IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

ED103138

JALESIA MCQUEEN,

Plaintiff-Appellant,

v.

JUSTIN GADBERRY,

Defendant-Respondent.

Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable Douglas R. Beach
Case No. 13SL-DR06185

Brief of American Civil Liberties Union of Missouri Foundation as *Amicus Curiae* in Support of Respondent

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Jurisdictional Statement

Amicus adopts the jurisdictional statement as set forth in Respondent's brief.

Authority to File

Amicus files this brief with the consent of all parties.

Interest of *Amicus Curiae*

The ACLU of Missouri Foundation is an affiliate of the national American Civil Liberties Union (ACLU), a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 500,000 members nationwide. The ACLU of Missouri has more than 4,500 members in the state. In furtherance of their mission, the ACLU and its affiliates engage in litigation, by direct representation and as *amici curiae*, to encourage the protection of rights guaranteed by the federal and state constitutions.

In cases across the country, the ACLU has explained and defended the constitutional right *not* to procreate, or, in other words, an individual's right to decide whether and with whom to have children and to avoid forced parenthood. The ACLU is committed to protecting an individual's right to reproductive liberty: the right to decide to procreate or to avoid procreation. In cases across the country, the ACLU and its affiliates have submitted *amicus* briefs exposing the constitutional infirmity of the notion that a person can unilaterally decide to implant *in utero* cryopreserved blastocysts[1] against the wishes of the person with whom he or she created those blastocysts. *See J.B. v. M.B.*, 783 A.2d 707 (N.J.

[1] *See infra*, n.2.

2001); *J.B. v. M.B.*, 751 A.2d 613 (N.J. Super. Ct. App. Div. 2000); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *Davis v. Davis*, No. 180, 1990 WL 130807 (Tenn. Ct. App. Sept. 13, 1990). On behalf of its members, the ACLU *amicus* files this brief addressing the statutory and constitutional implications of a court granting "custody" of frozen blastocysts.

Statement of Facts

Amicus adopts the statement of facts as set forth in Respondent's brief.

Argument

As the parties and the *amici* all recognize, this appeal presents an issue of first impression in Missouri: the disposition of cryopreserved fertilized eggs, created through *in vitro* fertilization, for a married couple who have subsequently divorced and who now have conflicting wishes regarding the disposition of the resulting blastocysts.[2] As far as the ACLU *amicus* has found, no state court has

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[2] Despite widespread use of the term "embryo" to describe the cryopreserved cells resulting from IVF, "zygote" is the medically correct term for a fertilized ovum less than a few days old. ***See, e.g., Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 454 (Mo. App. W.D. 2006)** (using the term "zygote"); **"Fetal development," U.S. Nat'l Library of Med., https://www.nlm.nih.gov/medlineplus/ency/article/002398.htm** (last visited March 11, 2016) (stating that "[t]he combined sperm and egg is called a zygote," that after a few days (usually five), it divides sufficiently to "form a ball of cells called a blastocyst," and that "[w]eek 5 [measured from the first day of the gestational parent's last menstrual cycle] is the beginning of the embryonic period"). IVF-created fertilized ova are always frozen or implanted as zygotes, blastocysts, or so-called "early cleaved embryos," not as embryos. *Amicus* does not know precisely when the fertilized ova at issue were cryopreserved, *see infra* n.5, but medically speaking, blastocyst freezing is now the most common cryopreservation method. ***See, e.g.,* Inna Berin *et al.*, "Frozen-thawed embryo**

held—absent exceptional circumstances or an enforceable contract, both of which are lacking here—that a former spouse who wishes to use the blastocysts to try to procreate can do so without the consent of the other former spouse.[3]

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transfer cycles: clinical outcomes of single and double blastocyst transfers," 7 J. Assisted Reprod. & Genetics 575 (2011) (explaining that fertilized ova may be cryopreserved at the "pronuclear or multicellular stages" or as blastocysts); **Eric Levens *et al.*, "Blastocyst development rate impacts outcome in cryopreserved blastocyst transfer cycles," 90 Fertility & Sterility 2138 (2008)** (reporting that successful outcomes from implantation of day-6 blastocysts are rarer than from implantation of day-5 blastocysts).

