No. 23-9176

IN THE

Supreme Court of the United States

October Term 2023

In re Infertility Center of New Lincoln, Inc.,

Debtors.

Liam JOHNSON,

Petitioner,

— versus —

Michael SMITH, M.D.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifteenth Circuit

BRIEF FOR PETITIONER

Team 3219

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QUESTIONS PRESENTED

I. Whether the Bankruptcy Court properly exercised "hypothetical jurisdiction" to assume it had "related to" jurisdiction under 28 U.S.C. § 1334(b), over a child's state law tort claims against a party not in bankruptcy when it dismissed his claims, despite the requirement that every federal court must establish jurisdiction before issuing a judgment on the merits?

II. Whether the Bankruptcy Court took the correct considerations into account when it found 28 U.S.C. § 1334(c)(2) did not mandate it to abstain from considering novel state tort law and remand them to the state court, although it had no jurisdiction other than through § 1334(b) and the state court would have an interest in adjudicating this area of law?

III. Whether a child may sue a fertility doctor for emotional harm arising out of an IVF procedure in which the doctor—without the patient's knowledge or consent—substituted his own sperm for the sperm of the individual the child believed to be his father?

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OPINIONS BELOW

The opinion of the United States Bankruptcy Court for the District of Lincoln is unreported but appears on pages 1–15 of the record where the bankruptcy court DENIED the Plaintiff's motion to remand. The opinion of the United States District Court for the District of Lincoln is also unreported but appears on pages 16–18 of the record where the district court AFFIRMED the bankruptcy court's judgment. The opinion of the United States Court of Appeals for the Fifteenth Circuit is also unreported but appears on pages 18–33 of the record where the circuit court AFFIRMED the district court's judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves two provisions of the United States Code 28 U.S.C. § 1334(b) and 28 U.S.C. § 1334(c)(2). This case also involves Art. III § 1 and § 2 under the United States Constitution.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This case involves a bankruptcy court's unlawful dismissal of state law tort claims without the jurisdiction to do so. The bankruptcy court dismissed Petitioner Liam Johnson's claims against Respondent Dr. Michael Smith. R. at 18. Neither are parties to the bankruptcy proceeding. R. at 2. Dismissing Liam's claims would prevent Liam from rightfully recovering for emotional distress caused by Dr. Smith's medical negligence. R. at 31. Liam appeals the United States Court of Appeals for the Fifteenth Circuit's ruling to uphold the district court's grant of Dr. Smith's motion to dismiss Liam's claim for damages for emotional harm. R. at 18.

The Johnsons. Emily and Paul Johnson longed to conceive a child. R. at 3. After several years of failed attempts to conceive naturally, the couple found renewed hope through in vitro

fertilization ("IVF") treatments. R. at 3. The Johnsons sought out Dr. Michael Smith at the Infertility Center of New Lincoln, Inc. ("the Center"), who had a reputation for a higher than normal success rate with IVF. R. at 3. After an exhaustive consultation with Dr. Smith, the couple settled on a procedure that the fertility doctor indicated would have the most success. R. at 3. Dr. Smith performed the procedure, and the crestfallen couple found joy at last—Emily Johnson became pregnant. R. at 3. On January 12, 2009, Emily gave birth to Liam, their healthy baby boy. R. at 3.

Liam lost his father when he was only 6 years old. R. at 3. Emily Johnson did her best to keep her husband's memory alive for her son. R. at 3. Liam's childhood was enriched with stories about his father, and pictures of Paul still adorn the Johnson home. R. at 3. Paul's career as a commercial airline pilot was of great inspiration to Liam. R. at 3–4. Even as a toddler, Liam expressed his desire to become a pilot "just like daddy," and some of Liam's earliest memories include playing with the model planes Paul kept on his desk. R. at 3–4.

The DNA Test. In November 2021, Liam received a school project on genetics that would change his life forever. R. at 4. The assignment required that Liam, his mother and his only living grandparent, Paul's father, take a DNA test through an ancestry website. R. at 4. The results came back showing that Liam had no matching connections with his paternal grandfather. R. at 4. Puzzled by this finding, the family took a second test through a local medical clinic that confirmed the first test's chilling results: Paul Johnson was not Liam's biological father. R. at 4.

In a desperate search for answers, Emily reached out to an individual who was listed on the online ancestry website as being Liam's "possible half sibling." R. at 4. This individual was also conceived through IVF, and her mother's doctor was none other than Dr. Michael Smith. R. at 4.

Emily confronted Dr. Smith with the information, and after first claiming he did not know what she was talking about, he relented and admitted that he had mixed his sperm with Paul's. R. at 4.

The Center launched investigations into all of Dr. Smith's IVF procedures and found that Dr. Smith used his own sperm in over twenty procedures where the gestational mother did not give permission to do so, resulting in six children who share his DNA. R. at 4–5. The Center immediately terminated Dr. Smith's employment. R. at 5.

Emily Johnson pursued a claim against the Center for failure to obtain informed consent and breach of contract. R. at 5. The Center settled Emily's claim, but failed to disclose that it had a contractual obligation to indemnify Dr. Smith. R. at 5. At the time he was hired and thereafter in each year of Dr. Smith's employment, the Center entered into an employment agreement and an indemnification agreement ("the Agreements") which provided Dr. Smith with a contractual right to be indemnified by the Center for "any legal action . . . connected . . . to the Employee's acts or omissions in Employee's performance of infertility services." R. at 5. Section 4 specifically states that the indemnification agreement survives Dr. Smith's termination. R. at 5. In anticipation of several other lawsuits based on Dr. Smith's conduct, the Center sought bankruptcy protection under Chapter Eleven of the Bankruptcy Code, 11 U.S.C. §§ 1101–1195. R. at 5.

Liam's Suffering. Since the jolting discovery that Paul Johnson is not his biological father, Liam's life is in total disarray. R. at 5. On one hand, Liam is suffering an identity crisis. R. at 5. The fourteen-year-old has repeatedly expressed to his mother that he feels like he doesn't belong to the family he thought was his own, and he fears his mother doesn't love him like she used to because he isn't his father's child. R. at 5. Emily found several photos on his phone where he cut himself out of family photos, and he fears meeting with his grandfather for fear of rejection. R. at

5. Liam has expressed fear that his father would have also rejected him if he had known, and Liam no longer talks of his dream of becoming a pilot. R. at 5. Liam is depressed. He refuses to eat, he has withdrawn from friends, and will not turn in school assignments. R. at 5–6. He also suffers from anxiety. He takes prescribed medication for insomnia, and his once-healthy relationship with his mother has turned hostile—Emily and Liam fight frequently even though, prior to this discovery, the two had a strong relationship. R. at 6.

II. NATURE OF PROCEEDINGS

The Bankruptcy Court. Liam Johnson filed a complaint against Dr. Smith in Jackson County, New Lincoln, Circuit Court, alleging that Dr. Smith committed medical malpractice and negligently inflicted emotional harm upon Liam in conjunction with the in vitro fertilization procedure that led to his conception and subsequent birth. R. at 2. This claim was removed to the United States Bankruptcy Court for the District of New Lincoln because the bankruptcy court allegedly had statutory jurisdiction to hear the state law claims under the "related to" provisions of U.S.C. § 1334(b). R. at 2. Liam asked the court to remand all state law claims against Dr. Smith back to the Jackson, New Lincoln, Circuit Court. R. at 1. Dr. Smith moved to dismiss the same state law claims pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim under New Lincoln law. R. at 1. The Court recommended that Johnson's motion to remand be denied and Dr. Smith's 12(b)(6) motion to dismiss be granted. R. at 2.

The District Court. On March 7, 2023, Liam's claims against Dr. Smith came before the United States District Court for the District of New Lincoln pursuant to the United States Bankruptcy Court under 28 U.S.C. § 157(c)(1). R. at 16. The court dismissed Liam's Complaint without prejudice and with costs for three reasons: (1) the bankruptcy court correctly denied Liam's Motion to Remand because Liam's claims "relate to" the Infertility Center of New

Lincoln, Inc. bankruptcy proceedings, (2) the bankruptcy court was not required to relinquish jurisdiction over Liam's state law claim because he did not meet his burden of proof in establishing mandatory abstention, and (3) Dr. Smith's Motion to Dismiss was properly granted. R. at 16.

Fifteenth Circuit Court of Appeals. Liam appealed the district court's judgment dismissing his state law claims against Dr. Smith. R. at 18. The Fifteenth Circuit found that the bankruptcy court properly exercised jurisdiction under § 1334(b). R. at 18. Specifically, the bankruptcy court assumed "hypothetical jurisdiction" in order to determine the merits of the motion to dismiss. R. at 18. The Fifteenth Circuit also found that the bankruptcy court properly dismissed Liam's claims for medical malpractice and negligent infliction of emotional distress because neither claim permits recovery under New Lincoln tort law. R. at 22.

