EXHIBIT A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

ED103138

JALESIA MCQUEEN-GADBERRY,

Plaintiff-Appellant,

v.

JUSTIN GADBERRY,

Defendant-Respondent.

Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable Douglas R. Beach, Judge

BRIEF OF *AMICUS CURIAE* THE THOMAS MORE LAW CENTER IN SUPPORT OF APPELLANT

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus Curiae Thomas More Law Center ("TMLC") is a national, public interest law firm that defends and promotes America's Christian heritage and moral values, including the religious freedom of Christians, time-honored family values, and the sanctity of all human life from the moment of conception to natural death. TMLC accomplishes its mission through litigation, education, and related activities.

TMLC has over 60,000 members nationwide, including members residing in the State of Missouri. TMLC and its members support the preservation and protection of all human life. TMLC, therefore, supports Missouri's legislative enactment, RSMo. § 1.205, that recognizes that life begins at conception and that all life, no matter how small or vulnerable, is entitled to the same rights, privileges, and immunities. TMLC believes that the child custody issues raised in this appeal go to the very heart of how human life, here in the form of embryos, should be treated under the law.

INTRODUCTION

Missouri law specifically recognizes that life begins at conception. This Amicus Brief challenges the holding from the Circuit Court of the County of St. Louis that failed to recognize that an embryo is a life and failed to treat this life as a child under RSMo. § 452.705 ("§ 452.705").

STATEMENT OF THE FACTS

In February 2007, Jalesia McQueen and Justin Gadberry created four children together through in vitro fertilization. LF71. Two of these children, in the form of embryos, were implanted into Ms. McQueen and, as a result, she gave birth to two boys.

LF71. The remaining two children at the embryo stage of their development were cryopreserved. LF71. The parties divorced and Ms. McQueen sought custody of the two embryos to implant. LF77. Mr. Gadberry sought custody of the embryos to prevent Ms. McQueen from implanting them. LF77. The circuit court, relying on Iowa law, found that these embryos were property, ignoring the intent of the Missouri General Assembly as expressed in RSMo. § 1.205 ("§ 1.205"), which confirms that life begins at conception and that embryos are children in Missouri with the same rights, privileges, and immunities available to other persons. LF71.

POINT RELIED ON

The circuit court erred in refusing to apply the best interest of the child test to determine custody of the unborn embryos, because embryos are minor children as defined in § 452.705, in that § 1.205 states that all Missouri laws must be construed to acknowledge that embryos are children. RSMo. §§ 1.205, 452.705(2).

SUMMARY OF THE ARGUMENT

This case boils down to a straightforward question of statutory interpretation. Missouri law provides that human life begins at conception and that, after conception, unborn embryos enjoy the same rights as do other persons. RSMo. § 1.205. Applying this interpretive principle, it is clear that unborn human embryos are "children" within the meaning of RSMo. § 452.705(2), which defines "child" broadly as any "individual who has not yet attained eighteen years of age." Missouri's child-custody statute mandates that courts determine the custody of a "child" based on the best interests of the child. RSMo. § 452.375.2. Thus, Missouri law requires a circuit court to determine the custody

of unborn embryos based on the best interest of the embryos. Contrary to § 1.205, however, the circuit court concluded that the embryos in this case constituted property, not human life. Rather than awarding custody of the embryos under § 452.375, the circuit court instead purported to award the embryos as marital property. The circuit court's failure to apply §§ 1.205 and 452.375 constitutes clear legal error that warrants reversal.

The Missouri General Assembly requires that courts interpret all statutes, including § 452.705, with the understanding that life begins at conception. *See* RSMo. § 1.205. Embryos fit this definition because they have already been conceived—the sperm of the male has fertilized the ovum of the female. Courts must use this interpretation unless there is a specific exemption or it conflicts with a U.S. Supreme Court decision. *Id*. There is no exemption or Supreme Court decision that disallows courts from applying § 1.205 to § 452.705. Since § 1.205 applies to Chapter 452, the circuit court was required to award custody of the embryos under the best interest of the child standard, not dispose of them as marital property.

