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18 NATIONAL CATHOLIC BIOETHICS CENTER

19 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
20 FOR THE COUNTY OF LOS ANGELES, SANTA MONICA COURTHOUSE

21	NICHOLAS LOEB, an individual	)	Case No. SS 024581
22		)	
23	Petitioner and Plaintiff,	)	<b>APPLICATION TO FILE AMICUS</b>
24		)	<b>TRIAL BRIEF SUPPORTING</b>
25	vs.	)	<b>POSITION THAT TWO FEMALE</b>
26		)	<b>EMBRYOS ARE HUMAN BEINGS</b>
27	SOFIA VERGARA, an individual; and	)	<b>AND DESERVING OF THE</b>
28	ART REPRODUCTIVE CENTER,	)	<b>COURT'S PROTECTION; and</b>
	INC., a California Corporation	)	<b>ACCOMPANYING BRIEF</b>
		)	
	Respondents and Defendants.	)	Action Filed: August 29, 2014
	_____	)	Honorable Richard A. Stone

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1                   **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

2           1.       Amici curiae American Association of Pro-life Obstetricians and  
3  
4       Gynecologists and the National Catholic Bioethics Center respectfully request the  
5       Court to accept this amicus brief filed on behalf of the two female human embryos  
6       whose fates await the Court's decision in this litigation. The purpose of this friend's  
7       brief is to supply the Court with correct and useful information regarding these  
8       embryos, who, being unrepresented, are without a voice in this litigation.  
9

10           2.       An amicus brief aims to render relevant and useful information to the  
11       Court in matters of law and public interest by a non-party to the litigation. The  
12       amici curiae participate by making a more complete analysis of certain facts and  
13       issues, particularly where the decision will affect non-parties who are unrepresented  
14       in the litigation. (See Michael K. Lowman, “The Litigating Amicus Curiae: When  
15       Does the Party Begin After the Friends Leave,” *The American University Law*  
16       *Review*, Vol.41: 1243, 1243-1245 (1992)) The appearance of amicus curiae is  
17       common in American litigation. (*Id.*) Trial courts have the inherent authority to  
18       accept and consider the briefs of amici curiae. *In re Bayshore Ford Truck Salem,*  
19       *Inc.* (11th Cir. 2006) 471 F.3d 1233, 1249 n.34; *Jin v. Ministry of Security* (D.I.C.  
20       2008) 557 F. Supp. 2d 131, 136. Courts in the State of California have this authority  
21       from Cal. Rules of Court, Rule 8.200 (c).  
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26           3.       The Court in this case is being asked to decide the fate of two female  
27       embryos of Loeb (father) and Vergara (mother) cryopreserved in an IVF Clinic. The  
28       Court’s decision will significantly turn on what rights the embryos are accorded in



1 their parents' contest over a parenting plan for them. The answer to this question in  
2 turn depends on the embryos' legal status. Amici in this brief address these  
3 questions by presenting the Court with current scientific knowledge of early pre-  
4 natal human development, which establishes that the embryos are human beings  
5 from the moment of fertilization (the binding of sperm and oocyte). The brief  
6 supports Petitioner's contention at ¶45 of his Third Amended Complaint that he is the  
7 "father" of the female embryos before the Court, whom he views as "his daughters,"  
8 and that the "Female Embryos have been conceived." A review of the current  
9 relevant science establishes that the embryos are human beings at fertilization and  
10 may not be treated, as some courts have done, as property, or as less than fully  
11 human, and without rights to parental or governmental protection.  
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15 4. Recently one of these courts, in California, though it received no  
16 advocacy on behalf of the five human embryos before it, appreciated that the  
17 embryos "represent the nascent stage of five human lives. They are not property nor  
18 are they a fully formed human being. They are, in the construct of the law, *sui*  
19 *generis* and will be deemed as such in this statement of decision." *In re the Marriage*  
20 *of Stephen E. Findley, Petitioner, and Mimi C. Lee, Respondent, The Regents of the*  
21 *University of California, claimant*, FDI-13-780539 (11/18/2015, S.F. Superior Ct.)  
22 at 82. (*Findley*) The amici agree with the court's holding that human embryos may  
23 not be treated as property, but they believe that the court did not fully understand the  
24 status of the embryos when it concluded that human embryos fall short of being fully  
25 human because they are not "fully formed." The court did not recognize that no  
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1 human beings are “fully formed” at any given age, but undergo continuous age-  
2 related change from fertilization to death. (A human being develops rapidly initially,  
3 but reaches sexual maturity only in young adulthood, and psychological maturity  
4 even later. Changes continue into old age -- e.g. with age spots and senescence --  
5 until death.) The only "fully formed" reality in this process is the human organism's  
6 unique development plan, initiated at fertilization, which directs each person's  
7 growth from fertilization until death.<sup>1</sup> The court in *Findley* recognized that the  
8 embryos before it were *sui generis* (unique), but could not articulate a valid basis for  
9 holding that they were less than fully human. This is not surprising given the lack of  
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14 <sup>1</sup> Condic, *When Does Human Life Begin, A Scientific Perspective*, (October, 2008),  
Westchester Institute, White Paper, Vol. 1, at 7 (*White Paper*).

15 [http://bdfund.org/wordpress/wp-](http://bdfund.org/wordpress/wp-content/uploads/2012/06/wi_whitepaper_life_print.pdf)  
16 [content/uploads/2012/06/wi\\_whitepaper\\_life\\_print.pdf](http://bdfund.org/wordpress/wp-content/uploads/2012/06/wi_whitepaper_life_print.pdf) (accessed 11/23/15)  
17 William Shakespeare colorfully describes life's “ages” in *As You Like It*, Act II,  
18 Scene VII (1600):  
19 <https://www.youtube.com/watch?v=QodM1Pt2Wyg>  
<https://www.youtube.com/watch?v=QodM1Pt2Wyg>  
<https://www.youtube.com/watch?v=QodM1Pt2Wyg>  
<https://www.youtube.com/watch?v=QodM1Pt2Wyg> (accessed 11/24/15)

20 All the World's a Stage,  
21 And all the men and women merely players;  
22 They have their exits and their entrances,  
23 And one man in his time plays many parts,  
24 His acts being seven ages. At first, the infant,  
25 Mewling and puking in the nurse's arms.  
26 Then the whining schoolboy, with his satchel  
27 And shining morning face, creeping like snail  
28 Unwillingly to school. And then the lover,  
Sighing like furnace, with a woeful ballad  
Made to his mistress' eyebrow. Then a soldier,  
Full of strange oaths and bearded like the pard,  
Jealous in honor, sudden and quick in quarrel,  
Seeking the bubble reputation

Even in the cannon's mouth. And then the justice,  
In fair round belly with good capon lined,  
With eyes severe and beard of formal cut,  
Full of wise saws and modern instances;  
And so he plays his part. The sixth age shifts  
Into the lean and slippered pantaloons,  
With spectacles on nose and pouch on side;  
His youthful hose, well saved, a world too wide  
For his shrunk shank, and his big manly voice,  
Turning again toward childish treble, pipes  
And whistles in his sound. Last scene of all,  
That ends this strange eventful history,  
Is second childishness and mere oblivion,  
Sans teeth, sans eyes, sans taste, sans everything.

1 any advocacy by the parties (or by anyone else on behalf of the embryos) for the  
2 position that they are fully human beings. This brief seeks to remedy that defect, and  
3 to assist this Court to better understand what current science teaches about the nature  
4 of the two female human embryos before it and what that status commands in law.  
5

6 5. In *Roe v. Wade* (1973) 410 U.S. 113, 159, the U.S. Supreme Court  
7 said:

8 We need not resolve the difficult question of when life begins. When those  
9 trained in the respective disciplines of medicine, philosophy, and theology are  
10 unable to arrive at any consensus, the judiciary, *at this point in the*  
11 *development of man's knowledge*, is not in a position to speculate as to the  
12 answer.

13 (italics added). Today, 42 years later, scientists have determined with confidence the  
14 point at which a human life begins, and thus overcome the uncertainty confessed by  
15 the *Roe* court concerning “the difficult question of when life begins.”<sup>2</sup>

16 6. Whether to accept briefs of amici turns in part on the significance and  
17 complexity of the issues presented. Both factors suggest the usefulness of an amicus  
18 brief here. The case is nationally known so the Court's decision is likely to influence  
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22  
23 <sup>2</sup> *Roe v. Wade* notwithstanding, biology has understood for over a century that a  
24 zygote, a one-cell embryo, the youngest form of human being, comes into existence  
25 at the moment of sperm-egg fusion. Clift & Schuh (2013) *Restarting life:*  
26 *fertilization and the transition from meiosis to mitosis*, Nature Reviews Molecular  
27 Cell Biology 14, 549-561 at Box 1: History of the discovery of fertilization  
28 doi:10.1038/nrm3643  
[http://www.nature.com/nrm/journal/v14/n9/box/nrm3643\\_BX1.html](http://www.nature.com/nrm/journal/v14/n9/box/nrm3643_BX1.html) (accessed  
11/23/15); see generally Bionity, “Beginning of Pregnancy Controversy” at  
[http://www.bionity.com/en/encyclopedia/Beginning\\_of\\_pregnancy\\_controversy.html](http://www.bionity.com/en/encyclopedia/Beginning_of_pregnancy_controversy.html#_note-10/)  
#\_note-10/ (accessed 11/18/2015)

1 how many cryopreserved human embryos are treated.<sup>3</sup> The legal issues presented  
2 are complex, and require careful consideration in light of current, relevant science.  
3 Such consideration has not occurred for decades, not, in fact, since the *Davis v.*  
4 *Davis* case in the late 1980's and early 1990's, discussed below. It is therefore likely  
5 that the discussions, citations, references and points made in the brief on these  
6 critical issues will not be presented by the parties themselves before this Court.  
7 Since the parties in post-*Davis* cases deciding the fates of human embryos have  
8 rarely advocated on behalf of the full humanity of the human embryos involved, the  
9 perspective offered to the Court is fresh and, frankly, needed.  
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12           7.       The amici are in a strong position to be helpful on the issues discussed  
13 in this brief. The amicus American Association of Pro-Life Obstetricians &  
14 Gynecologists (AAPLOG) is a nonprofit professional medical organization  
15 consisting of approximately 3,000 obstetrician-gynecologist members and associates  
16 practicing medicine in the United States and in several foreign countries. Its mission  
17 is to encourage the practice of medicine consistent with scientific truth and the  
18 Hippocratic oath, both of which it views as orienting medicine, as a healing art,  
19 toward the well being and flourishing of all human life. Its mission includes  
20 informing courts, legislatures, and the general public of scientific developments and  
21 their impact on the ethical practice of medicine.  
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27 <sup>3</sup> The *Findley* court quoted a letter to the Editor of National Biotechnology stating  
28 that there are over 4 million embryos maintained in assisted reproductive technology  
clinics with 90% stored for family preservation. (*Findley, supra*, at 2)

1  
2 8. The amicus National Catholic Bioethics Center (Center) is a non-profit  
3 research and educational institute committed to applying the principles of natural  
4 moral law, consistent with many traditions including the teachings of the Catholic  
5 Church, to ethical issues arising in health care and the life sciences. Nothing is more  
6 deeply related to the principles of natural moral law -- which can be embraced by  
7 persons of many faith traditions, or those of no faith at all -- than the protection of  
8 human life, especially at its most vulnerable stages, when that life is unable to speak  
9 for his or herself. Human offspring are not property, any more than a child is  
10 property of a parent. Parents, regardless of the stage of development of their  
11 offspring, always, regardless of the culture or faith tradition, but consistent with  
12 natural moral law, are to act in the best interest of those offspring. As soon as human  
13 life is deemed to be the property of another, all ensuing actions toward that life  
14 violate bioethical principles. The National Catholic Bioethics Center is committed to  
15 fostering a culture respectful of such fundamental bioethical principles.  
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20 9. The amici believe the information presented in this amicus brief may  
21 assist the parties to resolve their differences, but even if it does not it will assist the  
22 Court to decide the issues addressed based on scientific fact, and to avoid legal  
23 reasoning based on demonstrably false or inaccurate scientific premises.  
24

25 10. Accordingly, the amici believe the Court will be aided by: (1) a fresh  
26 look at the current science of early embryo development; (2) a review of the seminal  
27 case (*Davis v. Davis*) addressing the scientific issues, and other court decisions  
28

1 relevant to the Court's inquiry; and (3) a discussion of the implications of the current  
2 state of scientific understanding on resolution of embryo disposition disputes.