[3] The issue has been considered by courts of at least a dozen states, generally applying their own contract laws. ***E.g., Roman v. Roman*, 193 S.W.3d 40 (Tex. Ct. App. 2006)** (pre-IVF agreement that embryos would be discarded in case of divorce was valid and enforceable despite former wife's current wish); ***Kass v. Kass*, 91 N.E.2d 174 (N.Y. 1998)** (agreement that pre-zygotes would be donated for medical research in case of divorce was presumed valid and binding); ***A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000)** (as a matter of public policy against forced procreation, court would not enforce agreement to allow implantation of embryos against one former spouse's wishes); ***In re Marriage of Dahl & Angle*, 194 P.3d 834 (Ore. 2008)** (husband's request to take control of frozen embryos because he believed they were life did not overcome his valid pre-IVF

agreement that another type of disposition should occur); ***Cwik v. Cwik*, 2011 WL 346173 (Ohio Ct. App. 2011)** (upholding unambiguous pre-IVF contract concerning disposition of cryopreserved embryos in case of divorce and noting that "courts have not afforded frozen embryos legally protected interests akin to persons"); ***Vitakis v. Valchine*, 987 So.2d 171 (Fla. Ct. App. 2008)** (marital settlement agreement that required former wife to give frozen embryos to former husband for destruction was enforceable). ***See also Dodson v. Univ. of Ark. for Med. Sciences*, 601 F.3d 750, 752 (8th Cir. 2010)** (where Arkansas state court had applied state law and upheld pre-IVF agreement that university would take control of couple's frozen pre-embryos in the case of divorce, federal courts were barred from revisiting that holding under *Rooker-Feldman* doctrine).

Where no valid and enforceable contract provides for control or disposition of the frozen blastocysts, some states have considered exceptional circumstances. ***E.g., Reber v. Reiss*, 42 A.3d 1131 (Penn. 2012)** (where ex-wife was medically unable to procreate in any other way and where state law permitted her to bargain away ex-husband's financial support of any resulting children, she was entitled to control of pre-embryos); ***Szafrankski v. Dunston*, 34 N.E.3d 1132 (Ill. App. Ct. 2015)** (same). Unlike Pennsylvania and Illinois, however, Missouri prohibits a parent from contracting away the future rights of his or her potential children to seek financial support from a biological co-parent. ***See Williams v. Williams*, 542 S.W.2d 563, 566 (Mo. App. K.C. 1976)**; ***Rosener v. Mitchell*, 637 S.W.2d 381, 382 (Mo. App. E.D. 1982)**.

Petitioner McQueen and MRL *amici* argue that the outcome in Missouri should be different because most other states lack a statutory analogue to the

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Finally, in the absence of a contract or exceptional circumstances, states have uniformly found that one IVF party's interest in preventing involuntary procreation trumps the other party's interest in procreating. ***E.g., Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992)** (absent valid agreement to the contrary, ex-husband, who wished to destroy pre-embryos, had greater privacy and liberty interest in pre-embryos than ex-wife, who wished to implant them); ***In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003)** (under state law, pre-IVF agreements about disposition of frozen zygotes could not be enforced when one party had changed her mind; if parties could not reach a mutual decision, no use could occur without signed authorization of both parties); ***J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001)** (former wife's fundamental right not to procreate trumped former's husband's interest in implanting pre-embryos in surrogate, and court would not force former wife to procreate against her will); ***Bohn v. Ann Arbor Reprod. Med. Assocs., P.C.*, 1999 WL 33327194 (Mich. Ct. App. 1999) (per curiam)** (affirming trial court's holding that, in a case with complicated factual and procedural history, where divorced couple had cryopreserved zygotes during marriage, neither had a unilateral right to their disposition, and rejecting former wife's argument that state child custody act applied to frozen zygotes).

preamble codified at Missouri Revised Statute § 1.205.[4] That preamble expresses a "value judgment" that human life begins at conception. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 504 (1989). McQueen argues that Section 1.205 is both applicable to this dispute and material to its outcome.