SUMMARY OF THE ARGUMENT

This Court should reverse the holding of the Fifteenth Circuit Court of Appeals. The district court also incorrectly held that the bankruptcy court properly exercised "hypothetical jurisdiction" to dismiss Liam's claims, and that Liam did not meet his burden of proof to establish mandatory abstention under 28 U.S.C. § 1334(c)(2). The district court improperly held that Dr. Smith is not liable for Liam's emotional injuries under New Lincoln's negligence principles.

I.

The United States Bankruptcy Court for the District of New Lincoln improperly exercised "hypothetical jurisdiction" over Liam Johnson's state law tort claims because a federal court is never permitted to issue a judgment on the merits before establishing it has the subject-matter jurisdiction. The court intentionally disregarded whether it had statutory subject-matter

jurisdiction under 28 U.S.C. § 1334(b) and dismissed Liam's state law claims anyway. In violating this restriction, the court infringed upon the limits of the Constitution and flagrantly disregarded one of Congress's most important democratic checks on an unelected federal judiciary.

Even if "hypothetical jurisdiction" does violate the Constitution's design, the bankruptcy court did not meet the requirements of the test it applied: a complex jurisdictional question and that there were other obvious grounds for dismissal.

There is no indication the bankruptcy court was ill-equipped or too unfamiliar with the question of its own "related to" jurisdiction under 28 U.S.C. § 1334(b) to draw a conclusion. Further, the bankruptcy court too quickly assumed it could not solve the jurisdictional question even though as a whole the case law does not support a finding of jurisdiction. Further, the case law supports the fact that Liam's suit does not bear a sufficient relation to the bankruptcy proceedings through the indemnification agreement between Dr. Smith and the Clinic.

Additionally, there were no obvious grounds for dismissal. This is best demonstrated by the fact that upon appeal to this Court, the federal court system has three times disagreed about the merits of Liam's claim. Regardless, in the interest of fairness, comity and judicial efficiency, the bankruptcy court should have sided with those circuits only exercising hypothetical jurisdiction in rare situations against the party seeking to invoke jurisdiction, which would preclude Liam's claims.

II.

Even if the bankruptcy court did have jurisdiction, it was required to remand Liam's claims to state court under the mandatory abstention provision in 28 U.S.C. § 1334(c)(2). This is because the state court would be best suited to address such novel and complex state law tort

claims in a timely manner. Courts have recognized that timeliness is a relatively low bar hurdle to clear. The bankruptcy court and the majority opinion of the Fifteenth Circuit ignore this. Their analysis hinges timeliness only upon the haste of a bankruptcy court. Both courts ignore Congress's intent in designing the abstain exception as a safeguard for those state law claims that, like Liam's, due to their novelty and complexity deserve the right to be adjudicated in state court.

Lastly, if this Court finds that hypothetical jurisdiction is a viable approach, the purpose of mandatory abstention will be rendered useless, because Liams claims may be unable to qualify. A prerequisite for meeting the abstain exception is that there must be "related to" jurisdiction under 28 U.S.C. § 1334(b). Because the bankruptcy court decided it did not have to determine the confines on its own jurisdiction under one statute, it also avoided the confines of another statute—mandatory abstention under 28 U.S.C. § 1334(c)(2). Therefore, the bankruptcy court has mangled the intent of Congress's jurisdictional grant in multiple aspects, creating a clearly unworkable framework that avoids democratic checks. Thus, the case should clearly be remanded to state court.

III.

The Fifteenth Circuit improperly held that Liam Johnson's medical malpractice and negligent infliction of emotional distress claims are not viable under the general principles of tort law followed in New Lincoln. Although the Fifteenth Circuit correctly determined that Liam's claims cannot be analyzed as wrongful life causes of action, his claims nonetheless succeed under a medical malpractice analysis. A wrongful life analysis is not appropriate for the facts of this case because Liam does not allege that Dr. Smith's negligence deprived his parents of the

choice not to conceive. Nor does Liam allege that Dr. Smith's carelessness prevented his mother from terminating her pregnancy.

Instead, Liam's claims warrant analysis as insemination fraud, a new subset of medical malpractice actions that applies when a doctor inseminates a patient with his own sperm without the patient's knowledge or consent. Under this standard, Liam must prove that Dr. Smith breached his legal duty to Liam, and that this breach caused his resulting emotional injury.

The Fifteenth Circuit erroneously held that Dr. Smith is not liable for emotional harm because Dr. Smith breached his duty of care to Liam when he substituted Paul Johnson's sperm for his own during Emily Johnson's IVF treatment. Dr. Smith owed Liam a duty of care because Liam was a beneficiary of the physician-patient relationship between Dr. Smith and Emily. Additionally, Dr. Smith owed a duty of care to Liam because it was foreseeable that Dr. Smith's malpractice would result in the kind of harm suffered.

What's more, finding Dr. Smith liable for medical negligence will not result in limitless liability for defendants for two reasons. First, emotional distress claims are strictly limited to those who, because of their relationship with the defendant, suffer the greatest emotional distress. Liam's beneficiary relationship with Dr. Smith satisfies this burden. Second, to establish a successful emotional distress claim, plaintiffs must overcome the considerable hurdle of proving medical malpractice in court through expert testimony. Liam would need a declaration from a fertility specialist attesting that Dr. Smith's conduct deviated from the industry's standard of care.

Lastly, failure to find Dr. Smith liable for insemination fraud threatens society's invaluable interests in shielding children from harm and in holding physicians to a professional standard of

care. As guardians of the foundational values of this country, this Court is in the best possible position to protect these interests.

This Court should REVERSE the lower court's judgment and hold that Liam can recover damages for emotional harm caused by Dr. Smith's disgraceful malpractice.

ARGUMENT AND AUTHORITIES

Standard of Review. This appeal raises two legal questions. The Supreme Court of the United States reviews questions of law de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Whether an action can be timely adjudicated in state court is a mixed question of law and fact. *Parmalat Cap. Fin. Ltd. v. Bank of Am. Corp.*, 639 F.3d 572, 580 (2d Cir. 2011). Given this mixed question of law and fact, this Court reviews the lower court's determination de novo. *Id.*

I. THE BANKRUPTCY COURT IMPROPERLY USED "HYPOTHETICAL JURISDICTION" BECAUSE THIS COURT HAS CATEGORICALLY INVALIDATED THIS APPROACH, AND EVEN IF IT WERE A VIABLE APPROACH, THE BANKRUPTCY COURT DID NOT SATISFY THE ELEMENTS NECESSARY TO USE IT.

The bankruptcy court dismissed Liam's state law tort claims on the merits, but it did not first establish it had jurisdiction. In no situation may a federal court issue a judgment on the merits before it has determined it has jurisdiction. That is because "a federal court may not decide cases when it cannot decide cases, and must determine whether it can, before it may." *Cross-Sound Ferry Servs., Inc. v. I.C.C.*, 934 F.2d 327, 340 (D.C. Cir. 1991) (Thomas, C.J., concurring).

A. This Court Has Categorically Invalidated the Use of "Hypothetical Jurisdiction" Because It Allows a Court to Decide the Merits of a Claim Without Determining Its Authority to Do So.

The doctrine of "hypothetical jurisdiction" was already rejected by this Court, and the context in which the bankruptcy court used it is no exception. *See Steel Co. v. Citizens for a*

Better Env't, 523 U.S. 83, 99 (1998). Under *Steel Co.*, a federal court may never decide "an 'easy' merits question . . . *on the assumption* of jurisdiction." *Id.* (emphasis in original). That is because "[t]he requirement that jurisdiction be established as a threshold matter . . . is inflexible and without exception." *Id.* at 94–95.

This demand clearly applies here because the Bankruptcy Court did not decide it had statutory subject-matter jurisdiction under 28 U.S.C. § 1334(b), but still issued a judgment on the merits of Liam's claim. Like the bankruptcy court, several federal courts are not applying *Steel Co.*'s ban on assuming jurisdiction in the context of statutory subject matter jurisdiction. Instead, where a question of statutory jurisdiction is particularly difficult, they are deciding they may skip it and proceed to the merits question. *See, e.g.*, *Waleski v. Montgomery, McCracken, Walker & Rhoads, LLP (In re Tronox Inc.)*, No. 20-3949-bk, 2022 WL 16753119, at *1 (2d Cir. Nov. 8, 2022). But in doing so, the court issues a judgment without any authority.

Although *Steel Co.* dealt specifically with an attempt to bypass Article III subject-matter jurisdiction, the ban on assuming jurisdiction extends beyond that context. 523 U.S. at 94. *Steel Co.* explicitly declined to endorse the approaches in several cases that bypassed statutory subject matter jurisdiction before reaching the merits. *See id.* Further, after *Steel Co.* this Court has several times applied its rule to cases of statutory subject-matter jurisdiction. *See Ruhgras AG v. Marathon Oil Co.*, 526 U.S. 574, 584–85 (1999); *see also Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431–32 (2007).

Significantly, the requirement on federal courts to determine its jurisdiction before deciding the merits is "reflected in a long and venerable line of . . . cases" dating "at least as early as 1804." *Steel Co.*, 523 U.S. at 94. This mandate is also a bedrock requirement of the Constitution.