3  
4 11. The issues addressed in this brief are important. The right to life is the  
5 most basic right enshrined in the Declaration of Independence, the founding  
6 document of our nation. It is incumbent on a free people, and commanded by the  
7 common good, to be ever vigilant that the fundamental right to life is respected and  
8 made available to all human beings within its jurisdiction. This obligation is borne  
9 by all citizens, but particularly by the judiciary, acting on behalf of the people. This  
10 brief is offered to aid the Court in exercising its responsibility to meet this obligation.  
11

12  
13 12. Counsel for the amici have reviewed this application and amicus brief.  
14 Counsel have requested the parties' consent for filing. No compensation or  
15 monetary contribution from any party or counsel of party was solicited or received in  
16 connection with this filing. All parties have been served with this application and  
17 brief, which is intended to benefit the Court at this early stage in the litigation.  
18

19  
20 13. The amici move this Court to accept this brief, consisting of 11,145  
21 words. The amici have made the brief succinct, but note that the current length is  
22 necessary in order to present the scientific findings in sufficient detail so as to  
23 effectively explicate its position on when human life begins. Amici believe this  
24 constitutes good cause under Superior Ct. Rule 8.883(b)(4).  
25

26  
27 14. The amici also move the Court to accept an Appendix of referenced  
28 items in excess of 10 pages. The amici are filing one hard copy of the brief and  
appendix, and one electronic brief, which contains the brief and appendix and all

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documents referenced in the brief. The disk has been scanned with ESET Smart Security and is free of viruses.

15. For all of these reasons, the amici curiae respectfully request the Court to accept and file this amicus brief.

Respectfully submitted,  
  
Thomas More Society  
Thomas Brejcha  
Thomas Olp  
Megan Enright  
  
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Dated: December 22, 2015  
  
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By: \_\_\_\_\_ By: \_\_\_\_\_

Counsel for Amici Curiae American Association of Pro-Life Obstetricians and Gynecologists and National Catholic Bioethics Center

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## AMICUS CURIAE BRIEF

### ISSUES PRESENTED FOR REVIEW

1. When did human life begin for these embryos?
2. Should the rights and interests of the embryos as human beings be considered in resolving parental disputes over their disposition?
3. How does recognizing the embryos' status as human beings affect resolution of the dispute over their disposition?

### STATEMENT OF FACTS

To create their embryos Loeb provided his sperm and Vergara her eggs to an IVF clinic, which fertilized the eggs with the sperm *in vitro*, (French for “in glass”). (Third Amended Complaint, ¶35) Loeb and Vergara’s plan was to transfer the embryos to a surrogate mother’s uterus. At some point the embryos were cryopreserved. Later the parties separated, and disagreed over disposition of their embryos, prompting the lawsuit. (*Id.* ¶ 1) Press releases<sup>4</sup> say that Vergara wants the embryos to remain cryopreserved until either she or Loeb dies, at which time the embryos would be thawed “with no action taken,” meaning they would not be given the opportunity for further cell metabolism and would die. (*Id.*, ¶¶31-33; Exhibit A) Loeb seeks control of the embryos so he can find a surrogate mother to bear them. (*Id.*, Intro, 1) The parents never intended that Vergara would physically bear the

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<sup>4</sup> [Mayoras, Danielle and Andy, \(2015\) Sofia Vergara Lawsuit Teaches Lesson For Couples Seeking IVF, Forbes, http://www.forbes.com/sites/trilandheirs/2015/04/21/sofia-vergara-lawsuit-teaches-lesson-for-couples-seeking-ivf/](http://www.forbes.com/sites/trilandheirs/2015/04/21/sofia-vergara-lawsuit-teaches-lesson-for-couples-seeking-ivf/) (11/24//2015 accessed)



1 embryos, so a mother’s right to choose to bear, or not to bear, a child is not  
2 implicated. (*Id.* ¶15)

3  
4 According to the complaint, the parties in the informed consent forms they  
5 executed engaging the IVF clinic’s services never provided a directive for disposition  
6 in the event of their separation, only a directive for disposition in the event of their  
7 death (“thaw with no action”). (*Id.* ¶84) Loeb asserts that assigning a disposition  
8 upon one event (death) does not govern disposition upon a different, unanticipated  
9 event (separation). (*Id.* ¶80) He asserts that he would not have selected the  
10 disposition (thaw with no action) if he had an inkling that it might be enforced in the  
11 event of his and Vergara’s separation. (*Id.* ¶77) He further asserts that he signed the  
12 form under duress. (*Id.* ¶90, Count VI) Finally, Loeb claims that the clinic forms are  
13 void because they do not list all of the options, including “donation to another  
14 couple” or “other disposition” that the California Code requires. (*Id.* Ex.A, and  
15 §125315 (b) of the California Health and Safety Code). (Code) Loeb requests the  
16 court to find that the forms he and Vergara executed are invalid and to award him  
17 custody of the embryos. (*Id.* Count V, VI)

## 21 SUMMARY OF ARGUMENT

22  
23 The resolution of whether the female embryos are human beings will  
24 necessarily drive the outcome of this case. Recent scientific research, cited and  
25 discussed *infra*, establishes that fertilization of a single normal oocyte by a single  
26 normal sperm creates a new human organism. Therefore, the two female embryos in  
27 this case are not just "potential" life, but actual living human beings growing toward  
28

1 maturity. Even a one-cell zygote globally directs his or her own development toward  
2 the organized billions of cells that make up a human body at birth and after. A  
3 zygote is *sui generis*, not in the *Findley* court’s sense of being neither property nor a  
4 fully formed human being, but in his or her recognized definition as a *unique* human  
5 being. A human embryo does not become a human being at some arbitrary point in  
6 life’s continuum, but is one from fertilization as a one cell zygote, and continues to  
7 be one until death. Court decisions involving embryos that fail to recognize their  
8 status as human beings erroneously rely on outdated science and a corollary “right  
9 not to procreate.” That so-called right ignores the fact that, once an embryo is  
10 created, the parties have procreated, and the “right not to procreate” has evaporated.  
11 Vis-a-vis the created human embryo, the right not to procreate is, in reality, a right to  
12 terminate parental duties by terminating the embryo, a human being.

13  
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15  
16 In this case, the Court is being asked to resolve a dispute involving the  
17 conflicting rights and interests of *four* human entities: a mother, father, and two  
18 unborn female embryos, the actual unborn children of the parties. The Court should  
19 not proceed as if only the rights and interests of the parents are at issue. The rights  
20 and interests of all of these persons, in particular the interests of the helpless human  
21 embryos before the Court, must be articulated and carefully weighed. The state’s  
22 interest in protecting human life should also be considered. Legal rules that treat  
23 human embryos as property or anything less than human beings should be eschewed.  
24 Only a calculus including the best interests of the embryos respects their status as the  
25 very youngest of human beings, but human beings nonetheless.

## ARGUMENT

### I. VERGARA’S AND LOEB’S EMBRYOS ARE HUMAN BEINGS.

#### A. The Scientifically Demonstrable Characteristics Of A Human Zygote Establish That Human Life Begins At Fertilization.

The question as to when a human *being* comes into existence can and should be answered based on the most recent scientific evidence relating to the inception of human life. It is not a debate for ethicists, theologians, politicians or journalists - it is a question of demonstrable scientific fact that must be answered as such, irrespective of the ethical or political consequences that may flow from the fact.

In determining if the human embryos are human beings the Court may and should consider accepted scientific facts. (Cal. Evid. Code §§ 451 (f), 452 (g), (h).) Loeb’s sperm and Vergara’s eggs (oocytes) are germ cells or gametes, each containing a haploid number (one-half or 23) of the chromosomes that a somatic or body cell contains (46). This makeup permits the male and female germ cells to create a single cell that has a diploid or full set of chromosomes. Condic, *When Does Human Life Begin: Scientific Evidence and Terminology Revisited*, 6/20/2014, University of St. Thomas Journal of Law & Public Policy, Vol. VIII, 44, at 76-77 (glossary) (*Condic, 2014*).<sup>5</sup>

Chromosomes are linear bodies that contain all or most of the organism’s genes, which are the functional units of inheritance controlling the transmission and

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<sup>5</sup> <http://www.stthomas.edu/media/schooloflaw/pdf/jlpp/volume8no1/CondicArticle.pdf> (accessed 11/11/2015).

1 expression of one or more traits. Condic, *When Does Human Life Begin, A Scientific*  
2 *Perspective*, (October, 2008), Westchester Institute, White Paper, Vol. 1, at 14  
3 (*White Paper*). Genes do this by transmitting information in a specific sequence of  
4 nucleotides in DNA. (*Id.*) DNA describes the various nucleic acids that are the  
5 molecular basis of heredity. (*Id.*)

7 All cell types are scientifically identified by differences in composition and  
8 behavior, the universally recognized biological criteria for describing cell types and  
9 for determining when a new cell type is formed. *Condic, 2014* at 46. The egg or  
10 oocyte and sperm have different genomes (gene sets). At the instant of sperm-oocyte  
11 plasma binding in normal (and *in vitro*) human reproduction, a series of biochemical  
12 and molecular events occurs generating a *one-cell embryo* called a zygote, whose cell  
13 composition and behavior are immediately different from that of the sperm and  
14 oocyte. (*Id.* at 47 and 79 fig. 1) The zygote's molecular composition is unique, with  
15 sperm and oocyte-derived components. The zygote immediately behaves as a new  
16 and unique human organism, using cell components to direct his or her *own*  
17 development, not just as a single cell, but towards "production of interacting groups  
18 of cells, tissues and structures in a specific spatial and temporal sequence." (*Id.* at  
19 48.) In other words, the zygote immediately initiates a trajectory of development that  
20 ends only with the demise of the organism.