The Supreme Court expressly allows States to protect children once they can survive outside the womb, even if they need artificial aid to do so. *Roe v. Wade*, 410 U.S. 113, 160 (1973). Since frozen embryos live outside the womb, a State can enact laws to protect them or even prohibit their destruction. The constitutional right to bodily autonomy that the Supreme Court created to justify abortions does not apply to frozen embryos because they are outside the womb. Applying § 1.205 to § 452.705 does not require anyone to carry a child to term. On the contrary, it permits the parent who *wishes*

to bring the children to term the opportunity to do so. Therefore, the right to bodily autonomy is not implicated.

The Supreme Court also justifies its abortion decisions in terms of a reliance interest of women who wish to avoid bearing children. The Supreme Court reasons that women engage in sexual intercourse because they know that, should contraceptives fail, they can get an abortion to terminate their pregnancy. This is not applicable in the context of frozen embryos since frozen embryos are purposefully created.

Finally, the circuit court erred in relying on Iowa case law because Iowa law is in contradiction to the law in Missouri. The Missouri General Assembly enacted a unique life-affirming statute that Missouri courts cannot ignore in favor of Iowa law. Therefore, under Missouri law, human life under the age of majority, even in the form of an embryo, must be designated as a child in divorce proceedings, not just mere property. The circuit court should have applied the best interest of the child test to determine custody of the human embryos at issue in this case. RSMo. §§ 1.205, 452.705(2).

ARGUMENT

EMBRYOS ARE CHILDREN UNDER § 452.705 BECAUSE § 1.205 REQUIRES COURTS TO CONSTRUE ALL MISSOURI STATUTES WITH THE UNDERSTANDING THAT THE WORD "CHILD" INCLUDES ALL HUMAN BEINGS "FROM THE MOMENT OF CONCEPTION UNTIL BIRTH AT EVERY STAGE OF BIOLOGICAL DEVELOPMENT."

Standard of Review. This Court will reverse a judgment relating to the dissolution of marriage if "there is no substantial evidence to support it, it is against the weight of the

evidence, or it erroneously declares or applies the law." *Cule v. Cule*, 457 S.W.3d 858, 862 (Mo. App. E.D. 2015).

The circuit court erred in refusing to apply the best interest of the child test to determine custody of the unborn embryos, because embryos are minor children as defined in § 452.705, in that § 1.205 states that all Missouri laws must be construed to acknowledge that embryos are children. RSMo. §§ 1.205, 452.705(2).

Missouri's statutory law requires that a judge interpret all laws in Missouri, including Domestic Relations statutes, with the acknowledgement that life begins at conception and that embryos are children. RSMo. § 1.205. Under Missouri's custody statute, a "child" is "an individual who has not attained eighteen years of age." RSMo. § 452.705(2). Judges are *required* to interpret "child" in § 452.705 in light of § 1.205 as including all "children . . . from the moment of conception until birth at every stage of biological development." *See* RSMo. § 1.205.3. Custody of children is then considered under the best interest of the child analysis. *See* RSMo. §§ 452.705, 452.375.

I. Section 1.205 Governs the Interpretation of All Missouri Statutes and Requires that Unborn Children, Including Embryos, Receive the Same Legal Protections as Post-Birth Children and Adults.

Missouri Revised Statutes Chapter 1 sets forth rules for the construction of all Missouri statutes. Section 1.205 requires courts to construe all statutes with the understanding that life begins at conception. It states, "[t]he life of each human being begins at conception." RSMo. § 1.205.1(1). The statute further provides that "[u]nborn children have protectable interests in life, health, and well-being." RSMo. § 1.205.1(2).

The statute defines "unborn *children*" or "unborn *child*" as "all unborn child or children or the offspring of human beings from the moment of conception until birth *at every stage of biological development*." RSMo. § 1.205.3 (emphasis added). The statute requires that *all* of the laws of Missouri "be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, *subject only* to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and *specific* provisions to the contrary in the statutes and constitution of this state." RSMo. § 1.205.2 (emphases added).

