

# A Push for Personhood Under a New Guise: Arizona's SB 1393

Emily Morehead\*

## I. INTRODUCTION

Ruby Torres' breast cancer diagnosis not only changed the course of her life but also laid the foundation for recognizing embryonic personhood in Arizona. In June 2014, Torres, an Arizona attorney, discovered she had an aggressive form of breast cancer.<sup>1</sup> Upon learning that cancer treatment could leave her infertile, Torres and her now ex-husband, John Joseph Terrell, decided to undergo in-vitro fertilization ("IVF") treatment.<sup>2</sup> Torres hoped IVF treatment would allow her to have biologically-related children down the road.<sup>3</sup> Although Torres eventually beat her cancer and is now in remission, her marriage ended in a divorce and bitter dispute over what to do with the cryopreserved embryos.<sup>4</sup>

During Torres' divorce proceedings in 2017, Maricopa County Superior Court Judge Ronee Steiner faced the unprecedented question of how to deal with the couple's disputed embryos.<sup>5</sup> Based on the couple's IVF contract, in which the couple consented to a court deciding how to dispose of their embryos in the case of divorce, and the couple's disagreement over what to do with the embryos, Judge Steiner decided to balance the couple's interests.<sup>6</sup> In her analysis, Judge Steiner weighed Torres' interest in having a biologically-related child with Terrell's interest in not becoming a biological parent with Torres.<sup>7</sup>

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\* J.D. Candidate, Sandra Day O'Connor College of Law, Class of 2020. For his time, guidance, and inspiration, thanks to my faculty advisor Kaiponanea Matsumura.

1. Ken Alltucker, *Cancer Survivor Ordered To Give Up Her Embryos*, AZCENTRAL (Sept. 1, 2017, 6:31 PM), <https://www.azcentral.com/story/news/local/arizona-health/2017/08/31/cancer-battling-arizona-woman-ex-husband-ordered-donate-fertilized-embryos/617118001/> [https://perma.cc/TMX6-JV78].

2. *Id.* For an explanation on what IVF is see *infra* Section II.D.

3. Alltucker, *supra* note 1.

4. *Id.*

5. Although other states have dealt with this question, Torres' case was one of first impression in Arizona. *Id.*

6. Terrell v. Torres, 438 P.3d 681, 686 (Ariz. Ct. App. 2019).

7. *See id.*

To Torres' disappointment, Judge Steiner held that Torres could not personally use the embryos because "Terrell's 'right not to be compelled to be a parent outweigh[ed] [Torres'] right to procreate and desire to have a biologically related child.'"<sup>8</sup> Based on this conclusion, and the couple's contractual agreement not to destroy the embryos, Judge Steiner ordered that the embryos be donated to a third party.<sup>9</sup> Torres appealed the ruling and, in March 2019, the Arizona Court of Appeals reversed Judge Steiner's order and held that Torres may use the embryos to become pregnant.<sup>10</sup>

Hoping to prevent a ruling like Judge Steiner's from happening again, Arizona Senator Nancy Barto introduced SB 1393 to the Senate's Health and Human Services Committee in January 2018.<sup>11</sup> SB 1393, which Arizona's governor signed into law on April 3, 2018,<sup>12</sup> mandates that during a proceeding for dissolution of marriage that involves the disposition of IVF embryos, the court *must* award the embryos to the spouse who "intends to allow the in vitro human embryos to develop to birth."<sup>13</sup> The bill protects an embryo's potential for life by enhancing the rights of the spouses who want to use their IVF embryos and prohibiting Arizona judges from ordering IVF embryos to be destroyed. As SB 1393 helps protect an IVF embryo's potential for life, many connect the bill to the personhood movement.

The personhood movement is the push by pro-life advocates to legally define embryos as "persons."<sup>14</sup> Over the past decade, personhood advocates have fought—mostly unsuccessfully—to re-define who a person is in states across the country.<sup>15</sup> Although Arizona has been a vocal supporter of the pro-

8. *Id.*

9. *See id.*

10. *Id.* at 694. Also balancing the parties' interests, the appeals court concluded that Torres' interests outweighed Terrell's. The appeals court afforded substantial weight to the trial court's finding that it would be "extremely improbable" for Torres to have a biologically-related child without the embryos. *Id.* at 691. The appeals court also found it significant that the parties' reason for entering into the IVF process was to preserve Torres' ability to have a biologically-related child. *Id.* Although this holding will greatly impact Torres' and Terrell's lives, the Arizona Legislature's adoption of SB 1393 renders the decision inapplicable elsewhere for the time being.

11. *See Bill History for SB 1393*, AZLEG.GOV, <https://apps.azleg.gov/BillStatus/BillOverview/70559> [<https://perma.cc/4ARJ-VTDP>].

12. *Id.*

13. S.B. 1393, 53d Leg., 2d Reg. Sess. (Ariz. 2018), <https://www.azleg.gov/legtext/53leg/2R/laws/0128.pdf> [<https://perma.cc/FY6E-JUWP>]. *See also* discussion *infra* Section III.A.

14. Greer Gaddie, Note, *The Personhood Movement's Effect on Assisted Reproductive Technology: Balancing Interests Under a Presumption of Embryonic Personhood*, 96 TEX. L. REV. 1293, 1295 (2018).

15. For instance, the movement was unsuccessful in its attempts to add a personhood amendment to the state constitutions of Mississippi, Colorado, and North Dakota. *See* Jonathan

life movement,<sup>16</sup> as of this writing the Arizona State Legislature has not introduced any legislation to explicitly define embryos as persons nor has there been a push for a personhood amendment to the Arizona Constitution.

Although SB 1393 does not explicitly re-define who a person is, many argue that SB 1393 is the beginning of the push for embryonic personhood in Arizona. For instance, the American Society for Reproductive Medicine labeled the bill a “backdoor attempt to achieve the principles of personhood status for embryos”<sup>17</sup> and the International Fertility Law Group argued that “the new law is in fact an end-around aimed at establishing legislatively the ‘personhood’ of unborn embryos.”<sup>18</sup> Pro-life advocates also recognized SB 1393’s connection to the personhood movement—a writer for LifeNews noted that “SB 1393 is profoundly unique in that it recognizes the right to life of human embryos.”<sup>19</sup>

Despite several organizations linking SB 1393 to the personhood movement, SB 1393’s main proponents, Cathi Herrod, president of the Center for Arizona Policy (“CAP”), and Senator Barto, the primary sponsor of SB 1393, deny SB 1393 is a personhood bill.<sup>20</sup> In a news release, CAP

F. Will et al., *Personhood Seeking New Life with Republican Control*, 93 IND. L.J. 499, 506–07 (2018). Despite setbacks, the personhood movement is still alive. For instance, twenty state legislatures introduced personhood measures within the last legislative session. *Personhood*, REWIRE.NEWS, <https://rewire.news/legislative-tracker/law-topic/personhood/> (last modified Nov. 7, 2018) [<https://perma.cc/9MAR-9672>].

16. Dustin Gardiner, *Arizona Ranked Most ‘Pro-Life’ State in U.S. by Anti-Abortion Group*, AZCENTRAL (Jan. 21, 2018, 6:00 AM), <https://www.azcentral.com/story/news/politics/arizona/2018/01/21/arizona-ranked-most-pro-life-state-u-s-anti-abortion-group/1049863001/> [<https://perma.cc/WC6X-JXBR>].

17. Ben Giles, *Embryos in Divorce Dispute at Center of Arizona Senate Bill; Expect ‘Ferocious’ Debate, Says Kaine Fisher, Rose Law Group Partner, Director Family Health Dept.*, ROSE LAW GROUP REP. (Feb. 7, 2018), <https://roselawgroupreporter.com/2018/02/embryos-divorce-dispute-center-arizona-senate-bill/> [<https://perma.cc/5EGB-XJ8L>].

18. Rich Vaughn, *New Embryo Custody Law Strips Arizonans of Reproductive Rights*, INT’L FERTILITY L. GROUP (Apr. 6, 2018), <https://www.iflg.net/az-embryo-custody-law/> [<https://perma.cc/G2XF-FQ93>].

19. Joe Kral, *Much-Needed Pro-Life Law Protects Unborn Babies Created by In-Vitro Fertilization*, LIFE NEWS.COM (July 27, 2018, 3:02 PM), [https://www.lifenews.com/2018/07/27/much-needed-pro\\_life-law-protects-unborn-babies-created-by-in-vitro-fertilization/](https://www.lifenews.com/2018/07/27/much-needed-pro_life-law-protects-unborn-babies-created-by-in-vitro-fertilization/) [<https://perma.cc/7AW4-GKEZ>].

20. See Grace Carr, *Arizona Is Siding with Life in Frozen Embryo Debate. Here’s What You Should Know*, DAILY CALLER (July 18, 2018, 11:19 AM), <https://dailycaller.com/2018/07/18/arizona-frozen-embryos/> [<https://perma.cc/ZXZ2-9TNV>]; Giles, *supra* note 17. CAP categorizes SB 1393 as a “Marriage & Family” bill and not as a “Life” bill. CTR. FOR ARIZ. POL’Y, 2018 FAMILY ISSUES VOTING RECORD ARIZONA STATE SENATE (2018), [http://www.azpolicy.org/wp-content/uploads/2018/05/2018FamilyIssuesVotingRecord-Senate\\_Final.pdf](http://www.azpolicy.org/wp-content/uploads/2018/05/2018FamilyIssuesVotingRecord-Senate_Final.pdf) [<https://perma.cc/WHR4-LVR5>]. According to its website, CAP considers the category of “Life” to include issues like abortion and end of life, and the category of “Marriage

argued that SB 1393 “protect[s] parental rights” because the bill ensures that spouses in Torres’ position can bring their IVF embryos to birth and that spouses in Terrell’s position will not be forced to have any legal obligations toward any resulting child.<sup>21</sup> At a hearing in front of the Senate’s Health and Human Services Committee, Herrod also argued that SB 1393 is meant to give the courts a clear direction on how to resolve disputes over IVF embryos.<sup>22</sup> And, at a separate hearing, House Representative Eddie Farnsworth argued that SB 1393 is intended to treat embryos like any other property.<sup>23</sup>

The debate over SB 1393’s true purpose raises a question: is SB 1393 simply about parent’s rights, giving clear direction to the courts, and treating embryos like any other property, or is it a push for personhood? This comment argues that SB 1393, despite its purported intentions, is a stepping stone for embryonic personhood in Arizona.