We respectfully disagree. Assuming this question is properly before the Court, which is doubtful,[5] Section 1.205 has nothing to say about the trial court's

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[4] A few of the states that have considered this issue *do* have statutory analogues to Section 1.205, but no state has extended its analogue to govern the disposition of cryopreserved blastocysts. ***See, e.g.*, Tex. Health Code § 171.061(9); Ark. Const. amend. 68, § 2; Ark. Code §§ 20-16-1402(9), 20-16-1702(5, 15); Pa. Cons. Stat. § 3202; 720 Ill. Comp. Stat. 510/2;** ***see also infra*** **n.6.**

[5] In violation of the "well established" presumption that court records are open to the public, ***see Transit Cas. Co. ex rel. Pulitzer Publ'g Co.*, 43 S.W.3d 293, 300 (Mo. banc 2001)**, the Legal File has been sealed in this appeal without "articulate[d] specific reasons for closure." ***Id.*; *see also id.* at 301** (stating that "it is simply beyond dispute that public records are freely accessible to ensure confidence in the impartiality and fairness of the judicial system . . . ."). Since the trial court did not address Section 1.205, it is unclear to the ACLU *amicus* whether arguments concerning the applicability of Section 1.205 have been waived. ***See State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122,**

judgment in this case. To the contrary, expanding Section 1.205 to govern the disposition of unimplanted blastocysts would pose an unnecessary constitutional problem that this Court has an obligation to avoid. *See Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838-39 (Mo. banc 1991) (holding that interpretative canon of constitutional avoidance applies where one interpretation would be unconstitutional or where it would raise "grave and doubtful constitutional questions"); *see also United States ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909) (holding that courts have a duty to apply canon of constitutional avoidance where applicable). The interpretation McQueen seeks would yield an unconstitutional result and therefore should be rejected.

I. Section 1.205 Does Not Apply to Unimplanted Blastocysts

As the Court is aware, each of the parties—former spouses—now wishes to take unilateral control of two cryopreserved blastocysts they created during their marriage. Petitioner McQueen wishes to try to procreate by implanting the blastocysts in her uterus. Respondent Gadberry wishes to avoid the financial and psychosocial burdens of parenthood with his ex-wife and therefore wishes to donate the blastocysts to medical research or to an infertile couple. The trial court

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129 (Mo. banc 2000) ("An issue that was never presented to or decided by the trial court is not preserved for appellate review.").

ordered that the blastocysts not be transferred, released, or used without signed authorization from both parties, but that either party could renew the storage contracts and pay the storage fees indefinitely.

Section 1.205 has nothing to say about the trial court's decision to award the blastocysts jointly to the parties. In fact, no Missouri court[6] has ever applied

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[6] An Illinois state court has explicitly rejected the claim that that state's similar value judgment should extend to unimplanted fertilized ova. ***See Miller v. Am. Infertility Grp. of Ill.*, 897 N.E.2d 837 (Ill. Ct. App. 2008)** (holding that, although state wrongful death statute supports claims brought on behalf of embryos developing *in utero*, it does not extend to unimplanted fertilized ova, even where Illinois legislature had declared that human life begins at conception, and defined "conception" as the point of fertilization, *see* 720 Ill. Comp. Stat. 510/2). The *Miller* court held that the two statutes were "not *in pari materia* but, rather, address different subjects and were enacted for different purposes." ***Id.* at 306. *See also Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256 (Ariz. Ct. App. 2005)** (under Arizona law, destruction of cryopreserved eight-cell pre-embryo could not support statutory wrongful death claim); ***Doe v. Irvine Scientific Sales Co., Inc.*, 7 F. Supp. 2d 737 (E.D. Va. 1998)** (because *Roe v. Wade* unequivocally provides that embryos are not "persons" under the Fourteenth Amendment, gamete donors could not bring tort claim under Virginia law on behalf of cryopreserved embryos negligently contaminated by medical company).