To determine the meaning of a statutory term, "the court's primary responsibility is to ascertain the intent of the General Assembly from the language used and to give effect to that intent." *Cmty. Fed. Sav. & Loan Asso. v. Dir. of Revenue*, 752 S.W.2d 794, 798 (Mo. banc 1988). To do this, "[t]he primary rule of statutory construction is to give effect to legislative intent as reflected in the plain language of the statute." *State v. Blocker*, 133 S.W.3d 502, 504 (Mo. banc 2004). Missouri courts have consistently applied § 1.205 to protect the life of unborn children at every stage of biological development in all reviewed contexts. The General Assembly's lack of disagreement with these life-affirming holdings through subsequent legislative action is also indicative of its intent to protect all unborn children. *See State v. Harrison*, 390 S.W.3d 927, 929 (Mo. App. S.D. 2013).

Both this Court and the Missouri Supreme Court have held that § 1.205 governs the interpretation of *all* Missouri statutes. "Section 1.205.2 'sets out the intention of the

general assembly that Missouri courts should read all Missouri statutes *in pari materia* with this section.'" *State v. Rollen*, 133 S.W.3d 57, 63 (Mo. App. E.D. 2003) (quoting *Connor v. Monkem Co.*, 898 S.W.2d 89, 92 (Mo. banc 1995)). Moreover, the statute "set[s] out a canon of interpretation enacted by the general assembly directing that the time of conception . . . is the determinative point at which the legally protectable rights, privileges, and immunities of an unborn child should be deemed to arise." *Connor*, 898 S.W.2d at 92. Thus, in interpreting *any* Missouri statute, courts must give effect to § 1.205's principles that human life begins at conception and that unborn children—that is, persons between conception and birth—possess the same legal rights as post-birth children or adults.

Missouri courts have uniformly applied this principle, holding in every context that Missouri statutes apply to and protect unborn children to the same extent as post-birth children and adults. *See Harrison*, 390 S.W.3d at 929 (applying § 1.205 to conclude that an unborn child constitutes a "person" under RSMo. § 565.024); *Rollen*, 133 S.W.3d at 63 (applying § 1.205 to conclude that an unborn child constitutes a "person" under RSMo. § 565.021); *State v. Kenney,* 973 S.W.2d 536, 544-45 (Mo. App. W.D. 1998) (applying § 1.205 to conclude that an unborn child constitutes a "person" under RSMo. § 565.050), *overruled on other grounds by State v. Withrow*, 8 S.W.3d 75, 80 (Mo. banc 1999); *State v. Holcomb*, 956 S.W.2d 286, 289-90 (Mo. App. W.D. 1997) (applying § 1.205 to conclude that an unborn child constitutes a "person" under RSMo. § 565.020); *Connor*, 898 S.W.2d at 92-93 (applying § 1.205 to conclude that an unborn child constitutes a "person" under RSMo. § 537.080); *State v. Knapp*, 843 S.W.2d 345,

347-48 (Mo. banc 1992) (applying § 1.205 to conclude that an unborn child constitutes a "person" under RSMo. § 565.024); *see also Lough v. Rolla Women's Clinic, Inc.*, 1993 Mo. App. LEXIS 241 (Mo. App. S.D. 1993) (holding a child has a cause of action for a negligent act against his mother which occurred *prior to his conception* that resulted in *in utero* harm because it was foreseeable at the time of the negligence that a person—an unborn child under § 1.205—would be harmed). These cases all determined that the General Assembly intended for the laws to be interpreted under the principal that life begins at conception and that every unborn child is to be treated in exactly the same way as all born "persons, citizens, and residents" of Missouri.