This Comment proceeds as follows. Part II lays the groundwork for understanding how a divorce dissolution bill could be the stepping stone for the personhood movement in Arizona by looking at the personhood movement’s place in the pro-life movement and why IVF is of particular concern to the personhood movement. After addressing why it is strategic for personhood advocates to choose a bill like SB 1393 to pursue their goals, this Comment looks to SB 1393 itself. Part III breaks down SB 1393 into three parts—its text, sponsorship, and underlying reasoning. This legislative analysis illuminates the bill’s connection to the personhood movement. After

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& Family” to include issues like marriage, divorce reform, and school choice. *What Issues Does Center for Arizona Policy Address?*, subsection to *Frequently Asked Questions*, CTR. FOR ARIZ. POL’Y, <http://www.azpolicy.org/about/faq/> [https://perma.cc/4G5W-MNM4].

21. *News Release: AZ Lawmakers Protect Parental Rights*, CTR. FOR ARIZ. POL’Y (Mar. 28, 2018), <https://www.azpolicy.org/2018/03/28/az-lawmakers-protect-parental-rights/> [https://perma.cc/C8JZ-LBXV]. The characterization of SB 1393 as a parent’s rights bill is confusing considering that proponents deny SB 1393 confers personhood onto IVF embryos. Don’t IVF embryos have to be considered persons for SB 1393 to qualify as a parent’s rights bill? SB 1393’s proponents never addressed this question. It is possible proponents characterized SB 1393 as a parent’s rights bill because it removes obstacles in the way of the spouses that want to become parents in the future. It is also possible that SB 1393’s proponents characterized the bill this way because they believe IVF embryos should be considered persons but, in the aim of getting the bill passed, did not want to openly admit this.

22. *See SB1393—Dissolution; Human Embryos; Disposition*, AZLEG.GRANICUS.COM at 4:43:45 (Feb. 7, 2018), [http://azleg.granicus.com/MediaPlayer.php?view\\_id=13&clip\\_id=20387&meta\\_id=498417](http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=20387&meta_id=498417) (archival linking does not preserve multimedia).

23. *SB1393—Dissolution; Human Embryos; Disposition*, AZLEG.GRANICUS.COM at 0:35:10 (Mar. 28, 2018), [http://azleg.granicus.com/MediaPlayer.php?view\\_id=13&clip\\_id=21070&meta\\_id=519072](http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=21070&meta_id=519072) (archival linking does not preserve multimedia).

SB 1393's connections to the personhood movement are fully explored, Part IV addresses SB 1393's immediate and potential future consequences for Arizona. Finally, Part V sums up the Comment's major takeaways.

## II. SETTING THE STAGE FOR SB 1393: THE PRO-LIFE AND PERSONHOOD MOVEMENTS

By not defining embryos as persons or declaring that life begins at conception, SB 1393 is noticeably different from past attempts at establishing embryonic personhood.<sup>24</sup> Although SB 1393 does not present itself like the traditional personhood bill, this does not mean SB 1393 is not laying the foundation for embryonic personhood in Arizona. One of the pro-life movement's main strategies, in fact, is to disguise the true intentions of their bills.<sup>25</sup> Therefore, to understand why a bill like SB 1393 could be the stepping stone to embryonic personhood in Arizona, it is important to understand the pro-life and personhood movements.

### A. *The Birth of the Pro-Life Movement*

Although pro-life sentiments existed well before *Roe v. Wade*,<sup>26</sup> the landmark abortion case is largely attributed with sparking the modern pro-life movement.<sup>27</sup> In the decades following *Roe*, pro-life advocates focused much of their attention on completely overturning *Roe*.<sup>28</sup> Pro-life advocates viewed achieving personhood for embryos as the logical first step to overturning *Roe* because of the "Blackmun Hole:"<sup>29</sup> writing for the majority, Justice

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24. See S.B. 1393, 53d Leg., 2d Reg. Sess. (Ariz. 2018), <https://www.azleg.gov/legtext/53leg/2R/laws/0128.pdf> [https://perma.cc/8RZ3-BMNU]. Attempts at establishing embryonic personhood tend to be explicit in their purpose. See, e.g., Rosie Beauchamp, *Moves To Grant Embryos 'Personhood' Advance in Oklahoma but Are Postponed in Virginia*, BIONEW (Feb. 27, 2012), [https://www.bionews.org.uk/page\\_93455](https://www.bionews.org.uk/page_93455) [https://perma.cc/5S37-2RL5] (Oklahoma's Senate moved to "extend the definition of 'person' under State law to include a fetus from the point of conception.").

25. See Caitlin E. Borgmann, *Roe v. Wade's 40th Anniversary: A Moment of Truth for the Anti-Abortion Movement?*, 24 STAN. L. & POL'Y REV. 245, 246 (2013).

26. 410 U.S. 113 (1973). See Alyssa Yoshida, Note, *The Modern Legal Status of Frozen Embryos*, 68 HASTINGS L.J. 711, 717 (2017).

27. Jennifer L. Holland, *Abolishing Abortion: The History of the Pro-Life Movement in America*, THE AM. HISTORIAN, <http://tah.oah.org/november-2016/abolishing-abortion-the-history-of-the-pro-life-movement-in-america/> [https://perma.cc/H86C-M8PN].

28. See Borgmann, *supra* note 25, at 253.

29. See *Personhood in One State Would Hurt All Americans*, REPUBLICAN MAJORITY FOR CHOICE (July 8, 2009), <https://gopchoice.wordpress.com/2009/07/08/personhood-in-one-state->

Blackmun noted that “[i]f . . . personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.”<sup>30</sup> In other words, the Supreme Court acknowledged that abortion would be tantamount to murder if embryonic personhood is established. One such effort at filling the “Blackmun Hole” was the unsuccessful push for the Human Life Amendment, which defined life as beginning at conception, in the 1970s and 80s.<sup>31</sup> If successful, this amendment to the U.S. Constitution would have created a nationwide prohibition on abortion.<sup>32</sup>

Pro-life advocates also set their sights on the Supreme Court overturning *Roe*. During the 1980s, pro-life advocates crafted a Missouri statute that included several sections inconsistent with *Roe*, including a preamble stating that life begins at conception.<sup>33</sup> Pro-life advocates hoped the Missouri statute would result in the overturning of *Roe*.<sup>34</sup> In *Webster v. Reproductive Health Services*, the Supreme Court upheld the Missouri statute while claiming to leave *Roe* untouched.<sup>35</sup> The Court also declined to pass on the constitutionality of the preamble, reasoning that the preamble did not actually regulate abortion and could only be interpreted as offering protections to unborn children in probate and tort law.<sup>36</sup>

In 1992, pro-life advocates failed again in their efforts to overturn *Roe*. In *Planned Parenthood v. Casey*, the Supreme Court upheld *Roe* but allowed the state greater control over a woman’s pregnancy.<sup>37</sup> The Court held that a provision of a law is invalid “if its purpose or effect is to place a substantial

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would-hurt-all-americans/ [https://perma.cc/DN9U-9F2D]. Many pro-life advocates still view personhood as the best way to ban abortion. See generally JOE MUCCILO, DOCUMENTATION ON THE PERSONHOOD MOVEMENT, <http://abolishabortionwi.com/personhood-docs/Personhood-Documentation.pdf> [https://perma.cc/Y54M-VCU4].

30. *Wade*, 410 U.S. at 156–57.

31. Maya Manian, *Lessons from Personhood’s Defeat: Abortion Restrictions and Side Effects on Women’s Health*, 74 OHIO ST. L.J. 75, 78–79 (2013). Pro-life advocates define “conception” as the moment when an egg is fertilized. See, e.g., *Legislatively Overturning Roe v. Wade with a Life at Conception Act (S. 159/H.R. 616 and H.R. 305)*, NAT’L PRO-LIFE ALL., <http://prolifealliance.com/life-at-conception-act/> [https://perma.cc/D7HL-5KDD]; Life at Conception Act of 2019, S. 159, 116th Cong. (2019).

32. Borgmann, *supra* note 25, at 253.

33. The other sections that were inconsistent with *Roe* included: 1) a prohibition on the use of public facilities and employees for abortion; 2) a prohibition on the use of public funding for abortion counseling services; and 3) a mandate that physicians conduct viability tests before each abortion. Randall D. Eggert et al., “Of Winks and Nods”—*Webster’s Uncertain Effect on Current and Future Abortion Legislation*, 55 MO. L. REV. 163, 165–66 (1990).

34. Borgmann, *supra* note 25, at 257.

35. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 521 (1989).

36. *Id.* at 490–91.

37. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 833–34 (1992).

obstacle in the path of a woman seeking an abortion before the fetus attains viability.”<sup>38</sup> This is referred to as the undue burden test. Although *Casey* paved the way for the pro-life movement’s successful incrementalist strategy, the decision shifted the mainstream pro-life movement away from advocating for personhood.<sup>39</sup>

Alongside this initial push for personhood, pro-life advocates also promoted incremental restrictions that made abortion more difficult to obtain, such as laws requiring mandatory waiting periods.<sup>40</sup> After the federal personhood amendment failures and the Supreme Court’s refusal to overturn *Roe*, this less-radical strategy became increasingly popular among members of the mainstream pro-life movement.<sup>41</sup> In addition, by aligning itself with the “family values” movement of the 1970s, the mainstream pro-life movement began to tone down its rhetoric.<sup>42</sup> For example, the movement became less vocal about the association between abortion and murder.<sup>43</sup> With *Casey*’s undue burden test as its weapon, the mainstream pro-life movement dedicated itself to pursuing incremental restrictions on abortion and shying away from radical language.<sup>44</sup>

### B. *The Incrementalism Strategy’s Benefits and Limitations*

The pro-life movement has found its greatest success at slowly whittling away abortion rights while denying that it is doing so. Since *Casey*, pro-life advocates have successfully passed hundreds of state statutes that limit access to abortion.<sup>45</sup> Many of these state statutes survive court scrutiny, in large part, because pro-life advocates defend the statutes as protecting women’s health.<sup>46</sup> With public opinion polls consistently showing that the public supports abortion’s legality, albeit favoring a few restrictions, mainstream pro-life advocates recognize the importance of concealing their efforts at

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38. *Id.* at 878.

39. Borgmann, *supra* note 25, at 258. The pro-life movement’s radical sect reemerged again in 2006 and pushed for several personhood measures. *See infra* note 53 and accompanying text.

40. Holland, *supra* note 27.

41. *See* Will et al., *supra* note 15, at 503.

42. The “family values” movement was a push by Republican strategists and religious conservatives to promote socially conservative causes, like opposition to same-sex marriage. This alliance diluted the extremism of the pro-life position. Borgmann, *supra* note 25, at 254.

43. *Id.*

44. *See id.* at 258.

45. Examples include requiring clinics to have admitting privileges at nearby hospitals and particular widths for clinic doorways. *See History of Abortion in the U.S., OUR BODIES OUR SELVES*, <https://www.ourbodiesourselves.org/book-excerpts/health-article/u-s-abortion-history/> [<https://perma.cc/HW3A-6C5G>].

46. *See* Will et al., *supra* note 15, at 504.

completely banning abortion.<sup>47</sup> For example, in support of Arizona Senate Bill 1394, a bill Senator Barto introduced in the same legislative session as SB 1393, Barto and Herrod took advantage of this strategy.<sup>48</sup> SB 1394 requires abortion providers to ask patients several questions, including the patient's reason for seeking an abortion.<sup>49</sup> Opponents argued that SB 1394 will burden a woman's right to choose because the bill's personal questions shame patients for seeking an abortion.<sup>50</sup> Barto and Herrod, on the other hand, argued that the bill was intended to "promote the health, safety, and well-being of women."<sup>51</sup>

The radical sects of the pro-life movement, on the other hand, remain unconvinced incrementalism will ever outlaw abortion. Although the radical sects never completely disappeared after failing to enact the Human Life Amendment,<sup>52</sup> they largely reemerged in 2006 when they attempted, but failed, to completely ban abortion in South Dakota.<sup>53</sup> In this re-emergence, radical pro-life advocates expressed their frustration with the incrementalist approach and how they felt it had reached its limits.<sup>54</sup> For example, while pushing for a human life amendment to the Georgia constitution in 2007, Georgia Right to Life's president stated that he supported the amendment because "Georgia [had] already passed all of the suggested legislation by

47. See Borgmann, *supra* note 25, at 259.

48. See *SB 1394 - DHS; reporting; abortions*, AZLEG.GRANICUS.COM (Feb. 14, 2018), [http://azleg.granicus.com/MediaPlayer.php?view\\_id=13&clip\\_id=20515&meta\\_id=502313](http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=20515&meta_id=502313) (archival linking does not preserve multimedia).

49. *Arizona Bill Amending Abortion Reporting Requirements (SB 1394)*, REWIRE.NEWS, <https://rewire.news/legislative-tracker/law/arizona-bill-amending-abortion-reporting-requirements-sb-1394/> [<https://perma.cc/J6QE-L2M7>].

50. See *Invasive Arizona Law Seeks To Force Women To Share Personal Information With Government*, PLANNED PARENTHOOD (Apr. 16, 2018, 7:50 PM), <https://www.plannedparenthood.org/about-us/newsroom/press-releases/invasive-arizona-law-seeks-to-force-women-to-share-personal-information-with-government> [<https://perma.cc/F764-EZR5>].

51. *SB 1394 - DHS; reporting; abortions*, *supra* note 48, at 4:13, 26:15.

52. There have always been radical sects in the pro-life movement that remained committed to the idea that incrementalism is problematic. The 1990s, in particular, was marked by several radical activists killing abortion providers. See Borgmann, *supra* note 25, at 263–64.

53. See Evelyn Nieves, *S.D. Abortion Bill Takes Aim at 'Roe,'* WASH. POST (Feb. 23, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/22/AR2006022202424.html?noredirect=on> [<https://perma.cc/2NRU-HG5U>].

54. See, e.g., Flip Benham, *Incrementalism - A Lie from the Pit of Hell!*, OSA: JESUS IS THE STANDARD, <https://www.operationsaveamerica.org/articles/articles/incrementalism.html> [<https://perma.cc/GQQ8-NKYN>]; Mary Ziegler, *The Movement that Could Reshape the Abortion Fight*, WASH. POST (Mar. 20, 2018), [https://www.washingtonpost.com/news/made-by-history/wp/2018/03/20/the-movement-that-could-reshape-the-abortion-fight/?utm\\_term=.c5c4d6f57d1a](https://www.washingtonpost.com/news/made-by-history/wp/2018/03/20/the-movement-that-could-reshape-the-abortion-fight/?utm_term=.c5c4d6f57d1a) [<https://perma.cc/WCP2-DD33>].



[the] National Right to Life” and he felt that the amendment was “the next logical step” to get “beyond just incremental gains.”<sup>55</sup>

For those in the radical sects of the pro-life movement, the next logical step beyond incremental gains remains re-defining who a person is. Daniel Becker, leader of the Personhood Alliance,<sup>56</sup> argues that “[p]ersonhood is not just one battleground of 21st century pro-life discussions; it is the battleground.”<sup>57</sup> Advocating for personhood, Becker argues, “will place the pro-life policy and strategy soundly on the biblical foundation of the whole range of issues embodied in the phrase ‘sanctity of life.’”<sup>58</sup> As Part II.C explores next, many pro-life advocates embrace Becker’s viewpoint and are increasingly pushing for personhood measures.

### *C. In the Face of Failure: The Modern Personhood Movement’s Push for Success*

In 2008, Personhood USA brought the personhood movement back to the national stage.<sup>59</sup> Since sparking the modern movement, Personhood USA has introduced personhood ballot initiatives and legislation in states across the country.<sup>60</sup> Like the movement that came before it, the modern personhood movement’s primary goal is to confer personhood from the moment of fertilization. In the pursuit of achieving embryonic personhood, the personhood movement’s efforts have been largely futile. As of this writing, fourteen states have attempted to place personhood measures on the ballot and only three states—Colorado, Mississippi, and Alabama—succeeded in

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55. Borgmann, *supra* note 25, at 265 (citing Kathy Lohr, ‘Human Life’ Amendments Latest Challenge to Roe, NPR (Jan. 22, 2008), [www.npr.org/templates/story/story.php?storyId=18292863](http://www.npr.org/templates/story/story.php?storyId=18292863) [<https://perma.cc/8S8N-AEKP>]).

56. *Personhood Alliance Elects New Leader To Launch National Education Initiative*, CHRISTIANNEWSWIRE (Jan. 25, 2018), <http://www.christiannewswire.com/news/4877880663.html> [<https://perma.cc/HWD2-KC9J>].

57. Daniel C. Becker, *Personhood: The Future of the Pro-Life Movement in the 21st Century*, 6 LIBERTY U.L. REV. 273, 275 (2012).

58. *Id.* at 280. Becker argues that embryonic personhood will not only ban abortion but protect life whenever it is not respected, such as in practices like IVF and cloning. *See id.* at 281.

59. Manian, *supra* note 31, at 79.

60. *Id.*

putting their measures to a vote.<sup>61</sup> The measure in Alabama passed,<sup>62</sup> while the measures in Colorado and Mississippi failed.<sup>63</sup>

The personhood movement has also faced difficulty passing legislation and upholding its measures in the courtroom. As of this writing, only Kansas and Missouri have passed laws that explicitly define life as beginning at conception.<sup>64</sup> And, in 2012, the Supreme Court of Oklahoma unanimously struck down a ballot initiative to confer personhood status onto embryos because the measure “[was] clearly unconstitutional pursuant to” *Casey*.<sup>65</sup>

Although the personhood movement is not completely defined by failure, the movement’s successes are limited in scope. Arguably the longest standing success of the personhood movement, Louisiana’s statute<sup>66</sup> on the status of IVF embryos only regulates so much. Adopted in 1986, Louisiana’s statute prohibits the destruction of embryos and the use of embryos for research or for any purpose other than contributing to the development of human life.<sup>67</sup> The statute also recognizes embryos as “children with ‘parents’” in various ways, such as by requiring any dispute over IVF embryos to be “resolved in accordance with the ‘best interest of the in vitro fertilized ovum.’”<sup>68</sup> Despite its achievements for the personhood movement, Louisiana’s statute does not

61. Will et al., *supra* note 15.

62. In the November 2018 midterm election, Alabama voters approved a constitutional amendment declaring that it is the public policy of Alabama to support the rights of unborn children. According to supporters, the immediate impact of the amendment is to send the message that every life matters. Beyond that, the amendment leaves specific prohibitions to the legislature. Reproductive rights advocates worry that the amendment will allow further restrictions on abortion access and that the amendment will lead to a total ban on abortion in Alabama if *Roe* is ever overturned. See Marina Fang, *Alabama Voters Approve Anti-Abortion Constitutional Amendment*, HUFFPOST (Nov. 7, 2018, 11:12 PM), [https://www.huffingtonpost.com/entry/alabama-approves-anti-abortion-constitutional-amendment\\_us\\_5bd9e6a9e4b0da7bfc167a4b](https://www.huffingtonpost.com/entry/alabama-approves-anti-abortion-constitutional-amendment_us_5bd9e6a9e4b0da7bfc167a4b) [https://perma.cc/5HM4-RRV6]; Brian Lyman, *Amendment 2: How Far Would Alabama’s Proposed Anti-Abortion Amendment Go?*, MONTGOMERY ADVERTISER (Oct. 25, 2018, 12:52 PM), <https://www.montgomeryadvertiser.com/story/news/politics/2018/10/25/anti-abortion-amendment-alabama-election-ballot-amendment-2-meaning/1448690002/> [https://perma.cc/5WHB-GPC8].