Section 1.205 to guide its disposition of a blastocyst *ex utero*, and for good reason. First, just as fertilization is necessary to transform two gametes into a zygote, implantation is an essential precursor to development. Without implantation, a blastocyst has no potential to continue developing. Second, applying Section 1.205 to unimplanted blastocysts would dramatically extend the reach of state civil and criminal liability. For example, a physician or technician who recklessly breaks a glass pipette containing an IVF-created zygote would be guilty of involuntary manslaughter. *See State v. Harrison*, 390 S.W.3d 927, 928 (Mo. App. S.D. 2013) (holding that Section 1.205 supported conviction for involuntary manslaughter when defendant killed embryo developing *in utero*). A custodian who trips and inadvertently unplugs a freezer in an IVF facility could face a hundred wrongful death claims. *See Connor v. Monkem Co.*, 898 S.W.2d 89 (Mo. banc 1995) (holding that Section 1.205 supported wrongful death claim on behalf of fetus *in utero*). A medical researcher who purposefully destroys a fertilized egg—even with both gamete donors' consent—would be committing first-degree murder. *See State v. Holcomb*, 956 S.W.2d 286 (Mo. App. W.D. 1997) (upholding, by application of Section 1.205, first-degree murder conviction for killing fetus *in utero*).

These kinds of situations are not hypothetical, and they would implicate not only third parties but also the individuals who create frozen blastocysts for IVF: the patients as well as the doctors. Indeed, extending Section 1.205 to include unimplanted blastocysts would render criminally liable many Missourians who use IVF to conceive—to their great surprise. Although there is an exception codified in Section 1.205 to limit the liability of a woman who "*indirectly* harm[s] her unborn child" (emphasis added), there is nothing in the statute that would protect the many IVF users who purposefully discard surplus frozen blastocysts, donate them to medical research, or instruct their physician to carry out so-called "compassionate transfers,"[7] knowing that in all those cases, the blastocysts ultimately will be destroyed.[8] Indeed, the extension of Section 1.205 likely would put an end to IVF

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[7] A compassionate transfer occurs when those who create a blastocyst through IVF request implantation at a time when they know a resulting pregnancy is impossible or exceedingly unlikely.

[8] Approximately 7.4 million American women have sought infertility treatment. Current data suggest there are some 600,000 frozen fertilized ova in cryostorage nationwide, and the couples who created them have no plans for self-implantation of some 60,000 of them. ***See*** **"Embryo Adoption," OFFICE OF POPULATION AFFAIRS OF THE U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.hhs.gov/opa/about-opa-and-initiatives/embryo-adoption/ (last visited March 11, 2016)**. The latest fertility-

in Missouri, both because of increased liability and because it would preclude the creation of surplus blastocysts, which is necessary in most cases to achieve a successful pregnancy and birth.[9] McQueen's interpretation of Section 1.205 would

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clinic data from Missouri show there were at least eight fertility clinics providing IVF services in 2013, and all of them cryopreserved fertilized ova. ***See*** **2013 Assisted Reproductive Technology Fertility Clinic Success Rates Report 284-91, NAT'L CNTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION (October 2015), http://www.cdc.gov/art/pdf/2012-report/art-2012-fertility-clinic-report.pdf**. Likewise, so-called "embryonic" stem-cell research, which results in the creation and destruction of human blastocysts, is currently conducted in Missouri. ***See, e.g., Cures Without Cloning v. Pund,*** **259 S.W.3d 76, 78-79 (Mo. App. W.D. 2008); J. Mannies, St. Louis Public Radio (Oct. 22, 2015), "University of Missouri gets swept into renewed battle over embryonic stem-cell research," http://news.stlpublicradio.org/post/university-missouri-gets-swept-renewed-battle-over-embryonic-stem-cell-research**.