The General Assembly has carved out specific exceptions from the otherwise broad protection afforded to unborn children under Missouri law. *See, e.g.*, RSMo. §§ 188.015, 194.210.2(5), (8). However, the General Assembly did *not* designate § 452.705 as an exception to § 1.205. *See* RSMo. § 452.705. Because § 1.205 governs the interpretation of all Missouri statutes, it necessarily controls the interpretation of the domestic-relations statutes and, in particular, §§ 452.705 and 452.375. This conclusion is bolstered by the fact that the General Assembly enacted § 452.705 in 2009, twenty-three years *after* it enacted § 1.205. The Court must "presume[] that the Legislature is acquainted with the law; that it has a knowledge of the state of it upon the subjects upon which it legislates; that it is informed of previous legislation and the construction it has received." *Strottman v. St. Louis I. M. & S. R. Co.*, 109 S.W. 769, 776 (Mo. banc 1908). Since the General Assembly *only* limited application of § 1.205 to "*specific* provisions to

the contrary" and did not place a limitation in the after-enacted domestic relations statute, § 1.205 applies to § 452.705.

II. The Embryos in This Case Qualify as Unborn Children under § 1.205 and, Thus, Constitute Legal Persons with Protected Interests under Missouri Statutes.

The embryos in this case qualify as unborn children under § 1.205 and thus constitute legal persons with protected interests under Missouri statutes. As noted above, § 1.205 provides that "[t]he life of each human being begins at conception." RSMo. § 1.205.1(1). The statute also defines "unborn child" to include any "offspring of human beings from the moment of conception until birth at every stage of biological development." RSMo. § 1.205.3. Here, the embryos at issue constitute unborn children within the meaning of the statute. Like all embryos, they have undergone conception and are in the midst of the ordinary process of human biological development. LF71; *see also* RSMo. § 188.015.1(3). For legal purposes, their lives began at the moment of their conception, RSMo. § 1.205.1(1), and they "have protectable interests in life, health, and well-being." RSMo. § 1.205.1(2).

RSMo. § 188.015.1 further supports the conclusion that embryos constitute unborn children under § 1.205. Section 1.205 was enacted as part of the same bill as § 188.015.1, which defines "conception" as "the fertilization of the ovum of a female by the sperm of a male," and defines the phrase "every stage of biological development" specifically to include "the human conceptus, zygote, morula, blastocyst, *embryo*, and fetus." RSMo. § 188.015.1(3), (9) (emphasis added). "In determining legislative intent,

the reviewing court should take into consideration statutes involving similar or related subject matter when those statutes shed light on the meaning of the statute being construed." *Knapp*, 843 S.W.2d at 347. "Related statutes are also relevant to further clarify the meaning of a statute." *Blocker*, 133 S.W.3d at 504.

Moreover, had the Missouri General Assembly wished to make a distinction between frozen embryos and those *in utero*, it would have done so. Many other State and federal statutes draw express distinctions between embryos inside and outside the womb. For example, Louisiana defines "person" as "a human being from the moment of fertilization and *implantation*." La. Rev. Stat. § 14:2 (emphasis added). Similarly, federal law defines "unborn child" as "a child in utero, and the term 'child in utero' or 'child, who is in utero' means a member of the species homo sapiens, at any stage of development, who is *carried in the womb*." 18 U.S.C. § 1841(d) (emphasis added). In the face of these statutes, the General Assembly did not amend § 1.205 to specifically require that an embryo be in the womb and that does not use words such as "implantation," "gestation," or "in utero," that would connote such a limitation. This demonstrates the Missouri General Assembly's intent that § 1.205 applies to all embryos regardless of their location in or outside the womb. *See, e.g.*, *State ex rel. Notham v. Walsh*, 380 S.W.3d 557, 567 (Mo. banc 2012) (reasoning that a Missouri statute did not authorize derivative use immunity because "the statutes of other jurisdictions provided a model by which it could have done so" but the Missouri statute was silent on the issue); *see also Conagra Poultry Co. v. Dir. of Revenue*, 862 S.W.2d 915, 917 (Mo. banc 1993)

(holding that the legislature's intent is "clearly indicated by the legislature's failure to include within [a statute] specific language").