To elucidate, the creation of lower federal courts was earnestly debated at the Constitutional Convention between those who wanted states to retain much of the nation's power, versus a stronger, centralized government. *See* 1 *The Records of the Federal Convention of 1787*, at 124–25 (Max Farrand ed., 1991). The compromise devised in response was that Article III would vest Congress with the power to create or abolish the lower federal courts and limit their jurisdiction. *See* U.S. Const. art. III, §§ 1–2.

Congress's ability to allocate cases between the federal and state judiciary, through both types of subject-matter jurisdiction, protects states' sovereignty over their adjudicative domains and protects federal courts' limited resources. *See* Joshua S. Stillman, *Hypothetical Statutory Jurisdiction and the Limits of Federal Judicial Power*, 68 Ala. L. Rev. 493, 503 (2016) [hereinafter Stillman, *Hypothetical Statutory Jurisdiction*]. In doing so, Congress performs one of its main democratic checks on the unelected federal judiciary. Importantly, "[b]ecause federal judges are not subject to direct check by any other branch of government . . . [they] must make every reasonable effort to confine [them]selves to the exercise of those powers that the Constitution and Congress have given" them. *Wis. Knife Works v. Nat'l Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986).

As the concurrence in *Butcher v. Wendt* observed of "hypothetical jurisdiction" used in the statutory context:

> Under the doctrine of hypothetical jurisdiction that the court applies today, we are not constrained by jurisdictional statutes. If the court were right, we could assume jurisdiction over cases that Congress has barred us from considering. We could assume original jurisdiction over federal question and diversity of citizenship cases. We could assume appellate jurisdiction to review the decisions of other courts of appeals, or the decisions of district courts in other circuits. We could even assume jurisdiction over matters within the exclusive jurisdiction of the U.S. Court of Appeals for the Federal Circuit, the U.S. Court of Appeals for the D.C. Circuit, or the U.S. Court of Appeals for Veterans Claims. Each of these limitations on our jurisdiction is of statutory rather than constitutional origins . . . .

Butcher v. Wendt, 975 F.3d 236, 247–48 (2d Cir. 2020) (Menashi, C.J., concurring) (internal citations and quotations omitted).

"The truistic constraint on the federal judicial power, then, is this: A federal court may not decide cases when it cannot decide cases, and must determine whether it can, before it may." *Cross-Sound Ferry Servs.*, 934 F.2d at 340 (Thomas, C.J., concurring). Federal courts are subject to jurisdictional limits and cannot proclaim jurisdiction merely because the judges and parties want the dispute resolved. *See id.* This Court has stressed that federal courts have an "independent obligation to examine their own jurisdiction[.]" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). Without question, "[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." *Steel Co.*, 523 U.S. at 101. Therefore, the bankruptcy court dismissed the merits, with only the authority to produce a hypothetical judgment.

B. The Bankruptcy Court Did Not Meet the Requirements for the "Hypothetical Jurisdiction" Test It Adopted.

Even assuming it is a viable approach, the bankruptcy court fails to meet its test for hypothetical jurisdiction. This test requires that "a question of statutory (non-Article III) jurisdiction is complex[,]" and "the claim fails on other more obvious grounds," before a court may "assume hypothetical jurisdiction." *See, e.g.*, I*n re Tronox Inc.*, 2022 WL 16753119, at *1 (internal citations omitted). Neither requirement was met.

1. The bankruptcy court should have concluded it did not have "related to" jurisdiction over Liam's claims.

The bankruptcy never concluded whether it had jurisdiction under 28 U.S.C. § 1334(b). The bankruptcy court should have concluded it did not have jurisdiction over Liam's claims.

a. "Related to" jurisdiction under 28 U.S.C. § 1334(b) is not a complicated question for the bankruptcy court.

The bankruptcy court relies on *In re Tronox Inc.* to support its decision that the Dr. Smith-Clinic indemnity agreement raises a novel and complex question within the scheme of "related to" jurisdiction. R. at 9. But *In re Tronox Inc.* does not support this conclusion. There, the court determined that "hypothetical jurisdiction" was appropriate because the case presented a matter of first impression in its circuit, and "the Supreme Court . . . provided scant guidance in what is typically a highly fact-specific inquiry." *In re Tronox Inc.*, 2022 WL 16753119, at *1.

In contrast, "related to" jurisdiction is unproblematic for the bankruptcy court because "related to jurisdiction *must* be determined case-by-case." *Bos. Reg'l Med. Ctr., Inc. v. Reynolds (In re Bos. Reg'l Med. Ctr., Inc.)*, 410 F.3d 100, 107 (1st Cir. 2005) (emphasis added). Thus, the scope is often determined by the bankruptcy court itself. Moreover, by far the largest number of reported cases dealing with bankruptcy jurisdiction fall into this category. 1 *Collier on Bankruptcy* ¶ 3.01[3][e][ii], at 3–16 (16th ed. 2023). There is no indication the bankruptcy court was ill-equipped or too unfamiliar with the question to draw a conclusion. Further, because the question of "related to" jurisdiction is fact-specific, exercising hypothetical jurisdiction over the "related to" inquiry only perpetuates jurisdictional uncertainty and encourages future litigation over the same. That Liam is having to re-litigate this threshold jurisdictional issue serves as the case in point. Therefore, the bankruptcy court's approach lacks even the virtue of judicial efficiency to recommend it.

b. Liam's singular suit against Dr. Smith is insufficiently impactful on the estate's bankruptcy proceeding to establish "related to" jurisdiction under 28 U.S.C. § 1334(b).

Liam's claim is distinguishable from the cases where courts have found "related to" jurisdiction. The majority of jurisdictions have adopted the *Pacor* test to determine if a claim is

"related to" a bankruptcy proceeding. *In re Dow Corning Corp.*, 86 F.3d 482, 494 (6th Cir. 1996), *as amended on denial of reh'g and reh'g en banc* (June 3, 1996). That test asks, "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (emphasis omitted). This requires a case-specific inquiry into the utility of the forum with respect to the third-party claim. Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 Wm. & Mary L. Rev. 743, 873 (2000).

The bankruptcy court acknowledged that had the Clinic not declared bankruptcy, it would lack any basis for jurisdiction over Liam's claims. R. at 6. The weak link connecting these claims to the estate are the agreements between Dr. Smith and the Clinic, signed during his employment, and lasting beyond employment, that may result in Dr. Smith being indemnified by the Clinic for "any legal action . . . connected . . . to [Dr. Smith's] acts or omissions in the performance of infertility services." R. at 5.

The bankruptcy court too quickly assumed it could not solve the jurisdictional question. R. at 7 (stating that "the Fifteenth Circuit has not addressed" the issue and that there are cases from other jurisdictions that "hold either way"). Some courts may place more importance on automatic indemnity (e.g., automatically triggered by contractual provisions) than potential suits for common law indemnity, but under either standard Liam's claim falls outside the scope of jurisdiction.

The Third Circuit holds there is no related-to jurisdiction over a third-party claim if there would need to be another lawsuit before it could have any conceivable impact on the bankruptcy proceedings. *See In re W.R. Grace Co.*, 591 F.3d 164, 172 (3d Cir. 2009). The strongest argument for "related to" jurisdiction is the seemingly explicit, rather than inchoate,

indemnification agreement between Dr. Smith and the Clinic. R. at 5. But even this is not dispositive in the circuits which have distinguished the two. *See In re W.R. Grace Co.*, 591 F.3d at 174 n.9 ("[W]e do not mean to imply that contractual indemnity rights are in themselves sufficient . . . . What will or will not be sufficiently related to a bankruptcy . . . is a matter that must be developed on a fact-specific, case-by-case basis.").

Still, even in the context of contractual indemnity, jurisdiction has been primarily based on evidence that the claim and similar claims would ultimately determine the fate of the bankruptcy estate. *In re Brentano's, Inc.*, 27 B.R. 90, 91–92 (Bankr. S.D.N.Y. 1983) (third party was debtor's largest creditor, there were eleven potential similar claims obligating the debtor to indemnify the third party, and three of those cases were *already* in the bankruptcy court).

Liam's claim is the only claim asserted thus far against Dr. Smith. R. at 5. Even if Dr. Smith could potentially become the Clinic's largest creditor, he is not yet. Even the bankruptcy court admits Liam's claim could have *no impact* on the estate in concluding "Liam Johnson plainly failed to state a claim" before engaging in any substantive analysis on jurisdiction. R. at 9. Further, Dr. Smith used his own sperm without permission in over twenty procedures, but only six children share his DNA. R. at 4–5. Unlike the threat of multiple similar claims in *In re Brentano's*, other potential claimants here may very well bring a different cause of action (e.g., the mother brings the suit), in which case, this claim will have absolutely no precedential effect on the status of future litigants' claims.