[9] ***See*** **K. Sharif & A. Coomarasamy, ASSISTED REPRODUCTION TECHNIQUES: CHALLENGES AND MANAGEMENT OPTIONS (Wiley 2012), at 297** (describing three modified IVF techniques that do not create surplus blastocysts, stating that all "limit [a couple's] chances of getting a live birth" because "success rates will be compromised"; for one of the techniques described, the pregnancy—not birth—rate was only 44% after

therefore seriously impinge upon other Missourians' constitutional right to procreate.

Nothing about the MRL *amici*'s position on Section 1.205 would limit its applicability to divorce disputes.[10] The only thing that sets this appeal apart from

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nine repeated cycles, and for another, the birth rate was only 32% after four repeated cycles); ***see also*** **"In Vitro Fertilization," NYU Langone Med. Ctr., http://nyulangone.org/locations/fertility-center/in-vitro-fertilization (last visited March 16, 2016)** (explaining that retrieval and fertilization of several ova per cycle "reduces the need for repeated ovarian stimulation and IVF," which can be "difficult, both physically and financially").

The average cost of a single cycle of traditional IVF cycle is approximately $12,500, excluding necessary medications, and the average cost per live birth tops $41,000. *See* **G.M. Chambers *et al.*, "The economic impact of assisted reproductive technology: a review of selected developed countries," 91 Fertility & Sterility 2281 (2009)**. Unlike some states, Missouri does not require health insurers to cover any part of the cost of IVF. ***See*** **RESOLVE, The National Infertility Ass'n, "State Fertility Scorecard," http://familybuilding.resolve.org/fertility-scorecard/ (last visited March 16, 2016)**.

[10] ***See, e.g. Hampton v. Hampton*, 17 S.W.3d 599, 605 (Mo. App. W.D. 2000)** (noting, in a different context, that "[t]he constitutional analysis [regarding the

personal choices of IVF users is the disagreement between the parties, *not* the potential destruction of the blastocysts.

The Court is charged with giving effect to legislative intent as embodied by the plain language of a statute, *Ivie v. Smith*, 439 S.W.3d 189, 202 (Mo. banc 2014), and there is nothing plain about McQueen's proposed interpretation of Section 1.205. The Court should not presume a legislative intent to criminalize common activities widely understood to be not only lawful but constitutionally protected, *see infra* Section II, and should endeavor to avoid absurd results, which this kind of mass criminalization surely would be. *See, e.g.*, *Rothschild v. State Tax Comm'n of Mo.*, 762 S.W.2d 35, 37 (Mo. banc 1988) ("we presume the legislature did not intend an absurd law, and we favor a construction that avoids unjust or unreasonable results"); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972) (striking down as vague city ordinances that "criminal[ized] activities which by modern standards are normally innocent").

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application of a state statute] remains the same without regard for whether a parent's marriage is dissolved" and "a parent does not lose the parent's fundamental right to direct the upbringing of his or children upon the dissolution of the parent's marriage").

Expanding Section 1.205 to cover the disposition of unimplanted blastocysts would ultimately condemn the provision as unconstitutional, for the reasons described in Section II *infra*. To avoid this result, this Court has an obligation to "presume[] the General Assembly would not pass laws in violation of the constitution." *Planned Parenthood of Kan. v. Nixon*, 220 S.W.3d 732, 742 (Mo. banc 2007); *see also Webster*, 492 U.S. at 506 (declining to address the constitutionality of Section 1.205 in an action where it was arguably inapplicable, noting that any question about its scope "is something that only the courts of Missouri can definitively decide," and stating that "[i]t will be time enough for federal courts to address the meaning of the preamble should it be applied to restrict the activities of the appellee [providers of abortion services] in some concrete way").[11] In order to avoid the "grave and doubtful" question of Section 1.205's constitutionality if it applies to the disposition of frozen fertilized ova, *Blaske*, 821 S.W.2d at 838-39, the Court should hold that it does not guide the outcome of this appeal.