This Court should not read a limitation in § 1.205 excluding frozen embryos when the General Assembly did not put such an exclusion into the text of the statute. *Dworkin v. Caledonian Ins. Co.*, 226 S.W. 846, 851 (Mo. banc 1920) ("The court may feel sure the Legislature meant to include something which by oversight was omitted, yet cannot supply it."). The Court cannot amend the General Assembly's enactment by adding an environmental requirement—such as *in utero*, gestation, implantation, or in the womb—to § 1.205 because the General Assembly did not include it. The lack of such a requirement indicates the General Assembly intended to protect human concepti, zygotes, morulae, blastocysts, embryos, and fetuses regardless of whether they are located inside or outside the womb. Even if the court feels sure the legislature intended to include a limiting term, the court cannot circumvent the plain language of the statute, which does not include such a limitation. *Id.* The Louisiana and federal legislatures chose to make the distinction; the Missouri General Assembly did not. Therefore, § 1.205 applies to the embryos at issue here.

III. The Embryos in this Case Constitute Children within the Meaning of Chapter 452.

Chapter 452 defines "child" as "an individual who has not attained eighteen years of age." RSMo. § 452.705(2). An "individual" is "a single human being" or "a particular person." Webster's Third New Int'l Dictionary 1152 (2002). As noted above, § 1.205 specifically provides that "[t]he life of each human being begins at conception," RSMo.

§ 1.205.1(1), and "conception" is the union of a human sperm cell with a human egg cell. *See* RSMo. § 188.015.1. Here, the embryos at issue have been conceived. Thus, they are human beings under Missouri law and, specifically, "children" under Chapter 452. Moreover, as noted above, Missouri courts have repeatedly and uniformly held that § 1.205 prescribes that unborn children constitute legal "persons." *See Harrison*, 390 S.W.3d at 929; *Rollen*, 133 S.W.3d at 63; *Kenney,* 973 S.W.2d at 544-45; *Holcomb*, 956 S.W.2d at 289-90; *Connor*, 898 S.W.2d at 92-93; *Knapp*, 843 S.W.2d at 347-48. The embryos here are "human beings" and "persons," which in turn means that they constitute "individuals" as the term is used in RSMo. § 452.705(2).

The terminology in § 452.705 is compatible with the terminology in § 1.205. Section 1.205 informs when the life of a child begins, *i.e.*, at conception, while § 452.705 informs when a person moves from childhood to adulthood, *i.e.*, upon attaining eighteen years of age. *See* RSMo. §§ 1.205, 452.705. Section 452.705 defines the term "child" under Domestic Relations law; Section 1.205 uses the term "child" or "children" in reference to "human beings from the moment of conception until birth at every stage of biological development" *nine* times. The repetitive and identical language further indicates that the statutes are meant to be read together. *Knapp*, 843 S.W.2d at 347 ("In determining legislative intent, the reviewing court should take into consideration statutes involving similar or related subject matter when those statutes shed light on the meaning of the statute being construed."). Since the statutes both relate to defining "child" and § 1.205 expressly states it applies to all Missouri laws unless expressly exempted, § 452.705 must be read to include all unborn children, including embryos. The Missouri

General Assembly knew that Missouri law already defined the beginning of childhood in § 1.205 when enacting § 452.705, which is why § 452.705 only needed to contain when childhood ends. Thus, the embryos here constitute "children" under Missouri's child-custody laws.

IV. Because the Embryos Here Constitute Children Under Chapter 452, the Circuit Court was Required to Determine Their Custody Based on the Best-Interest-of the Child Standard.

Because the embryos in this case constitute "children" within the meaning of Missouri's child-custody statutes, the circuit court erred by failing to allocate their custody based on the best interests of the children (*i.e.*, the embryos). Section 452.375 mandates that a "court *shall* determine custody in accordance with the best interests of the child." RSMo. § 452.375.2 (emphasis added). "When awarding child custody, the court *must* determine the best interests of the child." *Cerutti v. Cerutti*, 169 S.W.3d 113, 115 (Mo. App. W.D. 2005) (emphasis added). A dissolution decree addressing child custody that fails to comply with § 452.375 "is legally deficient" and must be reversed. *Id.*; *see also Davis v. Schmidt*, 210 S.W.3d 494, 503 (Mo. App. W.D. 2007) (holding that a child-custody determination that does not include written findings regarding the best interest of the child must be reversed).