There is even less support for "related to" jurisdiction over Liam's claims in those circuits holding that a *potential* for indemnification arising out of tort litigation can be enough. *In re Dow Corning Corp.* was concerned with "one of the world's largest mass tort litigations." *In re Dow Corning Corp.*, 86 F.3d 482, 486 (6th Cir. 1996), *as amended on denial of reh'g and reh'g en*

banc (June 3, 1996). Thousands of suits were brought by third parties against the non-debtor defendants, and in many cases the debtor was also explicitly named as a co-defendant. *Id.* at 493. The defendants repeatedly asserted to the court that they intended to bring indemnification claims against the debtor, and the defendants and the debtor were asserting crossclaims against each other. *Id.*

Even though there were only potential claims for indemnification, the court found there was "related to" jurisdiction, due to the overwhelming enormity and complexity of managing this mass tort litigation. *Id.* at 494. But, "[a] single possible claim for indemnification or contribution simply would not represent the same kind of threat to a debtor's reorganization plan as that posed by thousands of potential indemnification claims . . . ." *Id.* Additionally, the court noted the importance of balancing the interests of those individuals who had brought and would bring claims. *Id.* at 487. Its "primary goal" was to find a forum that could resolve the claims in the "most fair and equitable manner possible." *Id.*

The Third Circuit faced a similar mass-tort litigation case, and although it generally limits jurisdiction to cases imposing automatic indemnification, it distinguished *In re Dow Corning* because the claims lacked the same "unity of identity" between the debtor and co-defendants. *See In re Fed.-Mogul Global, Inc.*, 300 F.3d 368, 382 (3d Cir. 2002); *see also In re Dow Corning Corp.*, 86 F.3d at 487.

Regardless of which indemnification approach is adopted, Liam's single claim does not present the same threat to the estate as the cases where courts have found that the existence of a right to indemnification necessitated the bankruptcy court's intervention. Liam's claim could never rise to the threat posed by thousands of plaintiffs litigating in diverse fora or complications of crossclaims against co-defendants in multiple actions. R. at 7. There is no unity of identity

between Dr. Smith and the Clinic other than the indemnity agreement. The Clinic filed for bankruptcy, but this case involves only Liam and Dr. Smith. R. at 5. Liam's single claim lacks the complexity and need for consolidated litigation in prior decisions amongst both circuits. Even if jurisdiction is construed in a broader sense, Liam's claims are not within its reach.

c. If the bankruptcy court was unable to determine its jurisdiction, it should have declined to exercise it out of respect for Article III and federalism principles.

In the case of any doubt, the bankruptcy court should have deferred to a narrower view of "related to" jurisdiction "out of respect for Article III" and to "prevent the expansion of federal jurisdiction over disputes that are best resolved by the state courts." *Matter of FedPak Sys., Inc.*, 80 F.3d 207, 214 (7th Cir. 1996) (internal quotation marks omitted). Exercising this caution recognizes the dangers of abusing judicial discretion "in a universe where everything is related to everything else." *Id.*

This is also supported by the fact that this Court has yet to fully weigh in on potential constitutional infirmities of the broad scope of bankruptcy court jurisdiction. *See* Elizabeth Warren, *Chapter 11: Reorganizing American Business: Essentials* 174, 180 (2008) (discussing how the Court's decision to strike down the 1978 Bankruptcy Code in *N. Pipeline Constr. v. Marathon Pipe Line Co.* required Congress to reduce their scope of jurisdiction, and the Supreme Court has yet to re-address the issue under the nearly identical current code); *see also N. Pipeline Constr. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982). Because there is a "statutory, and eventually constitutional, limitation" on its power, the bankruptcy court should have considered this as a deterrent from exercising jurisdiction over Liam's claims. *Pacor, Inc.*, 743 F.2d at 994. There was a correct venue in the state court, and no reason to be in another one.

2. Liam's claims were not obvious grounds for dismissal.

There is another reason to reject the bankruptcy court's finding that jurisdiction should be ignored to dispose of the claim on the merits. Liam's claims were anything but "obvious grounds on which to resolve the case." R. at 8. That the bankruptcy court and Fifteenth Circuit felt the need to devote such substantial portions of their opinions to disputing his claims proves they are not beyond reasonable debate. R. at 11–15, 20–25. And still, the courts drew different conclusions on how Liam's claim squared with New Lincoln law. R. at 11–15, 20–25.

The state court could also disagree with the bankruptcy court, as did the dissenting opinion upon appeal. R. at 32. At this point within the federal court system, there have been three different analytical approaches to Liam's state law tort claim. R. at 15, 25, 32. Based on this variance it is obvious to assume that the New Lincoln Supreme Court could be the fourth to disagree.

Moreover, at what gain to the system should Liam's contentious issues suffer? Whereas here, the federal court runs the risk of establishing binding precedent on novel claims related to the harms from medical malpractice during in vitro fertilization, the gains to the federal and state court system appear insignificant. *See Butcher*, 975 F.3d at 248 (Menashi, C.J.) (noting the dangers of hypothetical jurisdiction because even a dismissal on the merits can create binding precedent on important legal questions). "Judicial economy itself does not satisfy federal jurisdiction." *Pacor, Inc.*, 743 F.2d at 994. Here, the gains of efficiency are lacking. Thus, this Court should find any argument that there were "obvious grounds of dismissal" as insufficient.

C. Even if "Hypothetical Jurisdiction" Were Permissible, This Court Should Side with Those Circuits That Only Exercise It in Rare Circumstances Against the Party Seeking to Invoke Jurisdiction.

Deciding a case on the merits against the party not seeking to invoke jurisdiction presents major harm, because that court may be wrong. "The notion that the plaintiff will 'lose regardless' also ignores the crucial difference between a dismissal for lack of subject matter jurisdiction—which generally allows the plaintiff to refile the case in an appropriate forum—and a dismissal on the merits, which generally does not." Joshua S. Stillman, *The Dangers of Hypothetical Statutory Jurisdiction (Even When Jurisdiction Exists)*, 4 Savannah L. Rev. 129, 136 (2017) [hereinafter Stillman, *Dangers of Hypothetical Statutory Jurisdiction*].

Second, as a matter of principle, "[a]ttaching preclusive effect to a merits ruling made by a federal court 'without first ascertaining its subject-matter jurisdiction raises the specter of preclusion without power . . . .'" Joshua S. Stillman, *Hypothetical Statutory Jurisdiction*, *supra*, at 543. This is offensive to state sovereignty and separation-of-powers principles. *Id.*

Third, if re-filing in state court is an option, it is still at a cost. Stillman, *Dangers of Hypothetical Statutory Jurisdiction*, *supra*, at 139. Plaintiffs would be encouraged by even a minute possibility of relief on the merits in state court to collaterally attack the federal court's decision. *Id.* This imposes a cost on the litigants and the state court system. Consequently, the test employed by the bankruptcy court poses unjustifiable inefficiencies and burdens on individual parties and the entire judicial system.

In recognition of these concerns, this Court should at the very least adopt a narrower approach to cure the deficient design of the Second Circuit's test. The Ninth Circuit has adopted an alternative test requiring two additional elements: "the appeal must be resolved against the party asserting jurisdiction" and "undertaking a resolution on the merits as opposed to dismissing

for lack of jurisdiction must not affect the outcome." *In re Grand Jury Subpoena Issued to Bailin*, 51 F.3d 203, 206 (9th Cir. 1995); *see also Cross-Sound Ferry Servs.*, 934 F.2d at 333 (noting that "hypothetical jurisdiction" should be a rarity and used when deciding against the party seeking federal court jurisdiction). As the party not seeking to invoke the bankruptcy court's jurisdiction, Liam's claim would fail the hypothetical jurisdiction test of both circuits. Considering the unfairness that would result, if this Court wishes to affirm the avoidance of the clear jurisdictional issue, then it should only do so in accordance with grounds that do not seek to impose a judgment on a novel state law tort claim against a party that is potentially out of the federal court's purview.

II. EVEN IF THE BANKRUPTCY COURT HAD JURISDICTION, THE REQUIREMENTS WERE MET FOR MANDATORY ABSTENTION UNDER § 1334(c)(2).

Finally, even if the bankruptcy court had "related to" jurisdiction over Liam's claims, they are subject to mandatory abstention under 28 U.S.C. § 1334(c)(2). Four of the five elements required for mandatory abstention were undisputed by the bankruptcy court, and it incorrectly concluded that Liam could not meet the fifth element of the test, "timely adjudicat[ion] in state court." R. at 9, 11; *see Taub v. Taub (In re Taub)*, 413 B.R. 81, 88 (Bankr. E.D.N.Y. 2009).

28 U.S.C. § 1334(c)(2) mandates a federal court to abstain from hearing state law claims if the movant has established (1) there is a timely filed motion to abstain; (2) the proceeding is based upon a state law claim or state law cause of action; (3) the proceeding is a non-core, "related to" proceeding and does not arise under the Bankruptcy Code; (4) there is no basis for federal jurisdiction other than 28 U.S.C. § 1334; and (5) an action is commenced and can be timely adjudicated in state court. *In re Taub)*, 413 B.R. at 88. If this Court finds that the bankruptcy court had "related to" jurisdiction over Liam's claims, it is clear that as a final matter, Congress nonetheless would have intended them to be remanded to state court.