[11] The presumption of constitutionality is reinforced by the statute itself because the General Assembly has explicitly subjected it "to the Constitution of the United States," the Supreme Court's interpretations thereof, and "specific provisions to the contrary" in Missouri's statutes and constitution.

II. If Section 1.205 Applies, It Is Unconstitutional

The MRL *amici* argue that the Court must interpret Section 1.205 as a directive to treat unimplanted blastocysts as persons without considering the constitutionality of the statute. In support of this argument, they contend that the Supreme Court cases discussing the twin rights of procreation and *non*-procreation define those rights solely as corollaries of a pregnant woman's unique interest in bodily integrity, not as fundamental liberty and privacy rights secured to all individuals.

Again, the ACLU *amicus* disagrees. As described below, the robust liberty and privacy interests implicated in procreation decisions encompass much more than a pregnant woman's right to bodily integrity, and United States Supreme Court cases discussing procreative interests go far beyond the right to abortion. Procreative rights are not secured uniquely to a pregnant woman but to all individuals. Although a pregnant woman *does* have—in addition to her procreative interests—a fundamental right to bodily integrity that overcomes all but the most compelling competing interests, in this appeal no one is pregnant, and so no one can assert that right.

A. *Procreative freedom is a fundamental privacy right*

Because the frozen blastocysts remain *ex utero*, bodily integrity is not at issue. Instead, each of the parties asserts a broader interest in either procreation or

non-procreation. An individual's interest in procreative freedom follows from the U.S. Supreme Court's longtime and oft-repeated acknowledgement that the Constitution protects an individual right to privacy, within which lies the right to reproductive choice. *See Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (commenting that the "makers of our Constitution . . . conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized [people]," which is commonly recognized as a justice's first explicit recognition of the constitutional right to privacy); *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965) (holding that marriage, and particularly the correlative decision of a married couple to use contraception to avoid procreation, is protected by "the zone of privacy created by several fundamental constitutional guarantees"); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that the right of privacy prohibits a state from criminalizing the distribution of contraceptives to unmarried persons for the purpose of preventing pregnancy because "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion

into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").[12]

B. *Procreative freedom is a fundamental liberty right*

The Supreme Court has also found a fundamental liberty interest in procreative freedom distinct from the right to bodily integrity. *See Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking down forced-sterilization statute under the Equal Protection Clause, while noting that "procreation" is "one of the basic civil rights of man" that is "fundamental to the very existence and survival of the race" without mentioning bodily integrity); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that constitutional liberty interests include "not merely freedom

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[12] The Supreme Court has repeatedly interpreted the constitutional right to privacy as encompassing activities related to marriage, ***see Loving v. Virginia*, 388 U.S. 1 (1967)**, family relationships, ***see Prince v. Massachusetts*, 321 U.S. 158 (1944)**, and childrearing, ***see, e.g., Pierce v. Society of Sisters*, 268 U.S. 510 (1925)**.

Missouri courts agree. ***See Doe v. Phillips*, 194 S.W.3d 833, 843 (Mo. banc 2006)** (noting that procreative rights are "inherent in the concept of ordered liberty"); ***Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488 (Mo. Ct. E.D. 1990)** (where woman's participation in IVF was publicized in video celebrating success of IVF clinic, she could bring common-law tort claim for invasion of privacy because "the right of privacy has been held to apply particularly to sexual matters or matters of procreation").

from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children"); *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (acknowledging that the Due Process Clause confers "a fundamental individual right to decide whether or not to beget or bear a child"); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (noting that "choices concerning contraception, family relationships, procreation, and childrearing" are "protected by the Constitution" and "among the most intimate that an individual can make"). *See also Hampton v. Hampton*, 17 S.W.3d 599, 605 (Mo. App. W.D. 2000) (holding that grandparents' statutory right to visitation had to be balanced against the custodial parent's "fundamental right of privacy" inherent in childrearing, and that applying statute "in such a manner as to constitute more than a minimal intrusion on the family relationship" was "unconstitutional and prohibited").