63. See *infra* notes 71–75 and accompanying text.

64. Neither law conflicts with the right to obtain an abortion. See Will et al., *supra* note 15 and accompanying text.

65. *In re* Initiative Petition No. 395, State Question No. 761, 286 P.3d 637, 637 (Okla. 2012).

66. LA. REV. STAT. ANN. § 9:123 (2018).

67. June Carbone & Naomi Cahn, *Embryo Fundamentalism*, 18 WM. & MARY BILL RTS. J. 1015, 1038–40 (2010).

68. *Id.* at 1040–41.

conflict with the right to obtain an abortion or explicitly reject the indefinite storage of frozen embryos.<sup>69</sup>

Observers attribute the modern personhood movement's failures to public concerns about how embryonic personhood impacts aspects of women's health beyond abortion.<sup>70</sup> The failure of Mississippi's personhood ballot initiative, for example, is largely attributed to public concern about the initiative's impact on women's health.<sup>71</sup> Exit polls indicated that the two most common reasons for why voters rejected the initiative involved concerns about the amendment's potential implications for pregnancy treatment and IVF.<sup>72</sup> The personhood movement faced a similar defeat in Colorado where voters rejected personhood ballot initiatives twice.<sup>73</sup> Opponents to the Colorado amendments launched anti-personhood campaigns that educated voters on how the amendments could negatively impact the care women receive for miscarriages and infertility.<sup>74</sup>

Acknowledging the major failures of the personhood movement so far, personhood activists recognize embryonic personhood cannot be achieved all at once.<sup>75</sup> Personhood activists still see value in pushing for personhood measures, however, because these measures can lay the foundation for personhood in the future. For instance, one observer, Brendan Pons, argues that although "[p]ersonhood measures . . . are unconstitutional if they seek to ban all abortions. . . . [p]ersonhood measures can . . . have alternative effects on the opinions of the population."<sup>76</sup> Pointing to the preamble upheld in *Webster* as an example,<sup>77</sup> Pons argues that while policy statements may not ban abortion, they are the "first significant step down a process leading to outlawing abortion, as respecting the humanity of the unborn will logically

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69. *Id.* at 1041. The statute has also created problems for Louisiana's fertility industry. For example, the industry is dealing with the increasing problem of what to do with Louisiana's growing stock of frozen embryos. Britney Glaser, *The Fertility Dilemma: Frozen Embryos*, 7KPLC NEWS (Mar. 27, 2009, 11:57 AM), <http://www.kplctv.com/story/10081861/the-fertility-dilemma-frozen-embryos/> [<https://perma.cc/9S76-YVDL>]. And, despite criticism, the statute has not been challenged. See Alexandra Faver, *Whose Embryo is It Anyway?: The Need for a Federal Statute Enforcing Frozen Embryo Disposition Contracts*, 55 FAM. CT. REV. 633, 638 (2017).

70. See, e.g., Manian, *supra* note 31, at 86; Will et al., *supra* note 15, at 507.

71. See Manian, *supra* note 31, at 100.

72. See Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39 AM. J.L. & MED. 573, 585 (2013).

73. Manian, *supra* note 31, at 101.

74. *Id.*; see Will, *supra* note 72, at 583.

75. See, e.g., T.J. Scott, *Why State Personhood Amendments Should Be Part of the Pro-life Agenda*, 6 U. ST. THOMAS J.L. & PUB. POL'Y 222, 231–32 (2011).

76. Brendan F. Pons, Comment, *The Law and Philosophy of Personhood: Where Should South Dakota Abortion Law Go from Here?*, 58 S.D. L. REV. 119, 153 (2013).

77. See *supra* note 35 and accompanying text.

demand re-examination of abortion laws.”<sup>78</sup> Another pro-life scholar, T.J. Scott, also recognizes the importance of small victories for the personhood movement. In his paper on why the pro-life movement should continue to push for personhood amendments, Scott presents several ways in which personhood amendments can lay the foundation for embryonic personhood in the future:

First, a personhood amendment could secure the rights of the unborn to the extent possible under current federal law. The state would recognize its right and duty to protect the unborn, a subset of persons, under the rights and privileges available in its constitution. Second, a personhood amendment could create a foundation on which the state could build in abortion regulation if Roe is ever overturned. Third . . . there is a chance that a personhood amendment could give rise to a test case that would challenge and potentially overrule Roe.<sup>79</sup>

Pons’s and Scott’s arguments reflect how the personhood movement accepts that personhood measures cannot immediately bring about the change desired but believes that the movement can still find success through incremental restrictions, policy statements, and laws that lay the foundation for more radical measures in the future.

#### *D. The Personhood Movement’s Problem with IVF*

To understand how a bill like SB 1393 could be a stepping-stone to embryonic personhood in Arizona, it is also important to understand why IVF is an area of particular concern for the personhood movement. IVF, the most prevalent form of assisted reproductive technology (“ART”),<sup>80</sup> is a treatment that helps individuals struggling with infertility to conceive children.<sup>81</sup> During the first step in the IVF process, the woman takes a hormonal medication to produce an increased amount of eggs.<sup>82</sup> The eggs are then transferred to a laboratory where they are inseminated.<sup>83</sup> If the eggs are successfully fertilized, the cells begin to divide just as they would within the human body.<sup>84</sup> Once this process begins, implantation can commence. Medical professionals generally implant more than one embryo in the

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78. Pons, *supra* note 76, at 155.

79. See Scott, *supra* note 75, at 233.

80. Yoshida, *supra* note 26, at 714.

81. Gaddie, *supra* note 14, at 1300.

82. *Id.*

83. *Id.*

84. Faver, *supra* note 69, at 635.

woman's uterus to better the chances of pregnancy.<sup>85</sup> If this implantation leads to multifetal pregnancy, physicians often encourage their patients to consider selective reduction, which involves terminating the additional fetuses.<sup>86</sup>

If there are any embryos remaining at the end of the IVF process, the embryos are generally cryopreserved at a low temperature to keep them viable in case the couple wants to use them later.<sup>87</sup> One of the major issues that arises during this process is what to do with the embryos that the couple chooses not to use.<sup>88</sup> The potential options include discarding the embryos, donating the embryos for research, or giving the embryos to other individuals for reproductive purposes.<sup>89</sup>

As the IVF process involves fertilizing more embryos than a couple intends to use, the treatment poses big problems for the personhood movement. For instance, Daniel Becker takes issue with the selective reduction process because it “kill[s] all but one or two of [the children implanted].”<sup>90</sup> Personhood advocates also find it problematic that unused embryos are often frozen or donated to research.<sup>91</sup> With these issues in mind, personhood advocates argue IVF needs to be reformed to better ensure that IVF embryos are brought to birth.<sup>92</sup>

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85. Gaddie, *supra* note 14, at 1300.

86. Mary A. Scott, *Hard Choices: Where To Draw the Line on Limiting Selection in the Selective Reduction of Multifetal Pregnancies*, 100 MINN. L. REV. 1211, 1229–30 (2016).

87. Yoshida, *supra* note 26, at 714–15.

88. Carbone & Cahn, *supra* note 67, at 1016.

89. *Id.*

90. Becker, *supra* note 57, at 276.

91. See, e.g., *In Vitro Fertilization (IVF) Issues*, CTR. FOR ARIZ. POL'Y, <https://web.archive.org/web/20190307114308/http://www.azpolicypages.com/life/in-vitro-fertilization-ivf-issues/> [<https://perma.cc/94Q3-JYEJ>]. It is estimated that almost one million frozen IVF embryos are in storage either awaiting implantation or use for research. See Juli Fraga, *After IVF, Some Struggle with What to Do with Leftover Embryos*, NPR (Aug. 20, 2016, 7:00 AM), <https://www.npr.org/sections/health-shots/2016/08/20/489232868/after-ivf-some-struggle-with-what-to-do-with-leftover-embryos> [<https://perma.cc/2LA3-CMPS>]. In addition, researchers at Yale estimate that about 95% of IVF embryos are discarded. Michael Cook, *How Many Embryos Are Destroyed in IVF?*, BIOEDGE (Apr. 11, 2009), [https://www.bioedge.org/bioethics/bioethics\\_article/how\\_many\\_embryos\\_are\\_destroyed\\_in\\_ivf](https://www.bioedge.org/bioethics/bioethics_article/how_many_embryos_are_destroyed_in_ivf) [<https://perma.cc/R56Q-RT9D>].

92. See, e.g., Ariana Eunjung Cha, *Under New Arizona Law, Custody of Disputed Embryos Goes to Whoever Will Help Them 'Develop to Birth,'* SEATTLE TIMES (July 18, 2018, 7:29 PM), <https://www.seattletimes.com/nation-world/under-new-arizona-law-custody-of-disputed-embryos-goes-to-whoever-will-help-them-develop-to-birth/> [<https://perma.cc/4ASA-D2LZ>]; Yoshida, *supra* note 26, at 713.

### III. SB 1393'S CONNECTIONS TO THE PERSONHOOD MOVEMENT

In light of the pro-life movement's history and the nature of IVF, it makes sense why a bill like SB 1393 would be the chosen format for pro-life advocates to push for personhood in Arizona. By framing SB 1393 as anything but a personhood bill, SB 1393's proponents took cues from incrementalism's secretive approach and shied away from the explicit attempts at re-defining personhood that have led to the downfall of many personhood measures. And, by requiring Arizona courts to award IVF embryos to the spouse who intends to bring those embryos to birth, SB 1393's proponents embraced the notion that greater protections for embryos and policy statements recognizing the special status of embryos are the way to achieve embryonic personhood in the future.