25 Cryopreservation slows but does not stop molecular movement and  
26 metabolism, and so slows but does not stop the embryo's development. It is not of  
27 record yet in this case how far along the female embryos are in their developmental  
28

1 trajectory, but we know they are female (Complaint, Intro.), and each cell in each  
2 embryo has her own unique DNA, which is different from the DNA of the sister  
3 embryo, the mother and father, and the sperm and oocyte.  
4

5 Dr. Maureen Condic, who holds a doctorate in neurobiology from the  
6 University of California, Berkeley, and currently teaches human embryology as  
7 Associate Professor of Neurobiology and Anatomy at the University of Utah School  
8 of Medicine, confirms, based on accepted scientific criteria, that human life begins at  
9 fertilization:  
10

11 Based on universally accepted scientific criteria, a new cell, the human  
12 zygote, comes into existence at the moment of sperm-egg fusion, an event that  
13 occurs in less than a second.

14 She continues:

15 Upon formation, the zygote immediately initiates a complex sequence of  
16 events that establish the molecular conditions required for continued  
17 embryonic development. The behavior of the zygote is radically unlike that of  
18 either sperm or egg separately and is characteristic of a human organism.  
19 Thus, the scientific evidence supports the conclusion that a zygote is a human  
20 organism and that the life of a new human being commences at a scientifically  
21 well defined “moment of conception.” This conclusion is objective,  
22 consistent with the factual evidence, and independent of any specific ethical,  
23 moral, political, or religious view of human life of the embryos.

24 *Condic, White Paper* at ix; *Condic, 2014* at 44, 76-79; glossary of terms; fig.1 at p.

25 79.<sup>6</sup> Dr. Condic has given expert testimony to the same effect:

26 While philosophy and religion assign a value to life, what is human life is a  
27 biological fact and not an opinion. . . . The conclusion that a human zygote is  
28 a human being (i.e. a human organism) is not a matter of religious belief,

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29 <sup>6</sup> [http://bdfund.org/wordpress/wp-content/uploads/2012/06/wi\\_whitepaper\\_life\\_print.pdf](http://bdfund.org/wordpress/wp-content/uploads/2012/06/wi_whitepaper_life_print.pdf) (accessed 11/12/2015).

1 societal convention or emotional reaction. It is a matter of observable,  
2 objective fact.

3 *Planned Parenthood of Ind. v. Comm'r* (S.D. Ind. 2011) 794 F.Supp.2d 892, 916-17.  
4 aff'd. (7<sup>th</sup> Cir. 2012) 699 F. 3d 962, cert. den. (May 28, 2013) \_\_U.S.\_\_, 2013 WL  
5 655224.

6 Other scientists confirm Dr. Condic's statements. Dr. Renee Reijo Pera,  
7 Ph.D., Professor of Obstetrics and Gynecology and former Director of Stanford  
8 Center for Human Pluripotent Stem Cell Research and Education, said in a 2010  
9 lecture that she discovered in her research that what makes us human "wasn't  
10 consciousness, and it wasn't love, and it wasn't spirituality but it just is. On day one a  
11 human sperm and a human egg come together and we have a human embryo."<sup>7</sup>  
12

13 The scientific conclusion that human life begins at fertilization arises from  
14 scientists' observation of early embryonic development. Dr. Condic's 2014 paper  
15 relied upon over 100 scientific research papers from 1995 onward describing and  
16 analyzing 26 separate developmental changes in the early embryo from sperm-egg  
17 binding through days 4-6. *Condic, 2014*, 49-67. Her paper establishes that from the  
18 time of fertilization as a one-cell zygote, an embryo is not a mere collection or  
19 aggregate of cells, but an internally directed, dynamic organism.  
20  
21

22 Dr. Condic explains the differences between an organism and an aggregate of  
23 cells, such as tissues or organs. While an aggregate of cells, "are alive and carry on  
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26  
27 <sup>7</sup> <https://www.youtube.com/watch?v=mkHhTT5Qqsg> at 10:04 lecture Dr. Pera  
28 (2010) (accessed 12/13/2015).

1 the activities of cellular life, yet [they] fail to exhibit coordinated interactions  
2 directed towards any higher level organization."<sup>8</sup> By contrast, an organism exhibits  
3 that "higher level" of organization, acting" in an interdependent and coordinated  
4 manner to 'carry on the activities of life.'" *Condic, (White Paper)* at 6.<sup>9</sup> An organism  
5 is distinguished by the interaction of its parts "in the context of a coordinated whole."  
6 (*Id.*) Cells and organs are parts of an organism; the organism is the whole, directing  
7 the parts from the moment of fertilization. *Condic* elaborates on the organismic  
8 functioning of the zygote as follows:  
9

11 From the moment of sperm-egg fusion, a human zygote acts as a complete  
12 whole, with all the parts of the zygote interacting in an orchestrated fashion to  
13 generate the structures and relationships required for the zygote to continue  
14 developing towards its state....The zygote acts immediately and decisively to  
15 initiate a program of development that will, if uninterrupted by accident,  
16 disease, or external intervention, proceed seamlessly through formation of the  
definitive body, birth, childhood, adolescence, maturity, and aging, ending  
with death. This coordinated behavior is the very hallmark of an organism.

17 (*Id.* at 7). *Condic* concludes that the zygote, though only a single cell, "is not merely  
18 a unique human cell, but a cell with all the properties of a fully complete (human  
19

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20  
21 <sup>8</sup> An example of cell aggregates are the HeLa cells extracted from Henrietta Lack and  
22 utilized in many medical treatments. See Zielinski, Sarah, *Cracking the Code of the*  
23 *Human Genome/ Henrietta Lack's 'Immortal' Cells*, (January 22, 2000),  
Smithsonian.com Special Report [http://www.smithsonianmag.com/science-  
24 nature/henrietta-lacks-immortal-cells-6421299/](http://www.smithsonianmag.com/science-nature/henrietta-lacks-immortal-cells-6421299/) (accessed 11/11/2015).

25 <sup>9</sup> *Condic* notes that the word "organism," as defined by the NIH medical dictionary,  
26 emphasizes an individual whole and interdependent/dependent parts: "(1) a complex  
27 structure of interdependent and subordinate elements whose relations and properties  
28 are largely determined by their function in the whole and (2) an individual  
constituted to carry on the activities of life by means of organs separate in function  
but mutually dependent: a living being." *White Paper.* at 6, fn.22.

1 organism)...”(Id.) Each of the scientific papers she cites in her 2014 paper (117 in  
2 all, dating from 1995 to 2013) document the fact that “the embryo does not function  
3 as a mere human cell or group of human cells, it functions as an organism; a  
4 complete human being at an immature stage of development.” *Condic, 2014* at 68.<sup>10</sup>

6 **B. The Tennessee Supreme Court’s Decision In *Davis v. Davis* Was**  
7 **Wrongly Decided Based On A Subsequently Disproven**  
8 **Misunderstanding Of What Occurs During Early Embryonic**  
9 **Development.**

10 Although several state courts have addressed the disposition of human  
11 embryos, only one court, the Circuit Court of Tennessee, Blount County, has taken  
12 evidence and heard scientific testimony relevant to the factual and legal questions  
13 raised here: namely, whether a frozen human embryo is a human being and deserving  
14 of legal protection as such. *Davis v. Davis*, No. E-14496 Blount County Cir. Ct.  
15 (1989), not reported in S.W.2d 1989, (1989 Tenn. Cir. Court) 1989 Tenn. App. Lexis  
16 641 at \*10 and note 11, judg. vac. and cause remanded., rev., 842 S.W.2d 588, 597  
17 (Tenn. 1992) (*Davis* trial); *Davis v. Davis*, (Tenn. 1992) 842 S.W.2d 588, 597, cert.  
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20  
21 <sup>10</sup> *Condic* cites as examples of the one cell zygote’s organismic actions: (1) Cellular  
22 modifications take place to prevent other sperm from entering the zygote (*Id.* at 49-  
23 50); (2) The two pronuclei have different patterns of DNA replication despite  
24 existing in the same cell space (*Id.* at 53); (3) Eight to ten hours after sperm-egg  
25 binding the DNA halves of the zygotic genome replicate in anticipation of the first  
26 division of the one-cell zygote that will not occur for another 15 hours (*Id.* at 54); (4)  
27 Coordination between the maternally and paternally derived DNA controls the  
28 development of the zygote as a whole (*Id.*); and (5) The sperm-derived nucleus  
begins transcription earlier than the maternal nucleus and is four to five times more  
active (*Id.* at 54, 55). These examples show the zygote’s integrated, organismic  
behaviors directing embryo development to an end. The actions will continue until  
the organism's maturity or demise.



1 den. 507 U.S. 911 (1993). (*Davis*) Given the Tennessee Supreme Court decision's  
2 influence on subsequent embryo disposition cases, its findings should be reviewed in  
3 light of current science.<sup>11</sup>  
4

5 In *Davis*, following a bench trial in which the court heard the testimony of  
6 competing experts and evaluated their credibility, the trial court determined that the 4  
7 to 8 cell frozen embryos at issue in that case were human beings. (*Davis trial* at \*13)  
8 The appellate court reversed, deciding the embryos were property. *Davis v. Davis*,  
9 (Sept. 13, 1990 Tenn. Ct. App.) 1990 Tenn.App. Lexis 642 (*aff'd, on other grounds*,  
10 842 S.W.2d 588, 596 (Tenn. 1992) *cert. den.* 507 U.S. 911 (1993)). The Tennessee  
11 Supreme Court ultimately affirmed the appellate court's decision but on different  
12 grounds, finding that the embryos occupied an intermediate status between person  
13 and property. (*Davis supra*, at 597). By the time the case reached the Tennessee  
14 Supreme Court, the parties had abandoned any argument that the embryos were  
15 human lives (*Davis, supra*, 842 S.W.2d 588, 594 at fn. 14), so the court made its  
16 ruling without the benefit of any advocacy for the embryos' status as human beings.  
17  
18  
19  
20 (*Id.*)  
21

22 At the trial in *Davis*, world-renowned human geneticist Dr. Jerome LeJeune in  
23 his expert testimony equated conception with fertilization, saying "[e]ach human has  
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26 <sup>11</sup> As noted above, the trial court in *Findley* decided that human embryos are not  
27 property. The court determined this on its own. The parties assumed that the  
28 embryos were property.

1 a unique beginning which occurs at the moment of conception." (*Davis* trial at \*14)<sup>12</sup>

2 He refuted the position of the opposing experts that there is a "subclass of the  
3 embryo [] called a preembryo," a position reflecting the views of the American  
4 Fertility Society. Dr. LeJeune testified that "there is nothing before the embryo;  
5 before an embryo there is only a sperm and an egg. . . . When the first cell exists all  
6 the 'tricks of the trade' to build itself into an individual already exists."<sup>13</sup> (*Id.*)  
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12 <sup>12</sup> Dr. LeJeune's use of "conception" for fertilization or sperm-egg fusion reflected  
13 the word's common and long-held meaning, as opposed to the definition of  
14 conception as "implantation" adopted in 1965 by the American College of  
15 Obstetricians and Gynecologists (ACOG). American College of Obstetricians and  
16 Gynecologists *Terminology Bulletin*. Terms Used in Reference to the Fetus. No. 1.  
17 September, 1965. ACOG stated that the change in definition was "selected  
18 deliberately because union of sperm and ovum, cannot be detected clinically unless  
19 implantation occurs." (*Id.*) This rationale, arrived at before the creation of children  
20 by advanced reproductive technology services, is no longer applicable. Richard  
21 Sosnowski, M.D., head of the Southern Association of Obstetricians and  
22 Gynecologists, also criticized it as being without scientific justification in his *The*  
23 *Pursuit of Excellence: Have We Apprehended and Comprehended It?* American  
24 Journal of Obstetrics and Gynecology, vol. 150. No. 2 (September 15, 1984) 117 ("I  
do not deem it excellent to play semantic gymnastics in a profession . . . It is equally  
troublesome to me that, with no scientific evidence to validate the change, the  
definition of conception as the successful spermatric penetration of an ovum was  
redefined as the implantation of a fertilized ovum. It appears to me that the only  
reason for this was the dilemma produced by the possibility that the intrauterine  
device might function as an abortifacient."). See also "Beginning of Pregnancy  
Controversy," *supra*.

