswold*, and *Eisenstadt*, the argument might well be persuasive" in discussing whether there was a constitutional right to produce via IVF.[267] Moreover, scholars addressing New Mexico's law in the context of *Griswold*, *Eisenstadt*, and *Skinner* have suggested that it will not withstand a challenge because it requires pre-embryo transfer and becoming a parent.[268]

State and federal case law also suggest that IVF and cryopreservation decision-making would be included in privacy rights.[269] For instance, the *Davis v. Davis* court based its decision in part on two Supreme Court premises: the right to procreate established in *Skinner* and the right not to procreate established in *Carey*.[270] In addition, in *Lifchez v. Hartigan*, a federal district court found a vague Illinois abortion law that restricted access to certain ART procedures invalid because it restricted a woman's "right to make reproductive choices free of governmental interference with those choices"[271]—notwithstanding that the reproductive context was noncoital. The *Lifchez* court quoted *Carey* in saying "[t]he decision whether to beget or bear a child is at the very heart of . . . constitutionally protected choices,"[272] including "the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy."[273]

An additional question is whether, if pre-embryo disposition decision-making implicates a privacy right, the right applies to both gamete providers. Case law, especially state supreme court cases applying a balancing test, suggests that it does, even though it may not apply equally in all contexts.[274] Legal scholars reason that, unlike in abortion decisions where the procreative rights of pregnant women are protected over those of their partners,[275] in pre-embryo dispositions the woman's

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266. *See* Reilly, *supra* note 200, at 129.

267. DEP'T OF HEALTH, EDUC., AND WELFARE, HEW SUPPORT OF RESEARCH INVOLVING HUMAN IN VITRO FERTILIZATION AND EMBRYO TRANSFER 66 (1979) (emphasis omitted), https://repository.library.georgetown.edu/bitstream/handle/10822/559350/HEW_IVF_report.pdf?sequence=1&isAllowed=y [https://perma.cc/B8D7-6CX2].

268. Reilly, *supra* note 200, at 129–30; Brown, *supra* note 31, at 186.

269. While outside the scope of this analysis, such a right would likely be a negative right. It seems unlikely that the Constitution requires states to pay for their citizens' IVF.

270. 842 S.W.2d 588, 600 (Tenn. 1992).

271. 735 F. Supp. 1361, 1376 (N.D. Ill. 1990).

272. *Id.* (citation omitted).

273. *Id.* at 1377.

274. *See, e.g.*, J.B. v. M.B., 783 A.2d 707, 718 (N.J. 2001).

275. Planned Parenthood v. Casey, 505 U.S. 833, 895 (1992) (holding that a husband cannot veto his wife's abortion).

physical integrity is not implicated in the same way, which evens the playing field for both gamete providers.[276]

Despite this, the *Torres* court was unsure about whether Terrell had a constitutional right not to procreate even while it recognized that Torres had a constitutional right to procreate.[277] According to the court, it was "unclear whether there is a constitutional right not to procreate but Husband cites no law to support such an argument; nor has the Court been able to identify any such citations."[278] The court went on to say that neither Torres nor Terrell has a constitutional right to procreate with each other[279] and that, in any event, they waived this right by signing the disposition agreement that required mutual consent to transfer their pre-embryos.[280] There is no authority given for either of these propositions,[281] and, given that the Arizona court found the agreement fatally ambiguous,[282] it is odd to rely on that same agreement in this part of the analysis.

One final point is that the composition of the current Supreme Court complicates the analysis of whether the decisions of gamete providers in pre-embryo dispositions will be protected as fundamental rights.[283] Justices Breyer, Ginsberg, Kagan, and Sotomayor tend to take more liberal stances on these issues whereas Justices Alito, Gorsuch, Roberts, and Thomas tend to take more conservative views.[284] Recently-appointed Justice Kavanaugh is also a conservative and was appointed by a Republican president.[285] With five conservative votes, it is unclear if the Court will extend a substantive due process right to gamete providers. The Court could instead take a narrow view of substantive due process rights vis-à-vis what is "rooted in the traditions and conscience of our people" or "implicit in the concept of ordered

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276. *See* Brown, *supra* note 31, at 225 n.323.

277. Dissolution Decree, *supra* note 93, at 19.

278. *Id.*

279. *Id.*

280. *Id.* As mentioned above, *see supra* text accompanying note 195, it is not at all clear that individuals can waive or contract away a fundamental right in this manner, although the intricacies of unconstitutional conditions doctrine is beyond the scope of this Note.

281. *See* Dissolution Decree, *supra* note 93, at 19–20.

282. *See supra* text accompanying note 138.

283. Due to the limited caseload of the Court and the fact that there is no extant circuit split on the issue, the likelihood of either the *Torres* ruling or section 318.03 making it in front of the Supreme Court in the near future is relatively slim. However, judges in the federal court system are likely to hear these challenges and are also likely to be guided by a desire to establish solid precedent and thus avoid being overruled by a higher court. *See* RICHARD A. POSNER, HOW JUDGES THINK 39 (2008). To date, there are no federal cases on point.