A. Liam's Claims Could Be Timely Adjudicated in State Court Because It Is Better Suited to Hear Novel State Law Tort Claims and There Was No Evidence That Remanding Would Delay the Bankruptcy Proceeding.

Contrary to the bankruptcy court's conclusion, Liam effectively established his burden under the fifth element regarding timeliness of adjudication in state court. The bankruptcy court defined timeliness as "how quickly the case would be litigated in state court and whether that pace is sufficiently swift for the efficient administration of the bankruptcy proceeding." R. at 10; *see Parmalat Cap. Fin. Ltd. v. Bank of Am. Corp.*, 639 F.3d 572, 580 (2d Cir. 2011). There are four factors under timeliness which the court evaluated, and all lean in favor of requiring the court to abstain.

The first factor is "the backlog of the state court's calendar relative to the federal court's calendar." *Parmalat Cap. Fin. Ltd.*, 639 F.3d at 580. The bankruptcy court stated that this factor was "not exclusively about which case can most quickly adjudicate the claim," but its conclusion turned on only that. R. at 10. The court neglected to consider the "time in which the respective state forums could be reasonably expected to adjudicate the matter." R. at 10; *see Parmalat Cap. Fin. Ltd.*, 639 F.3d at 580. There is no reason that a state court, accustomed to hearing tort claims based on its own law, could not also adjudicate the matter quickly. No evidence suggested otherwise. R. at 10. This is particularly true if the claims are as meritless as the court supposed. This strongly suggests Liam's claims would be timely adjudicated in state court.

The second factor leans heavily in favor of abstention. The bankruptcy court considered "[t]he complexity of the issues presented and the respective expertise of each forum." *Parmalat Cap. Fin. Ltd.*, 639 F.3d at 580. There bankruptcy court did not consider any evidence that the state court lacks the relevant legal expertise to adjudicate Liam's claim. R. at 10–11. The little support the court cited was a collection of cases that found negligence and infliction of emotional

distress were not novel or complex before a federal court. R. at 10. This has little value because these are different from medical malpractice and negligent infliction of emotional distress, and do not discuss New Lincoln law. Liam's claim presents a novel question because claims for illicit insemination have not been determined under New Lincoln state law. *See also Pacheco v. United States*, 21 F.4th 1183, 1190, 1192 (9th Cir.), *certified question answered*, 515 P.3d 510 (2022) (finding a child's wrongful life claim was sufficiently complex given existing Washington state law). Further, where legal issues are especially complex, it is standard to assume the forum with the most expertise in the relevant areas of law may adjudicate the matter in the timeliest manner. *See Parmalat Cap. Fin. Ltd.*, 639 F.3d at 580. In lack of any evidence proving otherwise, the state court's expertise in hearing claims arising under its law should not be doubted.

"The status of the title 11 bankruptcy proceeding to which the state law claims are related" is also an unpersuasive factor here. *Id.* at 582–83. Chapter 11 organization *may* require expeditious resolution of state law claims to determine the resources available to fund the reorganization but it does not certainly. *See id.* Even assuming that it does, if other state law claims are brought, the state court would either dispose of the case on the merits as the bankruptcy court presumed, or quickly adjudicate the claim in the area of its expertise.

Lastly, in considering "whether the state court proceeding would prolong the administration or liquidation of the estate," the bankruptcy court relies on *Parmalat Capital Finance*. *Id.* But the court in *Parmalat Capital Finance* analogized its case, which involved the collapse of major corporations, to *In re Worldcom, Inc.*, which at the time was the largest bankruptcy in United States history. *See id.*; *In re Worldcom, Inc. Sec. Litig.*, 293 B.R. 308, 311 (S.D.N.Y 2003). The same threats of "duplicative motion practice and repetitious discovery, as

well as requiring common issues to be resolved separately by courts across the country," are simply not present here. *Parmalat Cap. Fin. Ltd.*, 639 F.3d at 581.

Overall, the bankruptcy court ignores that "[c]ourts have recognized that the [timeliness] requirement is a relatively low bar hurdle to clear." *In re Dune Energy, Inc.*, 575 B.R. 716, 729 (Bankr. W.D. Tex. 2017). Liam's case is one suit against Dr. Smith. The bankruptcy court's contention that abstaining from Liam's claim may require it to abstain from hearing other similar claims against Dr. Smith is based on nothing more than mere speculation. R. at 11. And presumably these claims would be decided under New Lincoln law, so Liam's claim would set a precedent. R. at 28. This assumes other children may also bring claims under the same theory of liability, but even if not, it would set a precedent for the Clinic's obligation to indemnify Dr. Smith. Thus, nothing if anything is really lost.

On the balance of the factors, all weigh in favor of the state court's ability to timely adjudicate the matter. If the brute speed is the be-all-end-all, then when the federal bankruptcy court believes their interpretation of the state law provides no relief, that claim will likely never meet the abstention requirements. The bankruptcy court argues that remanding to the state court "to reach the same conclusion" would only "delay the resolution." R. at 11. But this proves too much. This result conflicts with the principles of federalism that the abstention provision exists to protect. H.R. Rep. No. 95-595, at 50 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6283. "Congress wisely chose a broad jurisdictional grant and a broad abstention doctrine over a narrower jurisdictional grant so that the district court could determine in each individual case whether hearing it would promote or impair efficient and fair adjudication of bankruptcy cases." *In re Salem Mortg. Co.*, 783 F.2d 626, 635 (6th Cir. 1986). Therefore, the abstain exception is

meant to operate as a safeguard for those state law claims that, like Liam's, due to their novelty and complexity deserve the right to be adjudicated in state court.

The bankruptcy court and the majority opinion of the Fifteenth Circuit ignore this. Their analysis hinges timeliness only upon the haste of a bankruptcy court. In sum, it is clear the bankruptcy court should have decided to abstain under 28 U.S.C. § 1334(c)(2).

B. If This Court Applies "Hypothetical Jurisdiction," It Will Render the Abstain Exception Useless.

As established above, the abstain exception was meant to filter out those cases best suited to be heard in state court, but hypothetical jurisdiction in practice ignores this. A prerequisite for meeting the abstain exception is that there must be "related to" jurisdiction under 28 U.S.C. § 1334(b). Because the bankruptcy court decided it did not have to determine the confines on its own jurisdiction under one statute, it also successfully avoided the confines of another statute—mandatory abstention under 28 U.S.C. § 1334(c)(2).

By the plain language of the statute, Congress did not mean that this exception applies when a federal court thinks it *might* have "related to" jurisdiction under 28 U.S.C. § 1334(b). To include areas of unresolved jurisdiction under this grant would run the risk of sending "core" bankruptcy proceedings to the state courts merely because they tow the case-specific lines between "related to" and "arising under" jurisdiction. *See Libertas Funding, LLC v. ACM Dev., LLC*, 22-CV-00787, 2022 WL 6036559, at *2 (Bankr. E.D.N.Y. Oct. 7, 2022) ("The difference between proceedings that are merely 'related to' a case pending under the Bankruptcy Code and 'core' Bankruptcy Code proceedings is significant because the former proceedings are subject to mandatory abstention.").

Notably, the bankruptcy court's practice of assuming but not deciding "related to" jurisdiction poses the unique threat of avoiding Congress's restriction on the bankruptcy court's

ability to hear state law claims. Therefore, the bankruptcy court has mangled the intent of Congress' jurisdictional grant in multiple aspects, creating a clearly unworkable framework that avoids democratic checks. *See* H.R. Rep. No. 95-595, at 50 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6283 (detailing the federalism concerns). The abstain exception should only apply when the court has established "related to" jurisdiction. Since the bankruptcy court did not, it is clear that the case should be remanded to state court.

III. LIAM JOHNSON CAN RECOVER FOR EMOTIONAL HARM BECAUSE DR. SMITH BREACHED HIS DUTY OF CARE TO LIAM AND HOLDING DR. SMITH LIABLE IS CONSISTENT WITH PUBLIC POLICY.

No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint and interference of others, unless by clear and unquestionable authority of law. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891). As the old maxim goes, an injury is a wrong; and for the redress of every wrong there is a remedy: a wrong is a violation of one's right; and for the vindication of every right there is a remedy. *Parker v. Griswold*, 17 Conn. 288, 303 (1845).

Indeed, this Court has recognized that "non-economic injury" in the form of emotional harm is cognizable. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970). Emotional harm is broadly defined to mean impairment or injury to a person's emotional tranquility. Restatement (Third) of Torts: Physical and Emotional Harm § 45 (Am. L. Inst. 2012). The tort of negligent infliction of emotional distress has only emerged as a cognizable, independent cause of action within approximately the last half century. John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 Marq. L. Rev. 789, 807–08 (2007). Still, American courts have historically been reluctant to compensate plaintiffs for

emotional suffering. *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 436 (Wis. 1994). Three major concerns were behind limiting the viability of emotional distress claims: avoiding fictitious or trivial claims, the difficulty of establishing (or disproving) the nature and extent of the alleged mental injury, and limiting liability. *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 795 (D.C. 2011).