25 <sup>13</sup> Dr. LeJeune testified that "upon fertilization, the entire constitution of the man  
26 [human male and human female] is clearly, unequivocally spelled-out, including  
27 arms, legs, nervous systems and the like; that upon inspection via DNA  
28 manipulation, one can see the life codes for each of these otherwise unobservable  
elements of the unique individual." (*Id.* at \*15)

1           The trial court found Dr. LeJeune's testimony to be clear and unrebutted, and  
2 concluded, in agreement with him, "that the cells of human embryos are comprised  
3 of differentiated cells, unique in character and specialized to the highest degree of  
4 distinction." (*Id.*) The trial court concluded, also based on Dr. LeJeune's testimony,  
5 that the "life codes for each special, unique individual are resident at conception and  
6 animate the new person very soon after fertilization occurs." (*Davis* trial at \*27) As  
7 discussed above, scientific research conducted since Dr. LeJeune's 1989 testimony  
8 fully validates it. Science teaches that an individual human life begins at  
9 fertilization.  
10

11           The Tennessee Supreme Court's 1992 decision, however, rejected Dr.  
12 LeJeune's testimony and embraced the opinions of the three other trial experts.  
13 Those opinions were based on statements of the Ethics Committee of the American  
14 Fertility Society (AFS) issued in 1986.<sup>14</sup> Ironically, the Tennessee Supreme Court  
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19 <sup>14</sup> The trial court noted that the three experts opposing Dr. LeJeune "rely at least to  
20 some degree on the report of the Ethics Committee of the American Fertility Society  
21 in forming the basis of their opinions." (*Id.* at \*17) Dr. Charles Alex Shivers  
22 testified that "[a]t the time of fertilization, genetic controls are 'locked in forever'  
23 and control who the preembryo will later be, but ' . . . as far as we know . . . to my  
24 knowledge. . . there is no way to distinguish the cells [at the zygote stage] . . . [They  
25 are the same [undifferentiated] . . . ]". Another expert, Professor John A. Robertson,  
26 said that "[a] human embryo is an entity composed of a group of undifferentiated  
27 cells which have no organs or nervous system. That at about 10-14 days, the  
28 preembryo attaches itself to the uterine wall, develops its primitive streak and life  
then commences." *Id.* Dr. King, the treating IVF physician, testified that at about 14  
days the group of embryonic cells begins to differentiate in a process that permits the  
eventual development of the different body parts which will become an individual.  
(*Davis*), 842 S.W. 2d at 593.

1 rejected Dr. LeJeune’s opinion, that no such thing as a preembryo exists, as  
2 unscientific, concluding that he exhibited “profound confusion between science and  
3 religion” (*Id.* at 593), but then approvingly cited the AFS *ethics* statements in support  
4 of its own decision.<sup>15</sup>  
5

6 Each of the bases cited by the Tennessee Supreme Court in support of its  
7 ruling -- that there is something called a “preembryo” that is not a human being but  
8 an “entity deserving special respect” from days one to 14, and an “embryo” only at  
9 day 14 and thereafter -- is demonstrably wrong in view of subsequent research  
10 regarding human embryonic development (as discussed *supra and infra*). *Davis v.*  
11 *Davis, supra*, (Tenn. 1992) 842 S.W.2d 588, at 593-594, 596-597. The very term  
12 “preembryo” has been discredited. The International Federation of Associations of  
13 Anatomists, which is charged with defining phases of human embryonic  
14 development to appear in embryology textbooks, recommends against any scientific  
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21 <sup>15</sup> The Supreme Court quoted from The [AF] Society’s June 1990 report on "Ethical  
22 Considerations of the New Reproductive Technologies," published in the official  
23 Journal of the American Fertility Society, Volume 53, number 6, June 1990. *Davis*,  
24 at 593-594 and 596 and fn.14. Chapter 8, “The biologic characteristics of the  
25 preembryo,” (*Id.* at 31S-33S), and Chapter 9, “The moral and legal status of the pre-  
26 embryo,” (*Id.* at 34S - 36S) were also quoted from. The 1990 report is a later edition  
27 of the AFS Ethics Statements quoted by the *Davis* trial court titled “Ethical  
28 Considerations of the New Reproductive Technologies,” which appeared as “Ethical  
Considerations of the New Reproductive Technologies” in the Journal of the  
American Fertility Society, Supplement 1, Vol. 46, No. 3, 1986. (*Davis*, trial at \*17)

1 use of the term.<sup>16</sup> Embryologists confirm that it is scientifically inaccurate and ill-  
2 defined.<sup>17</sup> That is not surprising since, as noted by the trial court, the term  
3 “preembryo” was created by the IVF industry itself to help IVF practitioners defend  
4 themselves in malpractice suits. *Davis trial, supra*, at \*20.  
5

6 Subsequent scientific research refutes the distinction between embryo and  
7 preembryo. Science now knows that, far from being a “multicellular aggregate of  
8 undifferentiated cells” until 14 days after fertilization, a human zygote “from the  
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15 <sup>16</sup> See Federative International Programme on Anatomical Terminologie at  
16 <http://www.unifr.ch/ifaa/Public/EntryPage/ViewTE/TEe02.html> at p. 10, fn. 32  
17 (“The foreshortened term 'pre-embryo', which has been used in legal and clinical  
18 contexts, is not recommended.”) (accessed 11/11/2015);

19 <sup>17</sup> Ronan O’Rahilly, who helped develop the Carnegie Stages Model of Human  
20 Embryonic Development, explained why he did not use the term “preembryo” in his  
21 medical textbook:

22 The term ‘pre-embryo’ is not used here for the following reasons: (1) it is ill-  
23 defined because it is said to end with the appearance of the primitive streak or  
24 to include neurulation; (2) it is inaccurate because purely embryonic cells can  
25 already be distinguished after a few days, as can also the embryonic (not pre-  
26 embryonic!) disc; (3) it is unjustified because the accepted meaning of the  
27 word embryo includes all of the first 8 weeks; (4) it is equivocal because it  
28 may convey the erroneous idea that a new human organism is formed at only  
some considerable time after fertilization; and (5) it was introduced in 1986  
‘largely for public policy reasons’ (Biggers). ... Just as postnatal age begins at  
birth, prenatal age begins at fertilization.

27 Ronan O’Rahilly and Faiola Muller (2001) *Human Embryology & Teratology* (3rd  
28 ed.)(New York: Wiley-Liss) at p. 88.

1 moment of sperm-egg fusion onward” exhibits “globally coordinated functions that  
2 promote the health and survival of the individual as a whole.” (*Condic*, 2014, 48)<sup>18</sup>

3  
4 The *Davis* Court’s statement that “the first cellular differentiation of the new  
5 generation relates to physiologic interaction with the mother, rather than to the  
6 establishment of the embryo itself,” is also incorrect. *Davis, supra*, at 594 citing the  
7 American Fertility Society’s report in 1990, the *Ethical Statement of the New*  
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10 <sup>18</sup> The work of Dr. Renee Pera, Ph.D, cited above, also emphasizes that early  
11 embryos are not undifferentiated cell aggregates. She reported that she and her  
12 colleagues learned from filming 240 human zygotes developing that some cells in the  
13 8-cell embryos express genes specific to further development of the embryonic body,  
14 and other cells express mostly maternal genes. Stanford News and Medicine (2010)  
15 "Earlier, More Accurate Prediction of Embryo Survival Enabled by Research," p.1-3  
16 [http://med.stanford.edu/news/all-news/2010/10/earlier-more-accurate-prediction-of-  
17 embryo-survival-enabled-by-research.html](http://med.stanford.edu/news/all-news/2010/10/earlier-more-accurate-prediction-of-embryo-survival-enabled-by-research.html) (accessed 11/24/ 2015). Wong, Loewke,  
18 Bossert, Behr, DeJonge, Baer, Pera, *Non-invasive imaging of human embryos before  
19 embryonic genome activation predicts development to the blastocyst stage*. (October  
20 2010) Nature Biotechnology, Vol. 28, No. 10, p. 1115 and 1119, 1120 and fig. 6  
21 ;(Pera, *Video lecture- non-invasive imaging of human embryos before embryonic  
22 genome activation predicts development to blastocyst stage* (2013). Serono Symposia  
23 International (*Pera, Serono lecture*) including film of embryos developing at 3:50 to  
24 5:20 [https://www.exccemed.org/resources/13-non-invasive-imaging-human-embryos-  
25 embryonic-genome-activation-predicts-development-blastocyst-stage](https://www.exccemed.org/resources/13-non-invasive-imaging-human-embryos-embryonic-genome-activation-predicts-development-blastocyst-stage) (accessed  
26 11/24/2015). Pera notes that not all cells within the human embryo divide in  
27 synchrony, but on a self-determined schedule. (*Id.*) "We've always thought of  
28 embryos as living or dying [as a whole], but in reality we find each cell is making  
decisions autonomously." (Stanford News and Medicine, *Id.*) In other words, the  
cells exhibit differentiated behavior. Dr. Pera said that prior to the 2008 research she  
and other scientists believed that all cells of an eight-cell embryo acted as a colony,  
and said she was surprised to learn that, in fact, each cell enacts its own program.  
(*Pera, Serono lecture*), *Id.*, at 9:40-10:20. [https://www.exccemed.org/resources/13-  
non-invasive-imaging-human-embryos-embryonic-genome-activation-predicts-  
development-blastocyst-stage](https://www.exccemed.org/resources/13-non-invasive-imaging-human-embryos-embryonic-genome-activation-predicts-development-blastocyst-stage) (accessed 11/12/2015). This recent evidence confirms  
that early embryo cells perform different tasks yet work in an integrated, coordinated,  
organismic program to elaborate the body plan and supportive structures.

1 *Reproductive Technologies* at 31S-32S.<sup>19</sup> In fact, the cells in the early embryo work  
2 together to develop the embryo body together with the placenta and cord cells.<sup>20</sup> The  
3 inner cell mass that will make the cells of the embryo/human body is believed to be  
4 present in two of the first four cells. (*Id.*)

5  
6 The *Davis* Court also mistakenly discounted the individuality of the  
7 “preembryo” prior to 14 days of development, referencing the AFS report. (*Davis*,  
8 596 citing AFS, *supra*, at 34S) The AFS report at 34S argued that an early embryo is  
9 not an individual because the embryo can twin or combine with another embryo to  
10 become a single embryo. Dr. Condic explains, however, that when a human embryo  
11 splits in half to produce a twin, the developmental process does not start again from a  
12 single cell. Condic, *Totipotency What It is and What it Isn't* (April 15, 2014), *Stem*  
13 *Cells and Development*, 23 (8) doi: 10.1089/scd.2013.036, p.796 at 804-805 at Fig.  
14 5. (*Condic, Totipotency*)<sup>21</sup> Instead, the different cells in each half of the embryo

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20 <sup>19</sup> In support of its position the Supreme Court cited a law review article by expert  
21 Robertson (*Id.* at 594), which criticized the *Davis* trial court for ignoring “the  
22 biological reality that the early embryos, while genetically unique, consist of a few  
23 undifferentiated cells that will first form the placenta before the embryo itself  
develops.” (Robertson, (1990) *In the Beginning: The Legal Status of Embryos*, (76  
Va. L. Rev. 437, 482 ) (Robertson). This criticism was based on incorrect science.