Contrary to the MRL *amici*'s understanding, the Supreme Court's abortion-rights jurisprudence recognizes a pregnant woman's right to abortion as grounded in her liberty and privacy interests in procreative freedom, in addition to her basic right to bodily integrity. *See Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 857 (1992) (calling *Roe* not only a rule "of personal autonomy and bodily integrity" but also "an exemplar of *Griswold* liberty" and noting that "constitutional developments [after *Roe*] have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the liberty

relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child"); *see also Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 323 (2006) (declining to revisit abortion precedents).

C. *The negative right to avoid procreation is explicitly protected by the Constitution*

The Supreme Court's Fourteenth Amendment jurisprudence makes clear that the negative right to avoid procreation is not just *implied* by cases invalidating state action that would prevent a party from attempting to procreate. Instead, the right to be free from undesired procreation is itself explicitly protected and just as fundamental to ordered liberty. *Roe*, 410 U.S. at 153 (describing physical and psychological harms attendant to undesired procreation separate from pregnancy itself); *Griswold*, 381 U.S. at 495 (Goldberg, J., concurring) (characterizing contraception prohibition as invading "the private realm of family life," an area in which the Court had repeatedly found a fundamental privacy interest) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)); *Eisenstadt*, 405 U.S. at 453, 453 n.10 (calling the unimpeded "decision whether to bear or beget a child" fundamental to the constitutional right of privacy and characterizing that decision as a corollary of the constitutional "right to be let alone").

D. *The constitutional right to avoid procreation inures to an individual, not a couple*

The *Eisenstadt* Court emphasized that the right to avoid procreation inures to an individual, not to a married couple. In extending *Griswold*'s holding that married people could not constitutionally be prohibited from procuring contraception, the Court recognized that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup." 405 U.S. at 453.

Therein lies the heart of the constitutional issue that would arise if Section 1.205 were applied in this appeal. McQueen and Gadberry each have fundamental procreative interests. But Gadberry's right to avoid procreation with his ex-wife, by not contributing to a pregnancy via implantation of the blastocysts, is an individual right that requires nothing further from anyone. McQueen's right to procreate by implanting the blastocysts requires consent from the other person who co-created them. In other words, her constitutional right to become pregnant to procreate does not entail a right to procreate *with Gadberry*. Allowing implantation over the objection of an unwilling IVF participant imposes irrevocable and lifelong emotional, moral, and financial obligations on that party without his or her consent.

Applying Section 1.205 to achieve this outcome would impermissibly[13] infringe on Gadberry's fundamental individual right to avoid procreation and would effectively end IVF in the state, denying thousands of Missourians their fundamental rights to build families. For both those reasons, the unprecedented interpretation Petitioner urges on the Court would render Section 1.205 unconstitutional.

Conclusion

The trial court's decision to prohibit either party from unilaterally controlling the disposition of the blastocysts should be affirmed. As the trial court did implicitly, this Court should find Section 1.205 inapplicable. If the Court concludes that Section 1.205 applies, it should invalidate that statute as unconstitutional.

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[13] Any interest that might be espoused by the state to justify infringement would not be narrowly tailored, as required by the Constitution, ***see, e.g., Lawrence v. Texas*, 539 U.S. 558, 593 (2003)**; ***State v. Merritt*, 467 S.W.3d 808, 814 (Mo. banc 2015)**, given the revolutionary expansion of criminal liability that would follow directly from the application of Section 1.205 to unimplanted zygotes. ***See infra*, Section I.**

Respectfully submitted,

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Certificate of Service and Compliance

The undersigned hereby certifies that on March 30, 2016, the foregoing *amicus* brief was filed electronically and served automatically on the counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06 and Local Rule XLI; (3) contains 5990 words. Finally, the undersigned certifies that electronically filed brief was scanned and found to be virus-free.

/s/ Anthony E. Rothert