SB 1393's text, sponsorship, and underlying reasoning further strengthen the argument that the bill is a push for personhood, and not simply a parent's rights bill, a way to give clear direction to the courts, or an ordinary means of dividing marital property. This section analyzes each in turn.

#### A. SB 1393's Text

SB 1393's basic premise is that, during a divorce, the court *shall* award a couple's IVF embryos "to the spouse who intends to allow the in vitro human embryos to develop to birth."<sup>93</sup> The specifics of the bill are as follows.

In the scenario where both spouses "intend to allow the in vitro human embryos to develop to birth and both spouses provided their gametes" for the embryos, SB 1393 specifies that a court shall resolve the dispute in a manner that "provides the best chance for the in vitro human embryos to develop to birth."<sup>94</sup> If both spouses want to bring the embryos to birth but only one provided the gametes, the spouse who provided the gametes shall get the embryos.<sup>95</sup>

As for the spouse that is not awarded the embryos and/or does not consent to being a parent, SB 1393 states that the spouse "has no parental responsibilities and no right, obligation or interest with respect to any child resulting from the disputed in vitro human embryos."<sup>96</sup> For the spouse that is not awarded the embryos but provided the gametes and wants to be a parent, that spouse can consent in writing to be a parent.<sup>97</sup> Further, if the spouse that

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93. S.B. 1393, 53d Leg., 2d Reg. Sess. (Ariz. 2018), <https://www.azleg.gov/legtext/53leg/2R/laws/0128.pdf> [<https://perma.cc/SP2Y-K59A>].

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

provides the gametes does not consent to being a parent, that spouse must provide the spouse awarded the IVF embryos with a written report that includes their health and genetic history.<sup>98</sup>

SB 1393 also specifies that its provisions override any prior “agreement between the spouses concerning the disposition of the in vitro embryos.”<sup>99</sup> Finally, although not explicit in the bill’s text, SB 1393’s proponents clarified during legislative hearings that SB 1393 does not allow a court to order the embryos destroyed or given to a third party.<sup>100</sup>

SB 1393’s text raises red flags that indicate the bill is primarily a push for personhood. The first red flag is how radically different the law is from how all other courts around the country resolve disputes over IVF embryos during divorce. Generally, states follow one of three methods for resolving IVF embryo disputes.

One method is the balancing-of-interests approach. In 1992, the Supreme Court of Tennessee established the balancing-of-interests approach<sup>101</sup> in *Davis v. Davis*.<sup>102</sup> In *Davis*, the court held that when there is no valid, prior written agreement between the parties about what to do with their IVF embryos in the case of divorce, the court has to balance the parties’ constitutional interests.<sup>103</sup> Under the U.S. Constitution, individuals have the right to procreate and the right to avoid procreation.<sup>104</sup> Weighing these two competing interests, the Tennessee court found that the party who does not wish to procreate generally has a stronger constitutional interest than the party who wishes to procreate, unless the party who wishes to procreate is infertile.<sup>105</sup>

The second method is the contract approach. Courts following this approach simply enforce the couple’s contractual agreement about what to do with their embryos.<sup>106</sup>

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98. *Id.*

99. *Id.* For example, if a couple signed an agreement to dispose of their embryos in the case of a divorce and end up going through a divorce, a judge presiding over their divorce would have to ignore this agreement and award the embryos to the spouse who intends to allow the embryos to develop to birth.

100. *SB 1393 – Dissolution; Human Embryos; Disposition, supra* note 23.

101. Faver, *supra* note 69, at 636.

102. 842 S.W.2d 588 (Tenn. 1992).

103. *Id.* at 604.

104. *See* *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

105. *See* *Davis*, 842 S.W.2d at 604.

106. Faver, *supra* note 69, at 637.

The third method that some courts follow is the “contemporaneous-consent” approach.<sup>107</sup> Under this approach, courts only consider a couple’s contractual agreement when the dispute is between the couple and their fertility clinic.<sup>108</sup> If a couple disagrees about what to do with their embryos, courts generally rule in favor of the spouse who does not wish to procreate.<sup>109</sup>

SB 1393, on the other hand, completely disregards the interests of the spouse who does not wish to procreate. Although the bill makes sure the non-consenting spouse does not *legally* become a parent, SB 1393 does not address the non-consenting spouse’s desire to not become a *biological* parent. If SB 1393 was truly a parent’s rights bill, the bill would uphold the couple’s prior agreement. And, in the case where there is no prior agreement, it would at least consider the interests of the spouse that does not wish to have children. Instead, the bill completely overrides a key piece of evidence that indicates what the couple truly wants—their prior agreement—and only upholds the interests of the spouse that wishes to procreate. If we think about SB 1393 as a push for personhood, it makes sense why the bill’s proponents would only want the bill to favor the interests of the spouse that wishes to procreate. For personhood advocates, diverting from the three primary methods is necessary because these approaches often favor the party who does not wish to procreate, thereby diminishing the chances for IVF embryos to be brought to birth.

It is also a red flag how similar SB 1393’s text is to predictions on how embryo disputes would be resolved in a state that recognizes embryonic personhood. For example, in a law review article on personhood and ARTs, Mark Strasser argues that courts “generally refus[ing] to award embryos to those who wished to use them when one of the progenitors objected to their use . . . would likely change dramatically in a state where personhood began at conception.”<sup>110</sup> Strasser goes on to address a court decision he believes would come out differently under a personhood regime. In *Cwik v. Cwik*,<sup>111</sup> a case dealing with a divorce and dispute over IVF embryos, the husband asked the Ohio appellate court to disregard the couple’s prior agreement, which stated that the wife would keep their IVF embryos in the case of divorce.<sup>112</sup> The husband claimed it was in the IVF embryos’ best interest for him to win because his wife opposed their implantation and he would hire a

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107. *Id.*

108. *Id.*

109. *Id.*

110. Mark Strasser, *The Next Battleground? Personhood, Privacy, and Assisted Reproductive Technologies*, 65 OKLA. L. REV. 177, 201 (2013).

111. No. C-090843, 2011 WL 346173 (Ohio Ct. App. Feb. 4, 2011).

112. Strasser, *supra* note 110, at 217.



surrogate to bring the embryos to birth.<sup>113</sup> The court, at least in part, rejected the husband's argument because courts had "not afforded frozen embryos legally protected interests akin to persons."<sup>114</sup> Strasser argues it would have been difficult for the *Cwik* court to "justify awarding [the embryos] to an individual who opposed their implantation" if *Cwik* was "decided in a state where frozen embryos [are] considered persons."<sup>115</sup> Although SB 1393 does not re-define who a person is, its effects are strikingly similar to Strasser's predictions. If the *Cwik* case took place in Arizona today, the court would ignore the couple's prior agreement and award the embryos to the husband. As SB 1393 creates similar consequences to that of a personhood law, it is even clearer that SB 1393 is a push for embryonic personhood.

In addition to recognizing SB 1393's connection to embryonic personhood, it is also important to be aware of SB 1393's limited scope. As it currently stands, SB 1393 only regulates the disposition of IVF embryos in the event of a divorce. Therefore, if a couple decides to destroy their embryos or donate them to a third party before a divorce proceeding begins, SB 1393 does not prevent that couple from doing so. Thus, the number of individuals impacted directly by SB 1393 is small. Despite its limited scope, however, SB 1393 still lays the foundation for embryonic personhood in Arizona.<sup>116</sup>

#### B. SB 1393's Sponsorship

Looking at the background of SB 1393's supporters and sponsors also sheds light on the bill's connection to the personhood movement. In Arizona's House and Senate, support for SB 1393 fell strictly along party lines. The only Democratic legislator who voted in support of SB 1393 is a pro-life advocate.<sup>117</sup>

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113. *Id.*

114. *Cwik*, 2011 WL 346173, at \*9.

115. Strasser, *supra* note 110, at 217.

116. See discussion *infra* Part III.C & IV.

117. Catherine Miranda signed CAP's "pro-life pledge," which states that *Roe* is unconstitutional and "demands full 'personhood rights' for fetuses at any stage of development," and voted for several pro-life bills during her career as an Arizona legislator. *10 Things Every Voter Should Know About Catherine Miranda*, PLANNED PARENTHOOD (Nov. 3, 2014), <http://advocatesaz.org/2014/11/03/10-things-every-voter-should-know-about-catherine-miranda/> [<https://perma.cc/GA2T-DXPC>].

The following chart delineates the Senate's voting record for SB 1393.<sup>118</sup>

<b>Senator</b>	<b>Party</b>	<b>Vote</b>	<b>Senator</b>	<b>Party</b>	<b>Vote</b>
Allen, S	R	Yes	Hobbs	D	No
Barto	R	Yes	Kavanagh	R	Yes
Borrelli	R	Yes	Kerr	R	Yes
Bowie	D	No	Mendez	D	No
Bradley	D	No	Meza	D	No
Brophy McGee	R	Yes	Miranda	D	Yes
Burges	R	Yes	Otondo	D	No
Cajero Bedford	D	No	Peshlakai	D	No
Contreras	D	No	Petersen	R	Yes
Dalessandro	D	No	Pratt	R	Yes
Fann	R	Yes	Quezada	D	No
Farley	D	No	Smith	R	Yes
Farnsworth, D	R	Yes	Worsley	R	Yes
Gray	R	Yes	Yarbrough	R	Yes
Griffin	R	Yes	Yee	R	Yes

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118. CTR. FOR ARIZ. POLICY, *supra* note 20.