Yet negligence law naturally balances the social utility of a defendant's behavior against the risk of serious harm it poses to others' interests, and determines conduct to be negligent when its risks outweigh its utility. Deborah K. Hepler, *Providing Creative Remedies to Bystander Emotional Distress Victims: A Feminist Perspective*, 14 N. Ill. Univ. L. Rev. 71, 83 (1993). Further, common law recognizes that important interests of dignity, self-determination, autonomy, and privacy are implicated by an individual's ability to make informed, personal medical decisions. *In re Protective Proc. of Nora D.*, 485 P.3d 1058, 1065 (Alaska 2021).

Because society has an interest in seeing medical science develop and in creating healthy families, tort law should encourage that development to occur in a safe and positive manner. Ingrid H. Heide, *Negligence in the Creation of Healthy Babies: Negligent Infliction of Emotional Distress in Cases of Alternative Reproductive Technology*, 9 J. Med. & L. 55, 64 (2005). Assisted Reproductive Technology malpractice disrupts families and creates intense emotional strife, weakening family structure. *Id.* Liam Johnson's medical malpractice and negligent infliction of emotional distress claims are viable under New Lincoln's negligence laws. This Court should reverse the decision of the appellate court and find Dr. Smith liable to Liam for emotional harm.

A. The Fifteenth Circuit Correctly Determined That Liam's Claims Do Not Classify as Wrongful Life Actions.

Liam's claims against Dr. Smith do not require a wrongful life analysis. Wrongful life actions are suits brought by an impaired child, who alleges that but for the defendant doctor or health care providers' negligent advice to, or treatment of, the parents, the child would not have been born. *Bruggeman v. Schimke*, 718 P.2d 635, 638 (Kan. 1986). The essence of the child's claim is that the defendants wrongfully deprived the parents of information which would have prevented the child's birth. *Id.* However, most American jurisdictions decline to recognize wrongful life as a viable cause of action. *Elliott v. Brown*, 361 So. 2d 546, 548 (Ala. 1978); *Azzolino v. Dingfelder*, 337 S.E.2d 528, 530 (N.C. 1985).

1. Liam's claims are not wrongful life actions because Dr. Smith's negligence did not deprive the Johnsons of the option to avoid Liam's conception or to terminate Emily's pregnancy.

Only three states definitively recognize "wrongful life" as a cause of action. Heide, *supra*, at 64. On August 1, 1984, New Jersey joined California and Washington as the only states to have recognized the right of an infant with birth defects to collect damages in a wrongful life suit.

The California Supreme Court was the first state high court to allow a wrongful life cause of action. *Turpin v. Sortini*, 643 P.2d 954, 955 (Cal. 1982). In *Turpin*, Joy Turpin, a child born with hereditary deafness, brought a wrongful life claim seeking damages from a doctor for negligently failing to advise her parents of the possibility of the hereditary condition. *Id.* The California Supreme Court held that Turpin was entitled to special damages for the expenses necessary to treat the hereditary ailment. *Id.* at 954. The crux of Turpin's argument—and what made her wrongful life claim successful—was that because of the doctor's negligence, her parents were deprived of the opportunity to choose not to conceive a child. *Id.* at 955.

One year later, Washington joined California in accepting wrongful life as a claim for relief. *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 484 (Wash. 1983). In *Harbeson*, Elizabeth and Christine Harbeson successfully brought wrongful life actions against their mother's doctor for failing to disclose an epilepsy drug's dangerous effects on unborn children. *Id.* at 485. In 1972, plaintiff Jean Harbeson was prescribed Dilantin, an anticonvulsant medication, after being diagnosed with epilepsy. *Id.* Jean and her husband wanted to have more children, but were suspicious of the drug's possible effects on a fetus. *Id.* Three doctors failed to respond to the Harbeson's inquiries about the drug—as a result, Elizabeth and Christine were born with physical, mental, and developmental defects. *Id.* The court held that the minors could recover special damages under negligence principles because they suffered an actionable injury to the extent that they required special medical treatment. *Id.* at 506. Like Joy Turpin, the Harbeson sisters successfully asserted a wrongful life action because of their argument that their parents would not have conceived if they had known about Dilantin's potential birth defects. *Id.* at 462.

The New Jersey Supreme Court quickly followed suit in *Procanik*. *Procanik v. Cillo*, 543 A.2d 985, 986 (N.J. Super. Ct. App. Div. 1988). In that case, Mrs. Procanik's obstetrician negligently failed to diagnose her with German measles early on in her pregnancy. *Id.* at 989. As a result, her son Peter was born with rubella-syndrome—a condition that causes vision, auditory, and mental disabilities. *Id.* at 988–89. The court held that Peter could recover special damages for the extraordinary medical costs attributable to his affliction. *Id.* at 989. Peter's argument closely resembled the arguments in *Turpin* and *Harbeson*; he contended that Mrs. Procanik's doctor deprived her of the opportunity to opt for terminating her pregnancy. *Id.*

Unlike Joy Turpin and the Harbeson sisters, Liam does not argue that Dr. Smith's negligence deprived his parents of the choice not to conceive. Liam does not suffer from a

genetic disorder like hereditary deafness. Liam was born a healthy baby boy to two parents who waited years to have a child. Nevertheless, Dr. Smith's practice of inseminating his patients with his own sperm presents the troublesome possibility of genetic injuries from dating, marrying, and conceiving children with a half-sibling. *Id.* at 1033 ("[P]hysicians engaging in illicit insemination owe duties to their doctor-conceived children because certain harms are foreseeable, including psychological and potential genetic injuries and the possibility of consanguineous relationships.").

Unlike Peter Procanik, Liam does not allege that Dr. Smith's carelessness prevented his mother from terminating her pregnancy. Quite the contrary—patients like Emily and Paul Johnson undergo IVF treatment for one reason: to conceive a child. Jody Lyneé Madeira, *Understanding Illicit Insemination and Fertility Fraud, from Patient Experience to Legal Reform*, 39 Colum. J. Gender & L. 110, 173 (2020) [hereinafter Madeira, *Understanding Illicit Insemination*]. Liam was not born with mental development defects like those described in *Procanik*, but his battle with mental health illnesses—including anxiety—has left him malnourished and academically at risk.

As the Fifteenth Circuit succinctly stated below, Liam alleges "only that the doctor, without disclosing it, introduced his own sperm into the IVF procedure and lead his parents and ultimately himself to believe he was the biological child of the man he called 'dad.'" R. at 21. By doing so, Emily and Paul Johnson raised Liam under the full belief that Liam was Paul's biological child, and did not and could not adequately prepare for the possibility—much less the consequences—of anything else. Thus, while it is not entirely out of the question that New Lincoln will ever recognize a wrongful life claim like those in *Turpin*, *Procanik*, and *Harbeson*, it will not be today.

2. Liam's claims should be analyzed as insemination fraud because Dr. Smith used his own genetic material to artificially inseminate Emily without her knowledge or consent.

The case before this Court involves a developing area of law known as "insemination fraud" or "fertility fraud." Jody Lyneé Madeira et al., *Uncommon Misconceptions: Holding Physicians Accountable for Insemination Fraud*, 37 Law & Ineq. 45, 48 (2019) [hereinafter Madeira et al., *Uncommon Misconceptions*]. Beginning in 2016, cases began to emerge where male OB/GYNs had used their own sperm in the 1970s through 1990s to inseminate unsuspecting patients, only to have their deeds exposed decades later through direct-to-consumer genetic testing services. Madeira, *Understanding Illicit Insemination*, *supra*, at 112. Today, with the advent of widespread consumer DNA testing, instances in which fertility doctors secretly used their own sperm for artificial insemination many years ago have begun to surface with some regularity. Jacqueline Mroz, *Their Mothers Chose Donor Sperm. The Doctors Used Their Own*, N.Y. Times (Aug. 26, 2019), https://www.nytimes.com/2019/08/21/health/sperm-donors-fraud-doctors.html [https://perma.cc/FD24-2QE3].

Due to insemination fraud's recent emergence as an actionable tort, authority on the topic is regretfully few and far between. However, two district courts—one in Vermont, the other in Idaho—recently heard claims that are helpful in illustrating this specific cause of action. In *Rousseau v. Coates*, plaintiff Cheryl Rousseau and her husband, Peter, agreed to an insemination procedure using an anonymous medical student donor. No. 2:18-cv-205, 2022 U.S. Dist. LEXIS 156641, at *1, *2 (D. Vt. Aug. 30, 2022). Rousseau's doctor performed the procedure, but instead of using the donor's sperm, he inseminated Rousseau with his own sperm. *Id.* Cheryl became pregnant; the couple's daughter, Barbara Rousseau, was born December 27, 1977. *Id.* at *3. Barbara discovered that Coates was her biological father after conducting DNA testing many

years later. *Id.* at *3. Cheryl, Peter, and Barbara brought claims for battery, breach of contract, fraud, and emotional distress. *Id.* At trial, Coates moved for summary judgment on all counts. *Id.* at *2. The Vermont district court dismissed Barbara as a plaintiff, but the jury awarded Cheryl Rousseau $250,000 in compensatory damages and $5,000,000 in punitive damages. *Id.* at *1–2.