24 <sup>20</sup> Edwards, Hanis, (2005, original publication, copyright 2010 Reproductive  
25 Healthcare LTD.) *Initial differentiation of blastomeres in 4-cell human embryos and*  
26 *its significance for early embryogenesis and implantation*. *Reprod. BioMed. Online*  
27 11, 206-218; PII:S9999-9999(99)99910-1 DOI, accessible at  
28 <http://edwards.elsevierresource.com/> (accessed October 7, 2015). (*Edwards, Hanis*).

<sup>21</sup> <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3991987/> (accessed 11/12/2015)

1 repair and regenerate themselves consistent with being a human organism. (*Id.*)  
2 Therefore, the fact that the human organism has a body plan to generate identical  
3 (twin) siblings (or is capable of asexually reproducing a twin) does not mean that an  
4 individual human being is not present both before and after reproducing.<sup>22</sup>  
5

6 The additional AFS claim, cited by *Davis*, at 596, that an embryo is not a  
7 human being because the embryo has not yet developed the “features of  
8 personhood,” ignores that despite gross appearances, early human embryos are not at  
9 all alike because each enjoys a unique genome, the internal development blueprint  
10 that will produce a unique human being. Cells in the early embryo are not featureless  
11 at all from the point of view that really matters in human development: genes. The  
12 AFS (and the *Davis* Supreme Court in reliance on the AFS) could ignore or discount  
13 such scientific knowledge in the 1980’s. This Court may not do so today after the  
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19 <sup>22</sup> The AFS's related argument, that the “singleness” of a person is not established  
20 because each cell in the early embryo has the "totipotent" ability to independently  
21 develop into a complete adult, is also meritless. (*Davis, supra*, at 593, citing AFS at  
22 31S). Even assuming an 8-cell embryo has 8 totipotent cells, the embryo does not  
23 thereby comprise 8 human beings. One human being is developing. If one totipotent  
24 cell is manually extracted from the embryo at this time (not a normal event in  
25 embryonic development), the cell can rebuild, given a nutritive culture, and the  
26 remaining cells in the embryo from which the cell was extracted can regenerate the  
27 missing cell. But this behavior confirms that the extracted cell and the remaining  
28 intact cells each continue to behave as organisms after the cell is extracted. It does  
not in any way suggest that the embryo was somehow not a “single” organism before  
the totipotent cell was extracted. It was a single, or individual, organism, just as an  
embryo prior to twinning is a single, individual organism. *Condic, Totipotency, supra*  
at 804.



1 human genome has been mapped and its determinative influence on human life from  
2 the moment of fertilization is well recognized.<sup>23</sup>

3 Similarly, the AFS worry that an embryo is not a real human being because it  
4 may die before reaching its potential, *see, Davis, 596*, is no valid ground for denying  
5 human being status to an embryo. The same point can be made of any moment in a  
6 human being's life trajectory. Life issues no guarantee of continuity to anyone.  
7

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9 In short, none of the reasons cited by the *Davis* court is scientifically correct  
10 in light of current scientific research. While an early human embryo can be  
11 empirically observed in various recognized stages of development (ootid, zygote,  
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14 <sup>23</sup> Journalist Helen Pearson, reporting in 2002 in *Nature* (and citing scientific  
15 authorities) summarizes:

16 Your world was shaped in the first 24 hours after conception. Where  
17 your head and feet would sprout, and which side would form your back and  
18 which your belly, were being defined in the minutes and hours after sperm and  
19 egg united.

20 Just five years ago, this statement would have been heresy. Mammalian  
21 embryos were thought to spend their first few days as a featureless orb of  
22 cells. Only later, at about the time of implantation into the wall of the uterus,  
23 were cells thought to acquire distinct 'fates' determining their positions in the  
24 future body. But by tagging specific points on mammalian eggs shortly after  
25 fertilization, researchers have now shown that they come to lie at predictable  
26 points in the embryo. Rather than being a naive sphere, it seems that a newly  
27 fertilized egg has a defined top-bottom axis that sets up the equivalent axis in  
28 the future embryo. . . .

What is clear is that developmental biologists will no longer dismiss  
early mammalian embryos as featureless bundles of cells.

Pearson, (2002) Your Destiny, From Day One, *Nature* 418, 14-  
15doi:10.1038/418014a;

27 <http://www.public.iastate.edu/~zool.433/Lectures/mammal.egg.assym.pdf> (accessed  
28 11/11/2015).

1 embryo, fetus, baby, child, adolescent, adult, elder, etc.), “preembryo” is not one of  
2 these stages because a human organism is a whole human being in each  
3 developmental stage.<sup>24</sup>  
4

5 **C. Differences in Terminology Arising from Using Different Models of**  
6 **Embryonic Development Should not obscure the Scientific Fact**  
7 **that a New Human Life begins at Fertilization.**

8 Dr. Dianne N. Irving, Ph.D., a biologist/biochemist and former professor of  
9 history of philosophy and medical ethics at Georgetown University, agrees with Dr.  
10 Condit that human life begins at fertilization, at the instant the sperm membrane  
11 binds with the egg membrane.<sup>25</sup> Dr. Irving, however, uses the Carnegie Stages of  
12 Early Embryonic Development, commonly used in medical textbooks, to describe  
13 human embryonic development. (See e.g. Ronan O’Rahilly and Fabiola Muller,  
14 *Human Embryology & Teratology*, *supra*, p. ix.) The Carnegie Stages are a  
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18 <sup>24</sup> The *Davis* Supreme Court worried that if the trial court ruling were affirmed,  
19 human embryos would be persons and have “legally cognizable interests different  
20 from those of their progenitors. Such a decision would doubtless have had the effect  
21 of outlawing IVF programs in the state of Tennessee.” *Id.* at 595. This conclusion is  
22 unfounded. In Louisiana an embryo is recognized as a judicial person under the law,  
23 (LA-RS 9 §124, LA-RS 9 §128), yet IVF has not been outlawed. Advanced  
24 Reproductive Technology services treat infertile patients not only by cryopreserving  
25 embryos for later use, but gametes and reproductive tissues (such as an ovarian  
26 wedge) are also cryopreserved for later transfer. The extreme effect envisioned by  
27 the Supreme Court in *Davis* is not a necessary outcome of recognizing the full  
28 humanity of a human embryo.

<sup>25</sup> *Condit’s Pre-Zygote Error in “When Does Human Life Begin?”* (Dec. 2008) pp.  
1-10. (*Dr. Irving*).  
[http://www.lifeissues.net/writers/irv/irv\\_134maureencondic2.html](http://www.lifeissues.net/writers/irv/irv_134maureencondic2.html). (accessed  
October 7, 2015).

1 standardized system of 23 stages used to describe human embryologic development  
2 in the first 56 days of development before the embryo becomes a fetus.<sup>26</sup> Carnegie  
3 Stage 1 consists of three phases (a, b, and c).<sup>27</sup> At Stage 1a, a new sexually  
4 reproduced human being begins to exist as the "primitive embryo," with first contact  
5 and penetration of the sperm and oocyte. As that new human embryo begins to  
6 develop, he/she forms an "ootid"(Carnegie Stage 1b), and only then, at Carnegie  
7 Stage 1c, does the human embryo form a "zygote."  
8  
9

10 Dr. Condic, unlike Dr. Irving, does not employ the Carnegie Stages to  
11 describe stages of embryonic development, but instead uses the single term "zygote"  
12 to refer to all three phases of Carnegie Stage 1. The difference in terminology is,  
13 however, immaterial since, under the Carnegie stages, a new single-cell human  
14 embryo/human being begins to exist at the *beginning* of that process - at Stage 1a  
15 (the "primitive" embryo is an embryo, not a "preembryo," and not just a "cell").<sup>28</sup>  
16  
17 Both scientists agree that an individual human life begins at fertilization.  
18  
19

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21 <sup>26</sup> A description of the Carnegie Stages of Early Human Embryonic Development,  
22 Carnegie Collection of Embryology, National Museum of Health and Medicine,  
23 Human Developmental Anatomy, is available online at  
<http://www.medicalmuseum.mil/index.cfm?p=collections.hdac.anatomy.index>  
(accessed October 7, 2015).

24 <sup>27</sup> <http://www.medicalmuseum.mil/index.cfm?p=collections.hdac.anatomy.s01>  
25 (accessed October 7, 2015).

26 <sup>28</sup> Irving, *The Genuine Carnegie Stages* (September 8, 2013), at:  
27 [http://www.lifeissues.net/writers/irv/irv\\_216genuinecarnegiestages.html](http://www.lifeissues.net/writers/irv/irv_216genuinecarnegiestages.html) (accessed  
28 October 7, 2015).

1           **D.     The Scientific Distinction Between Cell Aggregates and Human**  
2           **Embryos is Also Recognized in Law.**

3           Several federal and state laws recognize the scientific fact that human  
4 embryos are not merely cell aggregates. Federal law recognizes that cells used in  
5 federally funded human embryonic stem cell lines do not have the same status as  
6 human embryos. *Sherley v. Sebelius* (2012) 689 F.3d 776, 779, 402 U.S. App. D.C.  
7 176, 181, cert. den. U.S. Supreme Ct. No. 12-454 (2013).<sup>29</sup> The distinction between  
8 a human embryo and cells taken from the embryo is also made in California law  
9 governing stem cell research. The legislative history of the statute states:  
10

11           An embryonic stem cell is derived from a group of cells called the inner cell  
12 mass, which is part of the early (four to five day) embryo called the blastocyst.  
13 Once removed from the blastocyst, the cells of the inner cell mass can be  
14 cultured into embryonic stem cells. These embryonic stem cells are not  
15 themselves embryos.<sup>30</sup>

16           The Cal. Assem. Com. Assembly Floor Analysis, 3<sup>rd</sup> reading of Senate Bill 253  
17 (August 25, 2002) as amended Aug. 23, 2002 at p. 4, par. 6 signed into law Sept. 20,  
18 2002 (Unlike the Tennessee Supreme Court’s decision in *Davis*, California  
19

20 \_\_\_\_\_  
21 <sup>29</sup> Human embryonic stem cells used in federal research are derived from the inner  
22 cell mass of embryos, and are referred to as pluripotent cells capable of developing  
23 into nearly 200 different types of human cells. (*Id.*) Pluripotent cells do not  
24 reproduce in an organized and temporal sequence to create a body plan. Condit,  
*Totipotency, supra*, 796, at 799.

25 <sup>30</sup> [http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb\\_0251-](http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_0251-0300/sb_253_cfa_20020825_123252_asm_floor.html)  
26 [0300/sb\\_253\\_cfa\\_20020825\\_123252\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_0251-0300/sb_253_cfa_20020825_123252_asm_floor.html) (accessed 10/15/2015) The  
27 court in *Findley* indicated that the embryos are at the blastocyst stage, unlike the 4 to  
28 8 cell embryos in the *Davis* case. (*Findley v. Lee*, FDI-13-780539 at p. 1 fn.1  
(tentative decision and proposed statement of decision) (11/18/15, San Francisco  
Superior Ct.)).

1 legislation correctly describes the embryo as an embryo and not a preembryo.

2 (CODE, *supra.*)

3  
4 Federal law protects human organisms by prohibiting federal funds from  
5 being used for research that would destroy a human organism. The Dickey-Wicker  
6 Amendment Sec. 509(a), first adopted in 1996 and included in certain appropriations  
7 bills, prohibits federal funding of (1) embryo creation for research; or (2) research  
8 that would cause destruction of a human embryo. See e.g. Consolidations  
9 Appropriations Act, 2010, PL 111-117, December 16, 2009, Section 509(a). The  
10 statute at Section 509(b) defines “human embryo” as including “any organism, not  
11 protected as a human subject under 45 CFR 46 (the Human Subject Protection  
12 regulations) that is derived by fertilization....”. The Dickey-Wicker prohibition does  
13 not apply to human cells, just to human organisms.  
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17 **E. Current, Not Antiquated, Scientific Understanding Regarding**  
18 **Human Embryonic Development Should Drive This Court’s**  
19 **Ruling. As a Matter of Scientific Fact, Vergara’s and Loeb’s**  
20 **Embryos are not Potential Human Life but living Human Beings.**  
21 **Their “Potential” is for Further Development Consistent with the**  
22 **Embryos’ Body Plan that came into Existence at the Time of the**  
23 **Binding of Sperm and Egg Membrane.**

24 Among the symbolic sculptures at an exit of the Supreme Court of the United  
25 States is a statue of a turtle, symbolizing that the law moves slowly behind society.  
26 In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court made a decision, based on  
27 science that is now more than forty years old, to call unborn life "potential life,"  
28 expressly citing its limited scientific knowledge at the time. (*Id.*) at 159, 160, 161

1 and fn.62. *Roe* also cited “new embryological data that purport to indicate that  
2 conception is a ‘process’ over time, rather than an event. . .”. (*Id.*) at 161. For the  
3 reasons discussed above, current human embryology now establishes that while  
4 human development is indeed a process, lasting throughout prenatal and postnatal  
5 life, it begins with a particular event: Fertilization. It is time for the courts to  
6 recognize what science now unmistakably establishes, that new human life is created  
7 at the instant of sperm-oocyte binding. The parents who contribute the sperm and  
8 oocyte for the express purpose of fertilization exercise their “right to procreate” at  
9 fertilization. At the instant of fertilization of a normal sperm and a normal oocyte a  
10 new human being comes into existence and begins to direct his or her own  
11 development until death.  
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15 **II. HUMAN EMBRYOS MAY NOT BE TREATED AS PROPERTY AND**  
16 **ARE NOT “ENTITIES DESERVING SPECIAL RESPECT.” THEY ARE**  
17 **HUMAN BEINGS AND SHOULD ENJOY EQUAL PROTECTION OF**  
18 **THE LAWS AS PERSONS.**

19 **A. Human Embryos May Not be Treated As Property.**

20 Scientific evidence demonstrates that human embryos are living human  
21 beings. For this reason, human embryos may not be treated as property to be bought,  
22 sold, traded, destroyed or experimented on. The United States patent laws recognize  
23 that human embryos are not property by prohibiting application of patent laws to  
24 human organisms.<sup>31</sup> Even clinic consent agreements impliedly acknowledge that  
25  
26

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27 <sup>31</sup> 35 U.S.C. 1 Leahy-Smith America Invents Act,(2014) 125 stat. 284, Pub. Law  
28 112-29, at Section 33, 35 U.S.C. 101 note, Limitation on Issuance of Patents.

1 embryos are nascent human beings by providing that only “viable” embryos will be  
2 frozen. *Findley* at 12, 81-82. The court in *Findley* also correctly determined that  
3 human embryos are not property.  
4

5 Ratification of the U.S. Constitution's 13th Amendment on December 6, 1865  
6 ended the last sorry period in American history in which human life was classified as  
7 property. At that time those in power arbitrarily defined African Americans as  
8 property in order to buy and sell them like chattel and deprive them of any rights.  
9 Our sorry legacy of having enslaved human beings, coupled with our scientific  
10 knowledge that human embryos are very young human beings, should raise a red flag  
11 of caution lest we again treat these human beings as less than fully human. The civil  
12 war era was stamped with the struggle to realize the Declaration of Independence's  
13 promise of liberty for all. Our present era's struggle is to realize the Declaration's  
14 equally important promise of the right to "life" for all human beings in our country.  
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18 **B. Human Embryos are Not “Special Entities.”**

19 Current science also precludes viewing human embryos as “special entities  
20 deserving respect.” This term is simply an intellectually dishonest euphemism used  
21 in the *Davis* case, *supra*, at 596, 597 (citing to *AFS supra*, at 34S-35S), and in  
22 various other cases, to blunt the force of what amounts, in practice, to a ruling that  
23 embryos are property. If those courts really viewed embryos as “special entities  
24  
25

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26 [http://www.uspto.gov/sites/default/files/aia\\_implementation/20110916-pub-1112-29.pdf](http://www.uspto.gov/sites/default/files/aia_implementation/20110916-pub-1112-29.pdf)  
27 [http://www.uspto.gov/sites/default/files/aia\\_implementation/human-organism-memo.pdf](http://www.uspto.gov/sites/default/files/aia_implementation/human-organism-memo.pdf)  
28 (accessed 10/28/2015).

1 deserving respect,” they would ordinarily decide frozen embryo disputes in favor of  
2 the party who wants to implant the embryo. But the opposite is true. (Darby Howell,  
3 *The Frozen Embryo: Scholarly Theories, Case Law, Proposed State Regulation*,  
4 (Spring 2013) 14 DePaul Journal of Health Care Law 3, 407). As Professor Howell  
5 noted:  
6

7           One can only wonder if the oft used term “entity deserving special respect”  
8 should be shortened simply to “entity.” Professor Angela Upchurch pointedly  
9 questions the intellectual honesty of referring to frozen embryos as an entity  
10 deserving of “special respect.”<sup>65</sup> She posits that a far more accurate  
11 assessment would be to call them an entity deserving of “special resistance,”  
12 since courts routinely decide in favor of their destruction.<sup>66</sup> Nonetheless, the  
term persists, if as nothing more than a comfort for Americans who are  
unwilling to designate frozen embryos as property.

13 Darby Howell at 415. Mislabeling human embryos as “special entities” is contrary to  
14 scientifically established fact and serves only the interests of those who would treat  
15 embryos with less respect than human beings, *i.e.* as property. Unfortunately, while  
16 the court in *Findley* found that the five human embryos before the court were *sui*  
17 *generis* human lives (i.e. neither property nor fully human beings), it denied any legal  
18 protection to the embryos, and, without even considering the issue in its 83-page  
19 Tentative Decision And Proposed Statement Of Decision, dispatched them to the  
20 “discard” pile. This treatment confirms the point made by Prof. Upchurch cited  
21 above.  
22  
23

### 24           **C. Human Embryos Are Persons.**

25           As noted, the Supreme Court 43 years ago in *Roe v. Wade* said it would not  
26 “speculate” on when life begins “at this point in the development of man’s  
27  
28



1 knowledge.” 410 U.S. 113, 160. On this basis the Court refused to recognize that  
2 unborn embryos carried by the mother are “persons” within the meaning of the Due  
3 Process and Equal Protection Clauses of the 14th Amendment to the Constitution.  
4 As presented in this brief, current science, not available to the Supreme Court when  
5 *Roe* was decided, now clearly proves that a human embryo is a human being from the  
6 first moment of existence. Because human embryos are human beings, the state’s  
7 interests and obligations are directed to actual living human beings, not simply to  
8 “potential life” as *Roe* (and *Davis*) incorrectly described them. Since the legal status  
9 of personhood is properly accorded to all living human beings, human embryos, as  
10 living human beings, are likewise entitled to the legal status of “person” within the  
11 meaning of the federal Constitution. *See Bryn v. New York City Health and Hosps.*  
12 *Corp.*, (N.Y.Ct.App.1972) 286 N.E.2d 887, at 891-897 (*dissent op. Justice Burke*),  
13 *app. disp.* (1973) 410 U.S. 949; *contra, Kass v. Kass* (N.Y.Ct.App.1998) 696 N.E.  
14 2d 174, 179 *citing Roe, supra*, 162, and *Bryn supra*.

19 Notably, the recognition, based on current science, that human embryos are  
20 human beings and “persons” would not necessarily resolve the issues addressed by  
21 the Supreme Court in *Roe*. The Court in *Roe* weighed a woman’s right to bodily  
22 integrity against the state’s interest in human life. Here *in vitro* embryos are intended  
23 for a surrogate woman willing to bear them, as Vergara is not. And while such  
24 surrogacy violates the embryos' best interest in being nurtured within the womb of  
25 their biological mother, neither Vergara's nor the surrogate's right to bodily integrity  
26 risks being violated. On the other hand, the state’s interest in protecting an  
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28

1 embryo's life as it would the life of any human person, remains compelling and  
2 should be decisive.

3  
4 **D. Even If Human Embryos Are Not Accorded A Constitutional**  
5 **Status Of "Person", the Court Should Nevertheless Recognize The**  
6 **Government's Interest In Protecting Human Life When Resolving**  
7 **Parental Disputes Over Frozen Embryos.**

8 Regardless of embryos' legal status as "persons," the State of California  
9 recognizes a compelling interest to protect human embryos and fetuses, even before  
10 viability. Under California law, from the moment an unborn child's existence is  
11 known to them, the child's parents are obligated under the law to provide medical  
12 care and shelter for the unborn child. (CA. Penal Code § 270; *Kyne v. Kyne* (1940)  
13 38 Cal.App.2d 122, 128 (commencement of an action for support prior to birth is  
14 contemplated and permitted by section 196a) of the Civil Code.); *People v. Yates*,  
15 (1931) 114 Cal. App., Supp.782, 788 (same). California Civil Code §43.1 further  
16 provides that "[a] child conceived, but not yet born, is deemed an existing person, so  
17 far as necessary for the child's interest in the event of the child's subsequent birth."  
18

19 Federal and other state's laws reflect a like concern for, and interest in  
20 protecting, prenatal life. As the Supreme Court recognized in *Webster v.*  
21 *Reproductive Health Services* (1989) 482 U.S. 490, 519, governmental interest in  
22 protecting human life is "compelling even before the viability of potential human  
23 life." As noted above at page 18, the Dickey-Wicker Amendment prohibits federal  
24 funding for human embryo-destroying research, and defines a human embryo as "any  
25 organism derived by fertilization." No "preembryo" exception is recognized. Also,  
26  
27  
28

1 as noted above at page 19, the U.S. patent laws prohibit patenting of human  
2 organisms. 35 U.S.C. §101, §33 of the 2014 Leahy-Smith America Invents Act,  
3 *supra*. The Office of Population Affairs in the Office of Public Health and Science,  
4 U.S. Department of Health and Human Services, administers grants in the Embryo  
5 Adoption Public Awareness Campaign<sup>32</sup> to assist persons with decisional authority  
6 over embryos to become aware of the range of options available for unwanted  
7 embryos, of which there may be more than 600,000.<sup>33</sup>

10 State laws also protect prenatal life. As an example, in Missouri, Mo. Rev.  
11 Stat. §1.205.1(1) (the Missouri preamble to the law regulating abortion) states: “The  
12 life of each human being begins at conception.” The state of Louisiana has  
13 legislatively recognized the human embryo as a judicial person (LA-RS 9 §124).<sup>34</sup>

15 Additionally, the California Constitution protects *parental* rights as part of the  
16 inalienable rights of each person. (Art. 1 § 1, Cal. Constitution.) Courts must honor  
17 the inalienable right of parents to provide care for their prenatal human beings and to  
18 enjoy (as liberty interests) their pursuit of happiness in their prenatal and postnatal  
19 care of and companionship with their offspring. (Declaration of Independence  
20 (1776); Art. 1 § 1 Cal. Constitution (“All people are by nature free and independent  
21  
22

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24 <sup>32</sup> Grant from the U.S. Department of Health and Human Services #1EAAPA141024-  
25 01-00 at <http://www.embryooption.org/about/history.cfm> (accessed 11.11/2015).