Legislators in the House also voted strictly along party lines.<sup>119</sup>

<b>Representative</b>	<b>Party</b>	<b>Vote</b>	<b>Representative</b>	<b>Party</b>	<b>Vote</b>
Allen, J	R	Yes	Grantham	R	Yes
Alston	D	No	Hernandez	R	Yes
Andrade	D	No	John	D	No
Barton	R	Yes	Kern	R	Yes
Benally	D	No	Lawrence	R	N/A
Blanc	D	No	Leach	R	Yes
Bolding	D	No	Livingston	R	Yes
Bowers	R	Yes	Martinez	D	No
Boyer	R	Yes	Mesnard	R	Yes
Butler	D	No	Mitchell	R	Yes
Campbell	R	Yes	Mosley	R	N/A
Cardenas	D	No	Navarrete	D	No
Carter	R	Yes	Norgaard	R	Yes
Chavez	D	No	Nutt	R	Yes
Clark	D	No	Payne	R	Yes
Clodfelter	R	Yes	Peten	D	No
Cobb	R	Yes	Powers Hannley	D	No
Coleman	R	Yes	Rios	D	No
Cook	R	Yes	Rivero	R	Yes
Descheenie	D	No	Saldate	D	No
Dunn	R	Yes	Salman	D	No
Engel	D	No	Shope	R	Yes
Epstein	D	No	Stringer	R	Yes
Espinoza	D	No	Syms	R	Yes
Farnsworth, E	R	Yes	Thorpe	R	Yes
Fernandez	D	No	Toma	R	Yes
Finchem	R	Yes	Townsend	R	Yes
Friese	D	No	Udall	R	Yes
Gabaldon	D	No	Ugenti-Rita	R	Yes
Gonzales	D	No	Weninger	R	Yes

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119. CTR. FOR ARIZ. POLICY, 2018 FAMILY ISSUES VOTING RECORD: ARIZONA STATE HOUSE OF REPRESENTATIVES (2018), [http://www.azpolicy.org/wp-content/uploads/2018/05/2018FamilyIssuesVotingRecord-House\\_Final.pdf](http://www.azpolicy.org/wp-content/uploads/2018/05/2018FamilyIssuesVotingRecord-House_Final.pdf) [<https://perma.cc/6AQS-ARHZ>].

SB 1393’s eleven sponsors, all Republicans, also share strong ties to the pro-life and personhood movements.<sup>120</sup> Senator Barto, SB 1393’s prime sponsor, believes that the “right to life is fundamental” and, according to her personal website, “has sponsored & promoted legislation protecting the most vulnerable at *every stage of life*.”<sup>121</sup>

The co-sponsors of SB 1393 also share pro-life sentiments. Senator Allen, for example, was endorsed by the Arizona Right to Life when she ran for her Senate position and prides herself on her 100% voting record for pro-life causes.<sup>122</sup> Senator Yee, another co-sponsor of the bill, was endorsed by the Susan B. Anthony List<sup>123</sup> during her run for Arizona State Treasurer in 2018 and is a charter member of the National Pro-Life Women’s Caucus.<sup>124</sup> On their respective websites, Senators Kerr and Petersen list protecting the sanctity of life as one of their main priorities.<sup>125</sup> The other co-sponsors of SB 1393<sup>126</sup> have also shown their support for the pro-life movement by backing other pro-life bills.<sup>127</sup>

CAP, the organization Herrod appeared on behalf of during the hearings for SB 1393, is also a strong supporter of the pro-life movement. CAP is a “nonprofit research and education organization committed to promoting and defending the foundational values of life, marriage & family, and religious freedom.”<sup>128</sup> On its website, CAP demonstrates an explicit support for the personhood movement. For example, in a blog post on IVF issues, CAP wrote that “[a]n embryo is a human life at its earliest stage of development.”<sup>129</sup>

SB 1393’s sponsors have also pledged their support to other types of pro-life legislation. Along with SB 1393, Senator Barto was the prime sponsor of

120. *Sponsor/Keyword/Sections*, Subsection to *Bill Status Inquiry SB 1393*, AZLEG.GOV, <https://apps.azleg.gov/BillStatus/BillOverview/70559> [<https://perma.cc/4ARJ-VTDP>].

121. *Principles*, NANCYBARTO.COM, <https://nancybarto.com/wordpress/issues/> [<https://perma.cc/S5ZB-43R3>].

122. Senator Sylvia Allen, *Senator Sylvia Allen Pro Life*, FACEBOOK, <https://www.facebook.com/SenatorSylviaAllen/videos/1610193475943292/> (archival linking does not preserve multimedia).

123. The Susan B. Anthony List is a pro-life advocacy group. See SUSAN B. ANTHONY LIST, <https://www.sba-list.org/> [<https://perma.cc/RAN9-FWUJ>].

124. *Susan B. Anthony List Proudly Endorses Kimberly Yee for Arizona State Treasurer*, KIMBERLY YEE: ST. TREASURER (Feb. 21, 2018), <https://www.kimberlyyee.com/blog/> [<https://perma.cc/5V4A-6TW3>].

125. See *Priorities: Families*, VOTEKERR.COM, <https://votekerr.com/priorities/> [<https://perma.cc/458B-GXQ2>]; *Warren on the Issues*, VOTEWARRENPETERSEN.COM, <https://votewarrenpetersen.com/issues/> [<https://perma.cc/8YPD-XANG>].

126. The other co-sponsors of SB 1393 are Senators Burges, Farnsworth, Gray, and Griffin. *Sponsor/Keywords/Sections*, Subsection to *Bill Status Inquiry SB 1393*, *supra* note 120.

127. See *infra* notes 131–35 and accompanying text.

128. *Frequently Asked Questions*, *supra* note 20.

129. *Id.*

SB 1394, an abortion-reporting bill Barto introduced in the same legislative session as SB 1393.<sup>130</sup> Except for Senator Borrelli, all of SB 1393's sponsors signed on as co-sponsors for the bill.<sup>131</sup>

Over the last couple years, many of SB 1393's sponsors also signed on in support of the following pro-life legislation:<sup>132</sup>

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130. See *SB 1394—DHS; reporting; abortions*, *supra* note 48 and accompanying text.

131. *Sponsor/Keywords/Sections*, Subsection to *Bill Status Inquiry SB 1393*, AZLEG.GOV, <https://apps.azleg.gov/BillStatus/BillOverview/70559> [<https://perma.cc/RNQ9-LACL>].

132. On to its website, CAP characterizes these bills as supporting “Life.” See CTR. FOR ARIZ. POLICY, 2017 FAMILY ISSUES VOTING RECORDS: ARIZONA STATE SENATE (2017), [https://www.azpolicy.org/wp-content/uploads/2017/05/2017FamilyIssuesVotingRecord-Senate\\_Final3.pdf](https://www.azpolicy.org/wp-content/uploads/2017/05/2017FamilyIssuesVotingRecord-Senate_Final3.pdf) [<https://perma.cc/ZHS3-Y2NM>]; CTR. FOR ARIZ. POLICY, 2016 FAMILY ISSUES VOTING RECORDS: ARIZONA STATE SENATE (2016), <https://www.azpolicy.org/wp-content/uploads/2017/05/Senate-2016.pdf> [<https://perma.cc/XR8K-4CBF>].

Senate Bill	SB 1393 Sponsors
<b>SB 1367</b> (2017) <sup>133</sup>	<ul style="list-style-type: none"> <li>- Barto</li> <li>- Allen, S</li> <li>- Borrelli</li> <li>- Burges</li> <li>- Farnsworth, D</li> <li>- Griffin</li> <li>- Kavanagh</li> <li>- Petersen</li> <li>- Yee</li> </ul>
<b>SB 1324</b> (2016) <sup>134</sup>	<ul style="list-style-type: none"> <li>- Yee (prime)</li> <li>- Barto (prime)</li> <li>- Kavanagh (prime)</li> <li>- Borrelli (prime)</li> <li>- Allen, S</li> <li>- Farnsworth, D</li> <li>- Griffin</li> </ul>
<b>SB 1474</b> (2016) <sup>135</sup>	<ul style="list-style-type: none"> <li>- Barto (prime)</li> <li>- Allen, S (prime)</li> <li>- Farnsworth, D (prime)</li> <li>- Kavanagh (prime)</li> <li>- Yee (prime)</li> <li>- Borrelli (prime)</li> <li>- Petersen (prime)</li> <li>- Burges</li> <li>- Griffin</li> <li>- Gray</li> </ul>

133. *Sponsor/Keywords/Sections*, Subsection to *Bill Status Inquiry SB 1367*, AZLEG.GOV, <https://apps.azleg.gov/BillStatus/BillOverview?Sessionid=119> (insert bill number 1367 in “Bill Number” search bar; then press “Search” button; then click “Sponsor/Keyword/Sections” tab) (archival does not allow for search functions). SB 1367 strengthened existing Arizona law that requires doctors to perform life-saving measures on fetuses that survive abortions. *See Arizona Bill Regarding Born-Alive Reporting (SB 1367)*, REWIRE.NEWS, <https://rewire.news/legislative-tracker/law/arizona-bill-regarding-born-alive-reporting-sb-1367/> [https://perma.cc/3MME-A4S7].

134. *Sponsor/Keywords/Sections*, Subsection to *Bill Status Inquiry SB 1324*, AZLEG.GOV, <https://apps.azleg.gov/BillStatus/BillOverview?Sessionid=119> (insert bill number 1324 in “Bill Number” search bar; then press “Search” button; then click “Sponsor/Keyword/Sections” tab) (archival does not allow for search functions). SB 1324 placed new restrictions on medications that induce abortions. *See Arizona Bill Restricting Medication Abortions (SB 1324)*, REWIRE.NEWS, <https://rewire.news/legislative-tracker/law/arizona-bill-restricting-medication-abortions-sb-1324/> [https://perma.cc/5N72-EK62].