In that same year, an Idaho District Court heard a case even more analogous to the one before this Court. In *Ashby v. Gerald Mortimer*, plaintiffs Sally Ashby and Howard Fowler sought fertility treatment from Dr. Mortimer. 2020 U.S. Dist. LEXIS 21622, at *1 (D. Idaho Feb. 5, 2020). Mortimer recommended that Ashby and Fowler undergo a treatment in which donor sperm from an anonymous donor would be mixed with Fowler's sperm in a lab prior to insemination. *Id.* at *3. Ashby and Fowler understood that there was a chance that conception could result from the donor sperm, and insisted on anonymity. *Id.* Instead of using a mix of semen from Fowler and an anonymous donor, Dr. Mortimer used his own semen to inseminate Ashby. *Id.* at *5. In September of that year, Ashby discovered she was pregnant; Ashby gave birth to daughter Kelli Rowlette on May 20, 1981. *Id.* at *4. Years later, Rowlette received a notification from Ancestry.com that a DNA sample she had submitted matched a sample submitted by Dr. Mortimer. *Id.* Ashby, Fowler, and Rowlette brought a medical malpractice action against Dr. Mortimer, arguing that his professional negligence caused substantial emotional distress, pain, and suffering. *Id.* at *22. The court dismissed Rowlette as a plaintiff, but held that a reasonable jury could find that Ashby and Fowler's emotional distress was caused by Dr. Mortimer's conduct. *Id.* at *6, *38. Additionally, the court held that a reasonable jury could find a specific dollar amount to award nominal damages for the harm they suffered. *Id.* at *38.

Rousseau and *Ashby* illustrate that illicit insemination cases, unlike those for wrongful life, are not about parentage or conception—they are about fraud and deception by a physician. *Rousseau v. Coates*, 2019 U.S. Dist. LEXIS 118728, at *3. In both *Rousseau* and *Ashby*, the plaintiffs' allegations were based on a physician's violation of the applicable standard of care in obstetrics and gynecology. *Ashby*, 2020 U.S. Dist. LEXIS 21622, at *20. As such, both courts concluded that insemination fraud claims should be analyzed under general negligence principles in the context of a medical malpractice action, *not* the elements of wrongful life. *Id.* at 8–9; *see also Kipfinger v. Great Falls Obstetrical & Gynecological Assocs.*, 2023 Mont. LEXIS 298 (Mar. 14, 2023) ("[E]lements of professional negligence claim generally correspond to four elements of common law negligence claim: an applicable legal duty owed by the defendant to the claimant, breach of that duty, causation of harm, and resulting damages.").

In response to cases like *Rousseau* and *Ashby*, some states have recently enacted fertility fraud laws that make a physician's use of his own semen to impregnate patients a felony and/or give victims the right to sue doctors for such conduct. Mroz, *supra*. Civil claims against these doctors are also available and can include a handful of torts, such as battery and emotional distress, as well as fraud and misrepresentation. Madeira, *Understanding Illicit Insemination*, *supra*, at 194. These claims offer former patients much more solid legal ground than criminal charges, but, as illustrated above, doctor-conceived children are on less stable ground in the absence of fertility fraud legislation, aside from claims for emotional distress. *Id.* Given the nearly-identical circumstances of *Rousseau* and *Ashby* to the case before this Court, it logically follows that Liam's claims for damages should be analyzed as a medical malpractice action, applying duty, breach, and causation—the basic foundations of negligence law. *Virgilio v. Ryland Grp., Inc.*, 680 F.3d 1329, 1339 (11th Cir. 2012).

B. The Fifteenth Circuit Erroneously Held That Liam Cannot Recover Damages for Emotional Harm.

New Lincoln law allows for Liam to sue Dr. Smith because Dr. Smith breached his duty of care to Liam, and this breach resulted in Liam's emotional distress. Negligence claims in New Lincoln follow the general 'no liability' rule for actions that result in only emotional harm, subject to the exceptions set out in § 47 and § 48 of the Restatement (Third) of Torts. *Grant v. Davis*, 450 N. Linc. 2d 1130 (1993). Section 48 sets out the "bystander rule," which requires that the plaintiff "perceive the event contemporaneously." Restatement (Third) of Torts § 48(a) (Am. L. Inst. 2012). Section 47 provides two alternative situations when emotional harm relief would be appropriate. *Id.* § 47. Under § 47(a), an actor is liable for emotional harm if the conduct places the plaintiff in "immediate danger of bodily harm." *Id.*

Subsection (b) provides that a plaintiff can recover if the allegedly negligent conduct involved in certain "activities, undertakings, or relationships" that make serious emotional distress "especially likely to result." *Id.* Under this subsection, "a defendant has a duty to avoid causing emotional distress to a plaintiff if the defendant has undertaken an obligation to benefit the plaintiff and if that undertaking, by its nature, creates not only a foreseeable, but an especially likely, risk that the defendant's negligent performance of the obligation will cause serious emotional distress." *Hedgepeth*, 22 A.3d at 802.

1. Dr. Smith owed Liam an extended duty of care under *Walker* and *Albala*.

Dr. Smith is liable to Liam under § 47(b) because he owed Liam a duty of care and the resulting harm was foreseeable. A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another. *Romain v. Frankenmuth Mut. Ins. Co.*, 762 N.W.2d 911, 912 (2009). A direct

physician-patient relationship can be one ground for creating affirmative protections of a plaintiff's economic and emotional interests under negligence law. *Tomlinson v. Metro. Pediatrics*, LLC, 412 P.3d 133, 141 (2018). Courts analyze a physician's duty to their patient by balancing three factors, namely: (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns. *Walker v. Rinck*, 604 N.E.2d 591, 594 (1992).

a. Physicians owe a duty of care to their patients' unborn children when the children are beneficiaries of the consensual relationship between the patient and their physician.

Unborn children can be the beneficiaries of a consensual relationship between patients and their physician. A duty may be owed to a beneficiary of a consensual relationship, akin to that of a third-party beneficiary of a contract, where the professional has actual knowledge that the services being provided are, in part, for the benefit of the third-party beneficiary. *Id.* at 594–95.

In *Walker v. Rinck*, Dr. Rinck from Lake Ridge Laboratory, Inc. ("Lake Ridge") mistyped newly pregnant Mrs. Walker with having Rh positive blood. *Id.* at 592. In fact, Mrs. Walker had Rh negative blood, and gave birth to a child with Rh positive blood just eight months later. *Id.* This disparagement in blood types meant that Dr. Rinck should have administered RhoGAM prior to the birth of her first child to prevent the formation of harmful antibodies. *Id.* Between May of 1981 and February of 1985, Mrs. Walker gave birth to three more children: Nathan, Kathy, and Jennifer. *Id.* All three children suffered from various ailments including hearing impairments, motor skill deficiencies, mental retardation, and anemia. *Id.* The Walker children sued Dr. Rinck and Lake Ridge, claiming that the doctor's negligence in failing to administer RhoGAM to Mrs. Walker prior to the birth of their oldest sibling caused their injuries. *Id.* at 596. The court held that Dr. Rinck owed a duty to the Walker children and that he breached his duty

when he failed to give their mother RhoGAM following the birth of her first child. *Id.* at 595. Dr. Rinck owed the children a duty, the court explained, because the Walker children were the beneficiaries of the consensual relationship between their mother and Dr. Rinck, and that Dr. Rinck had actual knowledge that the only reason for the administration of RhoGAM was for the benefit of any future children who may be born to Mrs. Walker. *Id.*

Just as Dr. Rinck owed a duty of care to Mrs. Walker's unborn children, Dr. Smith owed a duty to Emily Johnson's unborn son. Like Nathan, Kathy, and Jennifer, Liam is the beneficiary of Dr. Smith's relationship with Emily Johnson—children born from IVF procedures owe their life, quite literally, to intervention from medical science. Like Dr. Rinck, Dr. Smith had actual knowledge that the only reason for Emily Johnson's medical procedure was for the sole purpose and benefit of eventually bearing a child. After all, the goal of fertility treatments is to restore infertile individuals to the normal state of being able to bear a child if they want one. Thus, under *Walker*, the mere fact that Liam was not yet conceived at the time of Dr. Smith's blatant malpractice does not preclude Dr. Smith from owing him a duty to abide by the highest standard of care.

b. Physicians owe a duty of care to not-yet-conceived children when the kind of harm is easily foreseeable.