26 <sup>33</sup> (*Id.*)

27 <sup>34</sup> For a comprehensive discussion of state laws regarding embryo disposition see  
28 *Findley, supra at 26-27.*

1 and have inalienable rights. Among these are enjoying and defending life and liberty,  
2 acquiring, possessing, and protecting property, and pursuing and obtaining safety,  
3 happiness, and privacy.”); *Stanley v. Illinois* (1972) 405 U.S. 645, 651.<sup>35</sup> The fact  
4 that one parent may disagree in these areas, does not obviate the Court’s obligation to  
5 preserve the remaining parent’s rights to care for and enjoy the companionship of  
6 their children.  
7

8  
9 The Court should, in resolving the disputes in this case, consider these federal  
10 and state policies that respect and protect the lives of human embryos, even assuming  
11 *arguendo* that the embryos are not accorded status as persons within the meaning of  
12 the U.S. and California Constitutions. They still are human beings, and deserve  
13 appropriate protection under law owing to human beings.  
14

15 **III. EMBRYO DISPUTES SHOULD BE DECIDED BASED ON**  
16 **CONSIDERATION OF THE EMBRYOS’ BEST INTERESTS.**  
17

---

18  
19 <sup>35</sup> The Court in *Stanley* (405 U.S. at 651) described these rights as follows:

20 The Court has frequently emphasized the importance of the family. The rights  
21 to conceive and to raise one's children have been deemed "essential," *Meyer v.*  
22 *Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner v.*  
23 *Oklahoma*, 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than  
24 property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953). "It is cardinal  
25 with us that the custody, care and nurture of the child reside first in the  
26 parents, whose primary function and freedom include preparation for  
27 obligations the state can neither supply nor hinder." *Prince v. Massachusetts*  
28 (1944) 321 U.S. 158, 166 (1944). The integrity of the family unit has found  
protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v.*  
*Nebraska, supra*, at 399, the Equal Protection Clause of the Fourteenth  
Amendment, *Skinner v. Oklahoma, supra*, at 541, and the 9th Amendment,  
*Griswold v. Connecticut*, (1965) 381 U.S. 479, 496 (Goldberg, J., concurring).

1           The fact that Loeb’s and Vergara’s embryos are human beings requires that  
2 their rights as human beings be recognized and protected under California law. The  
3 primary criteria the courts are directed to consider to resolve a dispute between  
4 parents regarding their children is the “best interests of the child” standard used in  
5 custody determinations (California Family Code, §§ 3040, 3011.) The IVF clinic  
6 form signed by the parties fails to consider the best interests of the embryos, is  
7 otherwise defective under California law, and should not control disposition of these  
8 embryos. Any dispute resolution model (such as “balancing rights” and the  
9 “contemporaneous mutual consent model”) adopted by the Court must be modified  
10 to include consideration and weighing of the best interests of the embryos.  
11  
12

13  
14           **A.     The California Health And Safety Code 125315 Violates the  
15                   Thirteenth Amendment’s Prohibition on Treating Human Beings  
16                   As Property.**

17           The California Health and Safety Code 125315 (CODE), effective January 1,  
18 2004, was enacted to provide for embryo donation for research. Paragraph (c) states:

19           A physician and surgeon or other health care provider delivering fertility  
20 treatment shall obtain written informed consent from any individual who  
21 elects to donate embryos remaining after fertility treatments for research. For  
22 any individual considering donating the embryos for research, to obtain  
23 informed consent, the health care provider shall convey the following to the  
24 individual: . . . (7) A statement that early human embryos donated will not be  
transferred into a woman’s uterus, will not survive the human pluripotent stem  
cell derivation process, and will be handled respectfully, as is appropriate for  
all human *tissue* used in research.

25           (italics added). The statute accords a human embryo no higher treatment than other  
26 human “tissue.” The *Findley* court, *supra* at 2-4, interpreted the CODE to allow  
27 contract law principles to determine the fate of human embryos. As noted in Section  
28

1 II A *supra*, a human being has not been treated as property in this country since  
2 passage of the 13th Amendment to the U.S. Constitution. To mischaracterize human  
3 life as mere tissue for disposal or research treats human beings as property contrary  
4 to the letter and spirit of the 13th Amendment.  
5

6 Moreover, when parties creating embryos are misled by IVF forms prepared  
7 pursuant to California law into misconceiving their embryos as simply tissue and not  
8 human beings, they are without the necessary information to make an informed  
9 decision by way of contract or advance directive for the health and protection of their  
10 offspring. The Court should not enforce an Advance Directive made under the  
11 CODE that does not consider the best interest of nascent human life. To do so would  
12 violate the embryo's right to life and a parent's right to protect that life under the Due  
13 Process Clause of the 14th Amendment, as discussed in Section II D *supra*.  
14  
15

16 **B. The Clinic Form May Not Be Enforced As an Advance Directive**  
17 **Because It Failed to Consider the Best Interests of the Embryos**  
18 **and Does Not Satisfy Informed Consent Requirements Under**  
19 **California Law.**

20 The clinic form used here is in the nature of an advance directive for the  
21 embryos' future care and custody. Therefore, it cannot be viewed simply as an  
22 agreement to distribute property. Advance directive planning is governed by the  
23 requirement that the best interests of the persons cared for must control planning  
24 decisions. This principle is enshrined in the California Family Code (§ 3040(c)),  
25 which requires that custody determinations, and other decisions affecting care of  
26 dependent children, be governed by the best interests of the child. There is no  
27  
28

1 indication, in this still undeveloped record, that Loeb’s and Vergara’s planning  
2 decisions regarding their embryos were governed by the embryos’ best interests.  
3 Moreover, even if the Court finds that California Health and Safety Code § 125315  
4 does not violate the 13th Amendment, the IVF form fails to comply with minimum  
5 California requirements for informed consent, unlike the Consent and Agreement  
6 enforced in the *Findley* case. For these reasons, the IVF form, which treated the  
7 embryos as property (Ex. A, p. 15, 16) cannot be enforced.  
8  
9

10           The California Health and Safety Code (CODE) requires that an IVF  
11 agreement be “informed” by inclusion of “timely, relevant, and appropriate  
12 information to allow the individual to make an informed and voluntary choice”  
13 regarding disposition. A choice is not voluntary if made under duress, as Loeb  
14 alleges. But aside from the duress issue, the IVF forms in this case were defective.<sup>36</sup>  
15 Contrary to the requirements of California law, the IVF clinic forms here failed to  
16 address disposition in the event the parents' separation. Also contrary to the  
17 requirements of California law, the forms failed to include the option of  
18 adoption/donation. (Exhibit A, Third Amended Complaint ¶¶ 74, 75, 76). And the  
19 clinic forms did not accurately describe embryos as being human beings or human  
20 organisms, but instead lumped them together with the parents' genetic material  
21 (gametes or unfertilized eggs and sperm) in the category “Cryopreserved Material.”  
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26 <sup>36</sup> See generally, Forman (2011) *Embryo Dispositions and Divorce, Why Clinic*  
27 *Consent Forms are not the Answer*, 24 J. Am. Acad. Matrim. Law 57.  
28 [http://www.aaml.org/sites/default/files/MAT107\\_3.pdf](http://www.aaml.org/sites/default/files/MAT107_3.pdf) (accessed October 23, 2015)

1 (Third Amended Complaint Ex. A at p. 15, 16.) The forms' failure to respect the  
2 categorial difference between an embryonic human being and each parent's genetic  
3 material misled Loeb and Vergara, and may have prevented them from making an  
4 informed, valid decision regarding their embryos. The forms, as an advance  
5 directive, therefore cannot be dispositive of the issues to be decided, or bind the  
6 embryos' fates.  
7

8  
9 The Court should decline to follow decisions from other jurisdictions that  
10 enforce clinic forms under contract principles while treating embryos as property and  
11 ignoring their best interests. Cases such as the following should not be considered  
12 persuasive by the Court: *Kass v. Kass*, *supra*, 696 N.E. 2d 174, 176 [if unable to  
13 make a decision on disposition, the “pre-zygotes” should be used by the IVF  
14 program for research]; *Cahill v. Cahill*, (Ala.Civ.App.2000) 757 So.2d 465, 466;  
15 *Litowitz v. Litowitz*, (S.Ct.Wash. 2002) 48 P.3d 261, amended (S.Ct.Wash. 2002) 53  
16 P.3d 516, cert. den. (2003) 537 U.S. 1191 [neither parent wanted the embryo  
17 destroyed, but the court ordered destruction because, with expiration of the storage  
18 agreement, the clinic by contract retained custody, and the court did not see the  
19 relevance of a claim for custody and companionship of a child unsupported by  
20 precedent]; *Roman v. Roman* (Tx.Ct.App.2006)193 S.W. 3d 40, 52, 55 [contract  
21 enforced under “just distribution of marital property” even though mother said she  
22 did not think the contract applied until she had a child]; *Marriage of Dahl v. Angle*  
23 (OR. Ct. App. 2008) 194 P.3d 834, 837, [lower court order to destroy embryos  
24  
25  
26  
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1 affirmed on appeal despite husband’s position that “there’s no pain greater than  
2 having participated in the demise of your own child.”].

3  
4 In cases like this, where a party challenges the validity of a clinic form, the  
5 court should look beyond the form to find evidence of parental agreement on embryo  
6 treatment and disposition. In *Szarfranski v. Dunston* (2015 IL. App.) 2015 Il. App.  
7 122975. at ¶ 15, cert. den. (9/30/2015 Il.S.Ct. 122975B) review req., the embryos’  
8 parents signed a clinic document stating that “[e]mbryos are understood to be your  
9 property with rights of survivorship. No use can be made of these embryos without  
10 consent of both parties.” The trial court, balancing the parties’ interests, awarded the  
11 embryos to the mother. (*Id. at par.3.*) The appellate court reversed (*Szafranski v*  
12 *Dunston* (2013 IL App.) 2013 IL.App.122975), concluding that a contractual  
13 approach should be applied first. (*Id.*) After remand, and another appeal, the  
14 appellate court agreed with the trial court that the existence of a signed clinic form  
15 requiring that there be mutual consent to “use” the embryos did not preclude  
16 enforcement of a prior *verbal* agreement between the parties to create and have a  
17 child. (*Id. at ¶ 5.*) *Szarfranski* demonstrates that clinic forms need not be considered  
18 dispositive, and that all evidence should be considered to determine whether a valid  
19 agreement exists that takes the best interests of the embryos into account.

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24 The *Findley* court, citing sister state decisions, held that agreements by  
25 progenitors made before embryos are created should be honored when disagreement  
26 later arises. The court said it was willing as a consequence of modern technology to  
27 accept the application of cold contract principles in resolving embryo custody  
28

1 disputes. The amici suggest that this is too high a price to pay. Advance directives  
2 for the health and safety of embryos must consider the embryos' best interests, lest  
3 they fail to do justice to the interests of innocent human beings. The court should not  
4 enforce advance directives when they ignore these interests.  
5

6 **B. In Resolving Disputes Over Embryo Disposition, the Court Should**  
7 **Not Consider a “Right Not to Procreate” But Should Consider the**  
8 **Best Interests of the Embryos.**

9 In the event the parents have not entered into a valid embryo disposition  
10 agreement, some courts have rendered disposition decisions based on “balancing the  
11 interests of the parties,” (see *e.g.*, *Davis, J.B. v. M.B.*(N.J.S.Ct. 2001) 783 A.2d 707;  
12 *Reber.*), or have refused to take action until the parties themselves reach an agreed  
13 disposition (the “contemporaneous mutual consent” model) (*In Re: Marriage of*  
14 *Witten*, (Iowa 2003) 672 N.W. 2d 768 The amici urge the court to adopt a “balancing  
15 of the interests of the parties” model that includes consideration of the best interests  
16 of the human embryos.  
17  
18

19 **1. The “Balancing Of Rights” Model Should Not Include**  
20 **Consideration of a Right Not To Procreate, But Should Include**  
21 **Consideration of the Best Interests of the Embryos.**

22 In cases where courts have balanced the interests of the parties to resolve  
23 embryo disposition disputes, some courts have included in the balance a party's  
24 purported “right not to procreate.” There is no such right here because procreation  
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1 has already occurred.<sup>37</sup> Furthermore, once procreation has occurred, the so-called  
2 right not to procreate is secured only by terminating the life of a human being. The  
3 “right” arose from the *Davis* court’s misunderstanding of when life begins. Since  
4 science establishes that human life begins at fertilization, there can be no “right not  
5 to procreate” after fertilization. Nor is the “right” supported by the “right of privacy”  
6 invoked in the contraception and abortion cases. The contraception cases addressed  
7 the right to *avoid* procreation. The abortion cases, such as *Roe*, rested on a woman’s  
8 right to *bodily integrity*, a right not implicated in frozen embryo cases. *Davis*, 842  
9 S.W.2d 588, 601-602. The so-called right not to procreate after fertilization has  
10 occurred is just a euphemism for ending the life of a living human being, and is  
11 incompatible with the respect the law owes to a human being.  
12  
13  
14

15       Once procreation has occurred and human life has begun, the rights and  
16 interests at issue can no longer be framed solely as the procreative or reproductive  
17 interests *of the parents*. The rights and interests of the procreated human embryos, as  
18 well as the government’s own interest in protecting human life, must also be placed  
19 in the calculus. Cases such as *Davis, supra*, and *JB v. MB, supra*, which adopt a  
20 balancing test oblivious to the embryo’s human dignity, rights and interests, or a case  
21 like *A.Z. v. B.Z.* (Mass.S.Ct. 2000) 725 N.E.2d 1051, 1057-1058 that failed to  
22 understand that the embryos are already created beings (“forced procreation is not an  
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27 <sup>37</sup> See generally *Findley, supra*, at pp. 76-79. The court failed, however, to make this  
28 elementary observation.

1 area amenable to judicial enforcement” and would violate public policy), should not  
2 guide the Court.

3           The most important interest of an embryo is his or her interest in continued  
4 life. As noted, see Section II, D *supra*, from the moment parents are aware of their  
5 unborn child’s life, they must, under California law, provide medical care and shelter  
6 for the unborn child. They enjoy a corollary liberty interest in caring for their  
7 children and enjoying companionship with them. (*Id.*)  
8

9  
10           Some courts, while not directly recognizing an embryo’s right to life, have  
11 nevertheless protected the interest in life indirectly through the embryo’s parents’  
12 interests. In *Reber v. Reiss* (Pa. 2012) 42 A.3d 1131, 1142, the court found that the  
13 balance of interests in a divorce proceeding tipped in the wife’s favor where evidence  
14 showed she would not otherwise have an opportunity to reproduce (and had,  
15 additionally, agreed to waive financial support from the husband, an issue that the  
16 court left for later determination) . In the case at bar, the Court should also take  
17 cognizance of the fact that an embryo’s right to continued human life can be  
18 protected even if one parent seeks to terminate parental duty.<sup>38</sup> And it should  
19 recognize the embryo’s interest directly, not simply as derivative of a parent’s  
20  
21  
22

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23  
24 <sup>38</sup> The *Findley* court inconsistently held that a parent may not seek an order from the  
25 court to terminate parental duty to a child, see *Findley* at 67, but may terminate  
26 parental duty (and the corollary inalienable right of the other parent to raise a child)  
27 in the case of procreated human embryos by terminating the embryos themselves,  
28 even when the other parent agrees to alleviate the duty of the other parent. Rather,  
the policies of states such as North Dakota, which allow one party to be alleviated of  
parental duty without termination human life, should be followed. See *Findley*,  
*supra*, at p. 26.

1 interest, if it is to give the embryo’s best interests a place at the table in the calculus  
2 of its fate. That way, when a parent asserts a privacy or liberty right to sever parental  
3 duties by terminating embryonic life or leaving it frozen to be destroyed later, the  
4 alleged parental right will be weighed against the embryos’ best interests, including  
5 his or her right to life, as well as a parent’s constitutionally protected and inalienable  
6 right to protect and enjoy companionship with his or her offspring. In this calculus,  
7 the right to continued life of the embryo ordinarily should prevail.  
8  
9

## 10 **2. The Contemporaneous Mutual Consent Model.**

11 The “contemporaneous mutual consent” model prohibits embryo disposition  
12 until the parties agree. *In Re: Marriage of Witten*, (Iowa 2003) 672 N.W. 2d 768.  
13 The court’s rationale in *Witten* was that embryos are not chattel to be disposed of via  
14 property distribution agreements, and that courts should not force a “reproductive  
15 choice.” (*Id.* at 783). *Witten*, however, failed to understand that the progenitors had  
16 already made their reproductive choice when they created the human embryos they  
17 placed in cryostorage. The *Witten* model is flawed because: (1) it does not require  
18 evaluation of the best interests of the embryo, which the court did not recognize as a  
19 human being with rights, except to the extent the embryo’s interests are championed  
20 by one of its parents; (2) it will leave one party hostage to the other who refuses to  
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1 agree; and (3) it risks pushing embryo disposition decisions to future generations,  
2 since frozen embryos can outlive their progenitors.<sup>39</sup>

3 The model has not been generally accepted for the reasons given. See *Findley*  
4 *supra*, at 74-75; *Reber v. Reiss*, (Pa. 2012) 42 A.3d 1131 at 1136; *Szarfranski v.*  
5 *Dunston*, 2013, 993 N.E. 2d 502 at 512 (citing Strasser ( 2009) *You Take the*  
6 *Embryos but I get the House ( and the Business):Recent Trends in Awards Involving*  
7 *Embryos Upon Divorce* 57 Buffalo Law Rev. 1159, 1210),<sup>40</sup> (remanded on other  
8 grounds) 2015 Il. App. (1<sup>st</sup>) 122975, cert. den. (Il.S. Ct. (9/30/2015) 122975 B.) The  
9 amici do not recommend it.

## 12 CONCLUSION

13 For all of the reasons given, it is time for courts to recognize, accept and take  
14 judicial notice of current scientific facts establishing that human life begins at sperm  
15 - oocyte binding, and that frozen embryos are actual human beings with the potential  
16 to complete life's cycle, not "potential" human beings, or some lesser form of human  
17 life to be treated no better than property. Once procreation has occurred, human  
18  
19

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20  
21 <sup>39</sup> Live births have been reported from stored embryos a decade and more (even up to  
22 20 years) after cryopreservation. Dowling-Lacey, Mayer, Jones, Bocca, Stadtmauer,  
23 Oehninger (2011) *Live birth from a frozen-thawed pronuclear stage embryo almost*  
24 *20 years after its cryopreservation*. Fertility and Sterility, Vol. 95, No. 3, p. 1120e1-  
25 1120e.3 DOI: <http://dx.doi.org/10.1016/j.fertnstert.2010.08.056>  
26 <http://www.fertstert.org/article/S0015-0282%2810%2902470-2/abstract#.VYhyG071Alw.email> <http://www.fertstert.org/article/S0015-0282%2810%2902470-2/abstract#.VYhyG071Alw.email> (accessed October 22,  
27 2015).

28 <sup>40</sup> [http://lawprofessors.typepad.com/family\\_law/2009/11/strasser-you-take-the-embryos-but-i-get-the-house-and-the-business-recent-trends-in-awards-involving.html](http://lawprofessors.typepad.com/family_law/2009/11/strasser-you-take-the-embryos-but-i-get-the-house-and-the-business-recent-trends-in-awards-involving.html) (accessed October 23, 2015)

1 embryos, as human beings, are entitled at all stages of development to parental and  
2 governmental protection and to a voice in the resolution of disputes that will  
3 determine their fate. As human beings, the human embryos before this Court enjoy  
4 the same basic right to life and appropriate protection that all human beings possess,  
5 rights that must be recognized and respected whatever dispute resolution method is  
6 invoked to determine their fate.  
7

8  
9 Respectfully submitted,

Dated: December 22, 2015

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19 Gynecologists and National Catholic Bioethics Center  
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1 **CERTIFICATE OF WORD COUNT**  
2 (Cal. Rules of Court, rule 8.204(c)(1).)

3 The text of this brief (excluding application and tables) consists of 11,145  
4 words as counted by the Microsoft Word version 2007 word processing program  
5 used to generate the brief.

6 Dated: December 22, 2015

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**PROOF OF SERVICE  
STATE OF ILLINOIS, CHICAGO**

At the time of service, I was over 18 years of age and not a party to this action. I am at attorney with the Thomas More Society, 19 So. LaSalle Street, Suite 603, Chicago, IL 60603.

On December 21, 2015, I served true copies of the following document(s) described as:

- 1) Application For Leave to File Amicus Curiae Brief of American Association of Pro-Life Obstetricians and Gynecologists, and National Catholic Bioethics Center; and
- 2) the Amicus Curiae's Brief;
- 3) the Appendix; and
- 4) the *pro hac vice* applications of all attorneys involved in preparation of amicus brief

on the interested parties in this action as follows:

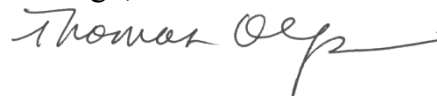
**SEE ATTACHED SERVICE LIST**

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