Here, the circuit court held that the embryos constituted marital property and purported to allocate control of them as such. *See* LF76, LF80. The circuit court did not make any findings regarding the best interest of the embryos and did not determine their custody based on § 452.375. *See generally* LF68-81. Because the embryos constitute

children under Chapter 452 and the circuit court failed to determine their custody based on the best-interest-of-the-child standard, the Court should reverse the circuit court's judgment and remand for a custody determination consistent with § 452.375. *See Cerutti*, 169 S.W.3d at 115; *Davis*, 210 S.W.3d at 503.

V. Embryos are Children under Missouri's Custody Statute Because There are No Constitutional or Statutory Provisions that Mandate Otherwise.

Section 1.205.2 provides that Missouri's rule that human life begins at conception under Missouri law is "subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state." RSMo. § 1.205.2. Here, neither the U.S. Constitution, nor the decisions of the U.S. Supreme Court, nor any provision of Missouri law imposes an obstacle to interpreting the custody statutes in light of § 1.205.

The U.S. Supreme Court, in its abortion jurisprudence, has specifically recognized that a State may make a judgment about when life begins, so long as it is not used to regulate abortions. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 506 (1989) (discussing RSMo. § 1.205). Thus, courts have consistently held that § 1.205 does not run afoul of the Supreme Court's abortion jurisprudence. *See Rollen*, 133 S.W.3d at 63 (explaining that § 1.205 does not run afoul of *Roe v. Wade* and its progeny, because the statute does not regulate abortion); *Rollen v. Dwyer*, 2007 WL 2199676, at *4 (E.D. Mo. July 27, 2007) (same).

The Supreme Court has decided that abortion is a right guaranteed under the Fourteenth Amendment's right to privacy. *Roe v. Wade*, 410 U.S. 113, 153 (1973). Even though the Supreme Court held that the unborn are not "persons" under the Fourteenth Amendment and, thus, not are not entitled to its guarantee of the right to life, States still maintain the freedom to determine when life begins outside of the abortion context. *See, e.g.*, *Connor*, 898 S.W.2d at 92-93; *Knapp*, 843 S.W.2d at 347-48. The implications and concerns protecting the right to abortion as expressed in *Roe* and elaborated on in *Casey*, are not implicated in the context of frozen embryos.

A. The Supreme Court's interpretation of the U.S. Constitution provides that States can prohibit destruction of frozen embryos because they are viable.

The Supreme Court has recognized that States have a compelling interest in protecting children once they can survive outside the womb. The Supreme Court held in *Roe* and reaffirmed in *Casey* that once an unborn child is capable of surviving outside the womb, even with artificial aid, a State has a compelling interest in protecting the unborn child that overrides the right of a mother to abort her child. *Roe*, 410 U.S. at 163; *Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992). Courts must be careful not to "undervalue the State's interest" in life. *Casey*, 505 U.S. at 870. Since frozen embryos are capable of life—and, in fact, survive—outside the womb, the Missouri General Assembly can institute policies and laws to protect them. This is exactly what § 1.205 does.

The Supreme Court has not given a static definition of viability—the stage at which a child can survive outside the womb. Viability is not determined by a specific time or gestational age and, thus, fluxes with scientific advancements. *Planned Parenthood v. Danforth*, 428 U.S. 52, 64 (1976) ("The time when viability is achieved may vary with each pregnancy."); *Casey*, 505 U.S. at 860 ("The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future."). The Supreme Court acknowledged that medical developments, such as cryopreservation, will "affect the precise point of viability, but this is an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter." *Casey*, 505 U.S. at 870. The "critical fact" is still the "attainment of viability," even though viability will occur at a younger and younger age. *Id*. at 860.