Courts have held physicians liable for potential harm to unborn children where the harm was easily foreseeable. *Albala v. City of New York*, 429 N.E.2d 786, 787 (N.Y. 1981). The concept of foreseeability is related to a court's determination of proximate, or legal, cause, as well as to its determination of duty. *Hedgepeth*, 22 A.3d at 794. In terms of analysis, courts will examine whether the evidence presents a chain of circumstances from which proximate cause can be reasonably and naturally inferred. *Id.* Ultimately, the question of proximate cause will almost always involve questions of fact for the jury. *Id.*

A physician's duty to benefit the plaintiff through artificial insemination, by its nature, creates a foreseeable risk that the defendant's negligent breach of this duty will cause emotional distress. Madeira, *Understanding Illicit Insemination*, *supra*, at 183. It would be cruel and irrational to deny that a physician performing an insemination could not foresee how this conduct could harm any resulting children. *Id.* At a minimum, potential harms include unexpected and traumatic disclosures of doctor-conceived status, disrupted personal identities, severely damaged trust in medical professionals, destabilized family relationships, and increased possibilities of consanguineous relationships within a particular geographic area. *Id.*

The issue in *Albala* was whether a cause of action existed in favor of a child for injuries suffered because of a tort committed against the mother prior to the child's conception. 429 N.E.2d at 787. Seven years before the birth of her child, the defendant physician negligently performed an abortion on 22-year-old Ruth Albala during which her uterus was perforated. *Id.* A malpractice action was brought on behalf of the child two years after his birth and alleged that the doctor's negligence caused him to suffer brain damage. *Id.* While the court of appeals emphasized that foreseeability, standing *alone*, was insufficient to prove a duty-based relationship, the court acknowledged that the harm was foreseeable. *Id.* at 788. Specifically, it was foreseeable that the mother would conceive again after the abortion and that those later-conceived children might be adversely affected by the damage to her uterus. *Id.*

Here, like in *Albala*, it is foreseeable that Dr. Smith's malpractice in Emily Johnson's IVF treatment would cause any resulting children grave harm. In *Albala*, it was foreseeable that Ruth and her husband would conceive again because she was in her peak reproductive years when she received the abortion. Here, it was foreseeable that Emily would conceive following her IVF treatments because that was the very purpose for which she sought treatment from Dr. Smith. It

was foreseeable that Ruth's perforated uterus would prevent her from sustaining a future pregnancy because a damaged uterus could leave a fetus without protection, causing its heart rate to slow and lose oxygen. Polina Schwarzman et al., *Obstetric Outcomes After Perforation of Uterine Cavity*, 11 J. Clinical Med., July 30, 2022, at 1. Similarly, it was foreseeable that Dr. Smith's deceptive practice of substituting the father's sperm for his own would cause Emily's child to suffer from psychological and genetic injuries.

Dr. Smith breached his duty of care to Liam, and the resulting harm was foreseeably caused by this breach. Thus, Dr. Smith is liable under § 47(b) for damages resulting from any emotional harm to Liam.

2. Finding Dr. Smith liable for medical negligence will not result in unlimited liability.

While it is true that the right to recover for negligently caused emotional distress in these circumstances should be limited to avoid "limitless liability out of all proportion to the degree of a defendant's negligence," these safeguards are already well in place. *Thing v. La Chusa*, 771 P.2d 814, 826 (Cal. 1989). The Fifteenth's Circuit's concern about unlimited liability is unfounded for two important reasons.

First, the class of potential plaintiffs in emotional distress claims is strictly limited to those who, because of their relationship with the defendant, suffer the greatest emotional distress. *Thing*, 771 P.2d at 829. Demonstrating a relevant relationship between the parties in question serves to sufficiently narrow this potential scope of liability. *Hedgepeth*, 22 A.3d at 802. As was established previously, the relationship between Liam Johnson and Dr. Smith provides for recovery because Dr. Smith owed Liam a duty of care. Dr. Smith's duty to his patient, Emily, extended to her unborn child because Liam was the beneficiary of their relationship, and the harm was foreseeable.

Second, insemination fraud cases impose upon the plaintiff the hefty burden of proving medical malpractice in court. *Edgeworth v. Fam. Chiropractic & Health Ctr., P.C.*, 940 So. 2d 1011, 1012 (Ala. 2006) ("[T]he trial court told the jury that the burden was a little different than in a normal civil case because a medical malpractice action required that the patient prove a claim to the jury's reasonable satisfaction by substantial evidence of the truth of the matters and things claimed."). Specifically, the plaintiff must establish through expert testimony the course of action that a reasonably prudent doctor with the defendant's specialty would have taken under the same or similar circumstances. *Meek v. Shepard*, 484 A.2d 579, 581 (D.C. 1984). Ideally, expert testimony should come from a physician who is specialized in the relevant practice area rather than from a physician who merely holds the relevant general Board certification. *Kordas v. Sugarbaker*, 990 A.2d 496, 501 (D.C. 2010).

In *Ashby*, the Plaintiffs used Dr. Parsons, another fertility specialist, as their expert witness. Applying his expert knowledge and experience in the field, Dr. Parsons concluded, with reasonable medical certainty, that Dr. Mortimer breached the standard of care by knowingly and purposefully using his own semen to artificially inseminate Ms. Ashby without her or Mr. Fowler's knowledge or consent to conceive. *Ashby*, 2020 U.S. Dist. LEXIS 21622, at *20. Specifically, Dr. Parsons explained that Dr. Mortimer's overall conduct deviated from the local standard of care for obstetricians and gynecologists in the Idaho Falls area during the years 1979 to 1981 in eight respects. *Id.* at *49.

Irrespective of Dr. Smith's supposed intentions for using his own sperm (Dr. Smith "thought he was doing the best thing to help Emily and Paul achieve their desire for a child due to Paul's low motility rate." R. at 4), an expert witness could testify that Dr. Smith's conduct was an egregious deviation from the standard practices in obstetrics and gynecology. *See* Madeira,

Understanding Illicit Insemination, *supra*, at 195 ("It appears that the standard of care in the 1970s and 1980s would not permit a physician's use of his own sperm, and certainly would not without the patient's consent . . . . It is an especially obvious breach for a physician to substitute his sperm for that of the patient's husband.").

As the court in *Walker* so aptly stated, "surely the public policy of this state follows and is coincident with the well-established medical practice of giving RhoGAM to an RH negative mother who has given birth to an Rh positive child in order to protect future children of such mother from injury." 604 N.E.2d at 597. Surely the public policy of the State of New Lincoln follows and is coincident with the well-established medical practice of abstaining from inserting one's own ejaculate fluid into their patient without their explicit consent. In sum, examination of the cases from other jurisdictions leads us to conclude that the dire consequences forecast by the defendants is overstated. *Id.* at 595.

3. Insemination fraud threatens society's interests in protecting children from harm and in holding physicians accountable for malpractice.

Perhaps most importantly, finding Dr. Smith liable for emotional distress is consistent with the highest values of this Court. This country's strong interest in protecting children from psychological harm is well-established. *Santosky v. Kramer*, 455 U.S. 745, 790 (1982); *Ginsberg v. New York*, 390 U.S. 629, 640–41 (1968); *New York v. Ferber*, 458 U.S. 747, 757 (1982). This Court has emphasized that "the whole community" has an interest "that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed . . . citizens." *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944). Children conceived through fertility fraud possess several key interests which are worth protecting. Madeira, *Understanding Illicit Insemination*, *supra*, at 177. Among the interests that children possess are

an interest in not being deceived, an interest in appropriately stored gametes, an interest in anonymity, and an interest in standing to pursue civil fertility fraud lawsuits. *Id.*

Society also has a vested interest in holding physicians to a standard of professional competence and imposing liability when they are negligent in treating their patients. *Hickman v. Myers*, 632 S.W.2d 869, 871–72 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.). A patient's confidence in her physician, the bond of trust between them, and the therapeutic space in which patients can feel safe are all fundamental building blocks for treatment compliance, communication, and efficacy. Madeira et al., *Uncommon Misconceptions*, *supra*, at 47. These standards are so paramount that societal interests are violated even if individual patients are unaware of specific breaches. These principles include not embezzling money from patients or involving them in improper emotional or sexual relationships. Madeira, *Understanding Illicit Insemination*, *supra*, at 165.

As has been the case so many times before, this Court is in the best possible position to protect these salient interests from the dangers of insemination fraud. The United States Supreme Court is in a position to shred the insulation of state law grounds that could prevent liability for grave wrongs. While the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right. *Obergefell v. Hodges*, 576 U.S. 644, 648 (2015). The Nation's courts are open to injured individuals, like Liam, who come to them to vindicate their own direct, personal stake in our basic charter. *Id.* at 677.

CONCLUSION

The bankruptcy court did not establish the threshold requirement that it had jurisdiction over Liam's claims in order to dismiss them on the merits, and nevertheless, if this Court finds it did have jurisdiction, it was required to remand the claims to state court. Liam's claims for emotional harm succeed under the general negligence principles of the State of New Lincoln. His claims for medical malpractice and negligent infliction of emotional distress should not be analyzed under wrongful life because Dr. Smith breached his duty to Liam and his negligence caused Liam's injuries. This Court should REVERSE the Fifteenth Circuit Court of Appeals' judgment in all respects.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER