

## Assisted reproduction post-*Dobbs*: the prospect of legislative protection

On June 24, 2022, the US Supreme Court decided *Dobbs v. Jackson Women's Health Organization*, overruling *Roe v. Wade* and rejecting protection for abortion in the federal constitution (1). In doing so, the Court relegated the "authority to regulate abortion" to the state legislatures (1). The ruling also opened up the possibility of more state restrictions that may not only restrict abortion but also restrict assisted reproductive technologies (ARTs) such as in vitro fertilization (IVF). The threat is not merely theoretical. An existing Louisiana law states that a "viable in vitro fertilized human ovum" constitutes "a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person" (2). A recently enacted Oklahoma law (HB4327) restricting abortion defined "unborn child" to mean a "human fetus or embryo in any stage of gestation from fertilization until birth" (3). The same is true of a recent West Virginia abortion restriction that has an explicit carveout for IVF (4). However, we are already seeing new bills proposed that might not clearly exempt embryo destruction as part of IVF or other ARTs. For example, House Bill No. 1395 (*Rights Beginning at Conception*), now under consideration by the Commonwealth of Virginia, states that "life begins at conception and each person is accorded the same rights and protections guaranteed to all persons by the Constitution of the United States, the Constitution of Virginia, and the laws of the Commonwealth beginning at the moment of conception" (5). The bill is aimed at abortion, but in its current form it is unclear whether it would also apply to the disposition of embryos created through IVF and under what circumstances. In this Inkling, we discuss recent federal legislative efforts responding to these threats aimed at protecting ART-mediated family building.

On August 2, 2022, Senator Patty Murray (D-WA) introduced Senate Bill S.4723 (*Let Doctors Provide Reproductive Health Care Act*) with an identical companion bill (H.R.8650) in the House of Representatives by Representative Kim Schrier (D-WA-8). Now with the Senate Committee on the Judiciary and the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties, the bill has yet to come up for a vote. The bill aims at protecting a very wide swath of reproductive care including abortion services, contraception services, IVF, or other reproductive care, education, and counseling. As written, the bill sets out "protections for...health care providers who offer reproductive health care services that are lawful in the state where the services are provided." Importantly, the bill also specifies that no individual or state may restrict or disadvantage "a health care provider or any individual or entity from providing or assisting a health care provider with reproductive health care services for an individual who does not reside in the state in which the services are to be provided,"

ensuring access for individuals from restrictive states. The bill authorizes the US Attorney General (i.e., the Justice Department) to pursue civil action against states or other entities that violate the law and also provides a private right of action to adversely affected individuals and health care providers for any violation.

Not long thereafter, on December 15, 2022, Senators Tammy Duckworth [D-IL], Patty Murray [D-WA], Tammy Baldwin [D-WI], and Kirsten Gillibrand [D-NY] introduced Senate Bill S.5276 (*Right to Build Families Act of 2022*) more narrowly focused on ARTs. A planned companion House Bill to-be-co-sponsored by Representatives Susan Wild (D-PA-7), Gerry Connolly [D-VA-11], and Rosa DeLauro [D-CT-3] has yet to materialize. As written, the Senate Bill prohibits states from interfering with a patient's access to ARTs, completing an ongoing treatment procedure using an ART, or "retaining all rights regarding the use of reproductive genetic materials, including gametes," with an exception for state measures that "(1) advance the safety of health care services or the health of patients and (2) cannot be advanced by a less restrictive alternative measure or action." The bill enforces these rights by allowing the US Attorney General (i.e., the Justice Department) to pursue civil action against states that violate the law and also provides a private right of action to adversely affected individuals and health care providers for any violation. As recently as December 21, 2022, Senator Duckworth took to the floor of the Senate with an eye toward seeking unanimous consent (absent a roll call vote) for the passage of the bill. However, objections on the part of Senator Cindy Hyde-Smith (R-MO) precluded the passage of the bill at that point in time. It follows that further consideration of the *Right to Build Families Act of 2022* must be deferred to 2023.

Available in the United States since 1981, IVF is all too often the last resort in the redress of infertility. In 2019 alone, a constellation of 450 US-based clinics performed >300,00 IVF cycles. The resultant complement of live infants born (>80,000) comprised close to 2.0% of the total number of infants born in the US that year. Limited by the paucity of insurance policies that cover assisted reproduction, IVF remains beyond the reach of many. Notably, IVF has largely been kept out of the national pro-life/pro-choice debate. This reality may well be attributable to the fact that many members of Congress and relatives thereof have personally resorted to and/or benefited from IVF when and if afflicted by infertility. This steady state, however, may well have been undermined by the outcome of the *Dobbs v. Jackson Women's Health Organization*. The recent failure to advance the *Right to Build Families Act of 2022* may well constitute an early demonstration of this newly established *status quo*.

All indications are that the legislative drive to protect ARTs from the "Dobbs" aftermath will unfold over the course of the 118th United States Congress. Success is hardly assured. Being faced with a Republican majority in the House of Representatives, the drive to shield IVF from the aftereffects of the *Dobbs v. Jackson Women's Health Organization* may well fall short. That said, it is good to recall that IVF has largely been kept out of the crosshairs of the pro-life vs.

pro-choice debate. Moreover, prominent Republicans such as former US Vice President Mike Pence have made it plain that fertility treatments “deserve the protection of the law” (Mike Pence. *So Help Me God*. Simon & Schuster; 2022). Mr. Pence went on to add that IVF afforded him and his wife great comfort in those long and challenging years that they struggled with infertility in their marriage. Viewed in this light, it is at least possible that ARTs may be in a position to hold on to its sheltered status and thereby sidestep the otherwise inevitable aftereffects of the latest post-Roe national debate.

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