Under any definition of viability in the Supreme Court of the United States or Missouri law, frozen embryos are viable. Viability is "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb," *Id.* at 870; when an embryo is "potentially able to live outside the mother's womb, *albeit with artificial aid*," *Roe*, 410 U.S. at 160 (emphasis added); or the "stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural *or artificial life supportive systems*." RSMo. § 188.010(10) (emphasis added).

Once a child attains viability by being able to survive outside the womb, even if the child needs aid—like cryopreservation—the State can prohibit his or her destruction. The cryopreserved state is like any other artificial aid used to keep a child alive. To suggest otherwise would mean that embryonic children are alive prior to cryopreservation, die when frozen, and then are miraculously brought back to life. This would require attributing God-like power to those who freeze and then thaw the embryonic children. A person must be either dead or alive. Under Missouri law, these embryonic children are alive and entitled to protection. Furthermore, suggesting otherwise would mean that the act of cryopreservation is destroying the life of an embryonic child and prohibited under the laws of Missouri.

B. The constitutional rights to privacy and personal autonomy are not implicated in the context of frozen embryos because a pregnancy is not involved.

The constitutional limitations on abortion are not implicated in the context of frozen embryos. A woman's constitutional right to terminate the life of her unborn child stems from the Due Process Clause of the Fourteenth Amendment. *Casey*, 505 U.S. at 848; U.S. Const. amend. 14 § 1. The "liberty" guaranteed in the Due Process Clause provides a woman the right to "personal dignity and autonomy," which the Court has interpreted as a right to end the lives of unwanted children through abortion. *Casey*, 505 U.S. at 851. The Court created this right to abortion because:

> . . . the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full

> term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

Id. at 852. The "liberty" and "destiny" the Supreme Court relies on to justify abortions applies only to women and pregnancy. The Supreme Court further justified a right to abortion by decrying unwanted pregnancy as follows:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

Roe, 410 U.S. at 153. Even with these litanies of potential harms, a woman's right to privacy and abortion is not absolute since a State can prohibit abortions after viability. *Id*. at 154, 159.

The State has an "important and legitimate interest," *Casey*, 505 U.S. at 871, "a substantial interest," *id*. at 876, a "compelling" interest, *Roe*, 410 U.S. at 154, and a "profound interest," *Casey*, 505 U.S. at 878, in protecting a life. Once a child can survive outside the womb, *even if the child needs artificial aid*, the State's important, legitimate, substantial, compelling, and profound interest overrides a woman's interest in terminating her pregnancy and ending the life of her child. With frozen embryos, the balance tips even more heavily in favor of the State. Not only are frozen embryos viable under the definitions in *Roe*, *Casey*, and Missouri state law, but a woman is not inconvenienced in any way by a State's ability to protect the lives of frozen embryos. A State can prohibit abortions after viability even when the child is still in the womb, thus requiring a woman to continue to bear the child until birth. *Roe*, 410 U.S. at 163-64; *see also* RSMo. § 188.030. With frozen embryos, the State's interest in life does not override a woman's interest in her bodily integrity because the frozen embryos are maintained outside of the womb.

None of the concerns that the Supreme Court enumerated to justify abortion are implicated in the context of frozen embryos. The majority of the concerns expressed in *Roe* and *Casey* stem from the potential physical and emotional challenges associated with pregnancy. Applying § 1.205 to frozen embryos does not force anyone to sacrifice her liberty to become pregnant with a child. Additionally, none of the financial hardships

apply because of programs, like Snowflakes Embryo Adoption, that implant unwanted embryos into couples who want a child. *See Snowflakes Embryo Adoption and Donation*, Nightlight Christian Adoptions, https://www.nightlight.org/snowflakes-embryo-donation-adoption/ (*last visited* Oct. 27, 2015). These programs are comparable to prohibiting post-viability abortions when a mother does not want her child. That mother can choose to either raise the child or give the child up for post-birth adoption. Furthermore, in the custody context at issue here, a parent is fighting to keep the unborn child so the child is not unwanted—one of the child's parents wants to embrace the emotional and financial responsibilities of raising and caring for the child.