135. *Sponsor/Keywords/Sections*, Subsection to *Bill Status Inquiry SB 1474*, AZLEG.GOV, <https://apps.azleg.gov/BillStatus/BillOverview?Sessionid=119> (insert bill number 1474 in “Bill Number” search bar; then press “Search” button; then click “Sponsor/Keyword/Sections” tab) (archival linking does not allow for search functions). SB 1474 prohibits the use of a human fetus or embryo obtained from an abortion for research purposes. *See Arizona Bill Prohibiting Fetal Tissue Research (SB 1474)*, REWIRE.NEWS, <https://rewire.news/legislative-tracker/law/arizona-bill-prohibiting-fetal-tissue-research-sb-1474/> [https://perma.cc/2EMA-NXZP].

Taken together, the strong connection between SB 1393's supporters and the pro-life movement provides further support that SB 1393 is a push for embryonic personhood.

In light of such a clear pro-life and partisan backing, it is hard to believe that SB 1393's only goal is to protect parent's rights and make IVF embryo disputes easier for the courts.

### C. SB 1393's Underlying Reasoning

Finally, SB 1393's underlying reasoning indicates the bill is a push for embryonic personhood. Although SB 1393's proponents made several non-personhood arguments in favor of the bill, opponents' criticisms of the bill and the proponents' later responses to those criticisms reveal SB 1393 is a personhood bill in disguise.

During hearings on the bill, SB 1393's proponents focused their attention on the trial court's ruling in Ruby Torres' case. Senator Barto and Herrod argued that SB 1393 is necessary because, with no prior case law in Arizona about how to resolve a dispute over IVF embryos during a divorce, the legislature needed to give the courts a clear direction.<sup>136</sup> Both proponents emphasized that SB 1393 is necessary to ensure that courts do not have the discretion to deny a biological parent, like Ruby Torres, a chance at parenthood again.<sup>137</sup>

As SB 1393 recognizes the wishes of parents who want to use their IVF embryos to have a child, Senator Barto and Herrod argued that the bill fights for parents' rights.<sup>138</sup> In a publication on SB 1393, CAP emphasized that SB 1393 is a parents' rights bill because it "protects a parent's right to his or her in vitro embryos in a divorce proceeding" and protects the interests of the spouse who does not want the embryos by "remov[ing] any right, obligation, or interest between the spouse and any resulting child."<sup>139</sup>

In addition to arguing that SB 1393 protects parents' rights, Herrod put a strong emphasis on public policy. During two separate hearings, Herrod

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136. See *SB1393–Dissolution; Human Embryos; Disposition*, AZLEG.GRANICUS.COM at 0:22:46 (Feb. 22, 2018), [http://azleg.granicus.com/MediaPlayer.php?view\\_id=13&clip\\_id=20646&meta\\_id=507425](http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=20646&meta_id=507425) (archival linking does not preserve multimedia); Giles, *supra* note 17.

137. See Cha, *supra* note 92; Giles, *supra* note 17.

138. *SB1393–Dissolution; Human Embryos; Disposition*, *supra* note 22 at 0:04:46; *SB 1393–Dissolution; Human Embryos; Disposition*, *supra* note 136 at 0:21:35.

139. FAMILY ISSUE FACT SHEET: PARENTAL RIGHT TO EMBRYO, CTR. FOR ARIZ. POLICY (Feb. 2018), [http://www.azpolicy.org/wp-content/uploads/2018/01/f18-03-Parental-Right-to-Embryo-Bill\\_Final2.pdf](http://www.azpolicy.org/wp-content/uploads/2018/01/f18-03-Parental-Right-to-Embryo-Bill_Final2.pdf) [<https://perma.cc/RD8C-WTGG>].

stressed that SB 1393 is setting the public policy for Arizona.<sup>140</sup> Specifically, Herrod explained that SB 1393 is “setting the public policy that when there is a dispute . . . and one party is more likely to bring the embryos to birth, then that party gets awarded the embryos.”<sup>141</sup> By setting this policy, Herrod explained, SB 1393 makes contracts that contradict it null and void.<sup>142</sup> In other words, Herrod argued that SB 1393 justifiably overrides a couple’s prior agreement because SB 1393 makes it against Arizona public policy to dispose of embryos in a way that does not bring them to birth.

Finally, SB 1393’s proponents stressed how commonplace the bill is. For instance, Representative Farnsworth argued that SB 1393 treats embryos like any other property.<sup>143</sup>

Although these arguments did not expressly connect SB 1393 to personhood, opponents remained skeptical about SB 1393’s true purpose. In pointing out how SB 1393 does not work in the best interests of both spouses and leaves many unresolved consequences, SB 1393’s opponents illuminated the bill’s connection to personhood. Resolve,<sup>144</sup> a national fertility association, is one such opponent. During a hearing in front of the Senate’s Health and Human Services committee, Dr. Mark Johnson, on behalf of Resolve, argued that SB 1393 limits an individual’s right for self-determination because the bill ignores a couple’s previously agreed upon directive for embryo disposition.<sup>145</sup> Dr. Johnson also pointed out how SB 1393 would force a judge to award IVF embryos to an unfit spouse if that spouse expressed an intent to allow the embryos to develop and the other spouse did not wish to use them.<sup>146</sup>

In addition to Dr. Johnson’s testimony, Resolve sent the Arizona legislature a letter to consider. In the letter, Resolve argued that SB 1393, by drawing on child custody standards, is an attempt at treating embryos as if they are children.<sup>147</sup> In addition to its concerns about SB 1393’s push for embryonic personhood, Resolve argued that SB 1393 does not actually respect the rights of non-consenting spouses because those spouses are still

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140. *SB1393–Dissolution; Human Embryos; Disposition*, AZLEG.GRANICUS.COM at 0:30:11 (Mar. 7, 2018), [http://azleg.granicus.com/MediaPlayer.php?view\\_id=13&clip\\_id=20812&meta\\_id=512477](http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=20812&meta_id=512477) (archival linking does not preserve multimedia); *SB 1393–Dissolution; Human Embryos; Disposition*, *supra* note 22 at 0:04:45.

141. *SB1393–Dissolution; Human Embryos; Disposition*, *supra* note 140 at 0:30:16.

142. *Id.* at 0:30:30.

143. *See SB1393–Dissolution; Human Embryos; Disposition*, *supra* note 23 at 0:44:29.

144. RESOLVE, <https://resolve.org/> [<https://perma.cc/Q7EE-64XK>].

145. *SB1393–Dissolution; Human Embryos; Disposition*, *supra* note 22 at 4:30:56.

146. *Id.* at 4:31:46.

147. Letter from Resolve to Ariz. House of Representatives 1–2 (Feb. 23, 2018) (on file with author).



greatly impacted despite having no legal rights or obligations as to the resulting children.<sup>148</sup> Resolve asked the legislators to consider the following:

It could be exceedingly painful to have one's blood-related children being born against one's wishes and then being faced with the dilemma of whether to stay separate from one's actual children versus take on lifelong financial support and childrearing. Second, think about what could happen in cases where there are many frozen embryos. One's ex-spouse could be given not one or two, but as many as ten or twenty frozen embryos. If the pregnancy attempts are successful, the ex-spouse who didn't want to use the embryos may be left helplessly watching a series of their biological children get gestated against their will and wishes. If the man gained control of the embryos, a woman who might still be childless will have to watch the husband's new girlfriend—or multiple girlfriends—bear her genetic children.<sup>149</sup>

Resolve also voiced concern about SB 1393's unresolved consequences. For example, Resolve asked, "will the court follow up to ensure the frozen embryos are transferred to a good womb?" And if the individual awarded the embryos does not use them for reproduction, can a "court order them to do so?"<sup>150</sup> Based on these unanswered questions and the association's other concerns, Resolve concluded its letter by stating that SB 1393 "is not even a solution: it is an attempt to add yet one more law that seems to treat microscopic embryos as having interests on a footing like that of children."<sup>151</sup>

Democrats in the Arizona legislature also voiced disapproval about how SB 1393 overrides a couple's prior agreement. For example, during a Senate floor session, Senator Farley argued that "the legislature should not come between a woman, her doctor, her faith, and her family" and that SB 1393 was "one of the most heinous examples of that."<sup>152</sup> The Democratic legislators also questioned why a bill intended to give clear direction to the courts does not allow consideration of prior agreements. During a debate on the bill, Representative Freeze got permission from the floor to ask Representative Engle, a lawyer, a couple of questions.<sup>153</sup> One question was whether Engle felt it was "clear direction" for the courts to uphold a couple's prior agreement.<sup>154</sup> Engle replied "yes that would be a clear direction . . . as

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148. *See id.* at 2.

149. *Id.*

150. *Id.*

151. *Id.* at 3.

152. *SB1393–Dissolution; Human Embryos; Disposition*, *supra* note 136 at 0:11:11.

153. *SB1393–Dissolution; Human Embryos; Disposition*, *supra* note 23 at 0:30:13.

154. *Id.* at 0:42:04.

the law now stands it seems like that is what the courts are doing.”<sup>155</sup> In her closing comments, Engle also pointed out that the trend in divorce is to follow the agreement of the parties when allocating property.<sup>156</sup>

In response to these criticisms, SB 1393’s proponents struggled to defend the bill on non-personhood grounds, making SB 1393’s connection to the personhood movement clear. For example, during a hearing for the House’s Committee of the Whole, Barto addressed the criticism that SB 1393 does not recognize the rights of non-consenting spouses. In her response, Barto pointed out that there is precedent in Arizona law for “issues dealing with life,” such as legislation that recognizes the life of a child killed in-utero during a car accident.<sup>157</sup> Barto argued that the rights of parents are upheld in this type of legislation because it gives parents the chance to hold individuals accountable for their child’s loss.<sup>158</sup> Based on this precedent, Barto argued it would not logically follow to decide that “a parent’s right is going to override another parent’s right to see those frozen embryos, that they created together, have a chance to be brought to life.”<sup>159</sup> Any other way, Barto contended, would require “overlooking something very important in our society.”<sup>160</sup> Barto’s argument, in other words, is that SB 1393 upholds both parents’ rights, like other legislation dealing with life, because SB 1393 recognizes the potential for life.