284. *See* Michael Bailey, *Will the Supreme Court Really Lurch Rightward with Trump's Next Appointment?*, WASH. POST (July 2, 2018, 5:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2018/07/02/will-the-supreme-court-really-lurch-rightward-with-trumps-next-appointment/?utm_term=.66a459ec80e0 [https://perma.cc/2YGP-RLCY].

285. Jasmine C. Lee, Alicia Parlapiano & Karen Yourish, *Where Kavanaugh, Trump's Nominee, Might Fit on the Supreme Court*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/interactive/2018/07/09/us/politics/supreme-court-kavanaugh-justice-conservative.html [https://perma.cc/LU94-R2DE].

liberty."[286] If the Court does so, then, almost by definition, ART cannot be a historically considered traditional right that is fundamental to our concept of liberty.[287]

CONCLUSION

Given the deeply personal nature of pre-embryo disposition decisions, it is very likely that laws like Arizona's *Torres* trial court ruling and section 318.03 could be challenged on privacy grounds. In addition, these laws are likely vulnerable to equal protection challenges because they draw distinctions between the procreative rights of people pregnant by coital means versus those undergoing ART. In contrast, holdings like the *Torres* court of appeals are less vulnerable to constitutional challenges because they focus on the individual interests instead of the policy interests of the state.

However, even if mandatory donation and implantation are somehow constitutionally permissible, the *Torres* trial court ruling and section 318.03 are still problematic because of the unresolved legal issues they raise. For instance, while section 318.03 removes parental responsibility from the gamete provider who is not awarded the pre-embryos, the ruling in *Torres* does not address what kind of legal rights and responsibilities Torres and Terrell will retain over any live birth that results from their pre-embryos. In addition, both laws raise questions as to the status of the legal pre-embryo. If Arizona is now taking a pre-embryo-as-person approach, then questions like whether pre-embryos can sue, be sued, or receive inheritances must be answered. While the *Torres* court justified its ruling in part on a desire to avoid creating litigation,[288] it is undoubtedly the case that the now opened legal questions raised by it and section 318.03 will have the opposite effect.

In addition to legal issues, cryopreservation is a useful procedure, use of which Arizona's recent laws could chill. Not only is IVF invasive and painful, but it is expensive.[289] At the same time, transferring multiple pre-embryos can be dangerous and lead to multiple pregnancies, which many patients, doctors, and states have recognized as problematic.[290] As a result, Arizona law currently presents patients seeking IVF in Arizona with tough choices that could affect their health.

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286. *See supra* text accompanying notes 192–93; *see, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 126–27, 127 n.6 (1989) (Justice Scalia's plurality focused on whether a fundamental interest had been traditionally protected).

287. Also of interest is the fact that six of the nine justices have a Catholic background (the remaining three are Jewish). While religious background does not necessarily map onto political ideology, and judges are subject to a variety of influences, not just religion, given the strength of the Catholic church's opposition to abortion and its lobby for embryonic personhood, it could be a factor in any pre-disposition rulings.

288. Dissolution Decree, *supra* note 93, at 20.

289. Jennifer Gerson Uffalussy, *The Cost of IVF: 4 Things I Learned While Battling Infertility*, FORBES (Feb. 6, 2014, 3:00 PM), https://www.forbes.com/sites/learnvest/2014/02/06/the-cost-of-ivf-4-things-i-learned-while-battling-infertility/#3446e85124dd [https://perma.cc/W7UC-7HVP].

290. Alissa Stockage, *Regulating Multiple Birth Pregnancies: Comparing the United Kingdom's Regulatory Scheme with the United States' Progressive, Intimate Decision-Making*

Finally, these laws run the serious risk of denying gamete providers access to the courts. Parties like Torres and Terrell now run the risk of having neither of their interests met if they adjudicate a pre-embryo dispute. In fact, the Arizona legislature has explicitly provided that if a predisposition agreement "is brought before the court" in a divorce proceeding,[291] it will not bind the court. This language currently stands as a warning to Arizona gamete providers not to adjudicate disposition disputes if they want to retain decision-making authority over disposition decisions. At the same time, the legislature's decision is at odds with the statement of both *Torres* courts that they should be guided by the contract, if possible.

For these reasons, intended parents in Arizona who are struggling with infertility should proceed with caution. Arizona is in unsettled territory insofar as pre-embryo dispositions are concerned, and until the procreative liberty issues raised by forced donation and implantation are settled, there is a new law in town.

Approach, 18 MICH. ST. J. INT'L L. 559, 563 (2010); Jane E. Brody, *Some I.V.F. Experts Discourage Multiple Births*, N.Y. TIMES (Oct. 10, 2016), https://www.nytimes.com/2016/10/11/well/family/experts-advise-minimizing-multiple-births-through-ivf.html [https://perma.cc/AC8N-LWSA].

291. ARIZ. REV. STAT. ANN. § 25-318.03 (Supp. 2018).