SB 1393’s other proponents also weighed in on the criticism that SB 1393 does not recognize the rights of non-consenting spouses. For instance, Herrod argued that “perhaps someone should think about [not being a parent] before they participate in creating biologically-related frozen embryos.”<sup>161</sup> In a similar vein, Representative Farnsworth argued that SB 1393 protects the rights of the non-consenting spouse because of that spouse’s initial agreement to participate. During comments in front of the House’s Committee of the Whole, Farnsworth argued that SB 1393 keeps a couple’s intent “intact” because the couple created the embryos for the purpose of having children.<sup>162</sup>

As for whether SB 1393 is like any other property bill, Representative Farnsworth, under pressure from his Democratic colleagues’ questions during the House’s Committee of the Whole hearing, clarified his initial

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155. *Id.* at 0:42:19.

156. *Id.* at 1:11:06.

157. During this response, Barto also pointed out that this precedent recognizes the life of in-utero children without conferring personhood. *SB1393–Dissolution; Human Embryos; Disposition*, *supra* note 136 at 0:28:39.

158. *Id.* at 0:29:14.

159. *Id.* at 0:29:42.

160. *Id.* at 0:29:55.

161. Giles, *supra* note 17.

162. See *SB1393–Dissolution; Human Embryos; Disposition*, *supra* note 23 at 0:46:29.

comment. When asked if other Arizona divorce statutes require courts to ignore a couple's prior agreement, Farnsworth acknowledged that SB 1393 is different because "the potential for human life . . . is different than a house."<sup>163</sup> Farnsworth argued that SB 1393 is still similar to other divorce statutes because "the idea that the court can make the final decision" exists elsewhere too.<sup>164</sup> As an example, Farnsworth pointed out how a judge can void a couple's prior agreement regarding who gets what in a house if the agreement is lop-sided or coercive.<sup>165</sup>

Finally, SB 1393's proponents responded to the criticism that SB 1393 could require a judge to award IVF embryos to an unfit parent. Herrod and Senator Barto argued that SB 1393 does not need to account for this type of scenario because IVF clinics do not consider whether couples are unfit.<sup>166</sup>

Taken together, the discussions surrounding SB 1393 illuminate how the bill is primarily a push for embryonic personhood and not simply about protecting parents' rights, giving clear direction to the courts, or treating embryos like any other property.

First, SB 1393's connection to the personhood movement is evident from the proponents' focus on the rights of the consenting spouses and the rights of IVF embryos to be brought to birth. SB 1393's proponents effectively conceded that non-consenting spouses' rights do not matter when they failed to address how it is unfair for non-consenting spouses to see their genetic material used against their will. Senator Barto's muddled response to the criticism about SB 1393's failure to respect the rights of non-consenting spouses, for instance, focused solely on protecting the rights of consenting spouses and IVF embryos. Herrod and Representative Farnsworth's argument about how SB 1393 recognizes the interests of non-consenting spouses because those spouses made their choice when they decided to go through with IVF treatment is also unpersuasive.<sup>167</sup> Their argument overlooks how contracts are used in all aspects of life to condition our consent. An individual that conditions their participation in the IVF process on an agreement that their IVF embryos are not to be used without their permission never made the choice for their embryos to be used without their consent.

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163. *Id.* at 0:55:21.

164. *Id.* at 0:55:47.

165. *Id.* at 0:57:12.

166. *SB1393–Dissolution; Human Embryos; Disposition*, *supra* note 22 at 4:50:17; *SB1393–Dissolution; Human Embryos; Disposition*, *supra* note 136 at 0:24:18.

167. Herrod and Representative Farnsworth's argument about upholding the original intent of the parties is very similar to how pro-life advocates argue that abortion should not be an option because the parties already exercised their decision to have sex. *See, e.g., Should Abortion Be Legal?*, PROCON.ORG, <https://abortion.procon.org/> [<https://perma.cc/J3BQ-RD49>].

Second, SB 1393's underlying push for personhood explains how a bill meant to give "clear" direction to the courts is, in reality, far from clear. As the Democratic Senators pointed out, it would be far simpler to require the courts to abide by a couple's prior agreement, especially when that is the standard most of the country follows. Instead, SB 1393's proponents chose a solution that leaves many unanswered questions. For instance, how is the judge to decide who is more likely to bring the embryos to birth? What evidence should the judge look at in deciding this question? What if neither spouse wants to bring the embryos to birth? The proponents' failure to address questions like these shows how the proponents' focus in enacting SB 1393 was primarily about advancing the right to life for IVF embryos—not about making things simpler for the courts. Herrod herself acknowledged this when she admitted that SB 1393 is not the "perfect solution," but a solution that "recognizes the desire of the party who is most likely to carry the embryos to birth."<sup>168</sup>

Third, the debate about whether or not SB 1393 is like any other marital property bill reveals a lot about SB 1393's true intent. Farnsworth's argument that SB 1393 is like any other property law because other laws also invalidate agreements that are lop-sided or coercive creates a misleading analogy. In Arizona, courts conduct case-by-case inquiries to determine if a particular marital property agreement is unfair.<sup>169</sup> Even if an Arizona court finds a marital property agreement to be unfair, that court still has the discretion to request that the parties submit a revised agreement.<sup>170</sup> SB 1393, on the other hand, involves no case-by-case inquiry and gives courts no discretion to modify a couple's prior agreement. SB 1393's dramatic departure from how Arizona law deals with other types of property agreements indicates that SB 1393's proponents view prior agreements in the IVF context as particularly lop-sided and coercive. This view sends the message that anything but ensuring the right to life for embryos is unjust.

Finally, and most importantly, the debates surrounding SB 1393 reveal how the bill lays the foundation for other personhood laws in the future. When Herrod repeatedly emphasized how SB 1393 impacts Arizona's public policy, she illuminated SB 1393's potential influence. If SB 1393 provides the policy foundation for invalidating prior agreements in the divorce dissolution context, then SB 1393 can also lay the foundation for more intrusive laws on procreation in the future. For example, SB 1393's message that the chance for life for IVF embryos is more important than any other interest can be used to justify a law that prohibits the destruction of embryos

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168. *SB1393–Dissolution; Human Embryos; Disposition*, *supra* note 22 at 4:51:11.

169. *See Breitbart-Napp v. Napp*, 163 P.3d 1024, 1029 (Ariz. Ct. App. 2007).

170. ARIZ. REV. STAT. ANN. § 25-317 (2019).

in the IVF process. Further, if *Roe* is ever overturned, Arizona legislators can use SB 1393 to argue that abortion goes against Arizona's public policy. In sum, SB 1393's message is nowhere near limited to the divorce dissolution context.

#### IV. SB 1393'S CONSEQUENCES FOR ARIZONA

Although SB 1393 only directly impacts divorcing couples with IVF embryos, SB 1393's short- and long-term consequences are far-reaching. In the short term, Arizona courts will have to grapple with how to decide which spouse is most likely to bring their IVF embryos to birth. In addition, Arizona couples may be discouraged from seeking IVF treatment out of the fear that their embryos could later be used without their consent.

SB 1393 may also be unconstitutional. As recognized by courts across the country, the disposition of IVF embryos implicates the constitutional rights to procreate and not to procreate.<sup>171</sup> Based on Supreme Court precedent concerning procreative liberty, it can be argued that individuals have the constitutional right to make certain intimate decisions without the heavy hand of the state.<sup>172</sup> Instead of letting Arizona residents make the intimate decision of whether or not to have children on their own, SB 1393 demands that the right to procreate and the right of IVF embryos to be brought to birth take precedence in this choice. Thus, SB 1393's enactment raises the question of whether the state can constitutionally interfere with an individual's decision on what to do with their IVF embryos.<sup>173</sup>

If SB 1393 survives the long-term, SB 1393 could lead to embryonic personhood in Arizona. With SB 1393 in their arsenal, personhood advocates will have an easier time arguing that Arizona law favors the implementation of more radical forms of personhood legislation. If personhood advocates ever succeed in gaining true recognition for embryonic personhood in Arizona, the repercussions for reproductive rights will go far beyond restrictions on abortion. For example, embryonic personhood will have a

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171. See *supra* notes 103–09 and accompanying text.

172. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”) (emphasis omitted) (citing *Stanley v. Georgia*, 394 U.S. 557 (1969)).

173. For more discussion on whether the state can interfere with intimate decisions that implicate procreative liberty see, for example, Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378 (2013); John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983).

negative impact on ARTs,<sup>174</sup> access to contraception,<sup>175</sup> and pregnancy services in Arizona.<sup>176</sup>

## V. CONCLUSION

On the surface, SB 1393 does not present itself like the typical personhood measure; the bill impacts only a small number of people and does not attempt to re-define personhood. On a second look, however, it is clear SB 1393 is a push for personhood. As SB 1393's text, sponsorship, and reasoning reveal, SB 1393's main goal is not to protect parent's rights, make embryo dissolution easier for the courts, or treat embryos like any other property, but to lay the foundation for embryonic personhood in Arizona. Thus, SB 1393's passage is a lesson of caution. Unlike the easily-spotted attempts at re-defining personhood in the past, the push for personhood may take on a far subtler guise in the future.

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174. Personhood laws could require physicians to only fertilize eggs they plan to implant. As implantation is often unsuccessful, this means that physicians will have to conduct multiple treatments to extract eggs, thereby exposing women to greater health risks. Manian, *supra* note 31, at 92.

175. Forms of contraception that go into effect after fertilization, like emergency contraception, would be banned. *See* Will et al., *supra* note 15, at 508.

176. If Arizona's personhood laws do not permit abortions in the case of life-threatening pregnancy, physicians could be held criminally liable for performing an abortion to save a woman's life or providing chemotherapy to a pregnant woman with cancer. Manian, *supra* note 31, at 88–89.