Supreme Court decisions, such as *Roe* and *Casey*, express the right to be free from *pregnancy*. This right is not implicated in the case of frozen embryos. The Supreme Court's reasoning and wording in these cases focus on the challenges related to pregnancy and the rights of *women*. This is further exemplified by the Supreme Court's reasoning in *Casey* that discusses the importance of upholding the right to an abortion. The Supreme Court states that women "have made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception might fail." *Casey*, 505 U.S. at 856. The Supreme Court advocates that women who engage in sexual behavior know that, should they become pregnant, they can terminate the pregnancy and that women's ability to make reproductive decisions defines them in society. *Id*. at 856, 860. The Supreme Court determined that the abortion decision falls *solely* on the shoulders of a woman. *Id*. at 888-89. Women are the only ones who can make the decision in the event of

contraceptive failure because women are the only ones who can get pregnant. *Id*. Men cannot engage in sexual behavior with a reliance on abortion as a back up to contraceptives because men cannot make the choice to have an abortion. *See id*.

An additional indication that the right to abortion is primarily a right to be free from unwanted pregnancy is that *Roe* does not discuss the rights of the father. *See Roe*, 410 U.S. at 165 n.67. Although the Court declined to address the issue directly in *Roe* because "no paternal right ha[d] been asserted," the Court found the father's right so insignificant that the rights of physicians, which were also not asserted, deserved mentioning and vindication but the father's did not. *Id*. at 165 n. 67, 165-66. Although no father *or physician*[1] was a party to the suit, the Supreme Court "vindicate[d] the right of the physician to administer medical treatment according to his professional judgment," *id*. at 165-66, while ignoring "the father's rights, *if any exist*." *Id*. at 165 n.67 (emphasis added). The fact that pregnancy is the crucial factor, not the decision of whether or not to have a child, is further exemplified by the unconstitutionality of spousal consent requirement prior to an abortion, *Danforth*, 428 U.S. at 69, and even spousal notification requirements. *Casey*, 505 U.S. at 898.

A focus on the decision to bear or beget a child rather than pregnancy would also result in a ludicrous dichotomy. As stated above, States can have wrongful death actions for the unborn and include the unborn in homicide laws. *See, e.g.*, *Connor*, 898 S.W.2d

[1] A doctor attempted to intervene but the Court dismissed his complaint for lack of standing. *Roe*, 410 U.S. at 127.

at 92-93; *Knapp*, 843 S.W.2d at 347-48. If abortion law is founded, not on a personal, physical bodily right to be free from pregnancy, but on a psychological desire not to have children, the entire difference between an outside person murdering an unborn child or a woman choosing to abort would be whether that child is wanted. The sole distinguishing factor between murder and legal abortion would be the whim of a mother's desire.

Therefore, because the constitutional rights and guarantees that apply in the abortion context are concerned with pregnancy and bodily autonomy, they are not relevant to frozen embryos, and the court should apply § 1.205 to child custody determinations.

C. The decision whether to bear or beget children is not implicated in the context of frozen embryos because no one is forced to bear children and because frozen embryos are children under Missouri law and, thus, already begotten.

Even if the court considers *Roe*, *Casey*, and other abortion case law to stand for a right not to bear or beget a child, rather than a right to be free from an unwanted pregnancy, this court should still protect the lives of the embryos. Unlike abortion, preservation and protection of frozen embryos does not force a woman to "bear" a child. In this case, the party seeking to preserve the embryos is the woman who *wants* to bear the children to term. If, in a future case, a man wishes to preserve and protect the lives of the embryos, he cannot compel a woman to bear them but will find a woman willing or preserve and protect his embryonic children in their current state outside the womb.

Applying § 1.205 to embryos also does not force someone to beget a child. Under Missouri law, embryos are *already children* and, thus, already begotten. *See* RSMo. § 1.205. The couple freely chose to beget children when they underwent IFV. Under Missouri law, the issue now is, not whether or not to beget a child, but what is in the best interest of the child that already exists.

The constitutional concerns expressed in *Casey* are inapplicable. In *Casey*, the Supreme Court articulated that women need abortion "in the event that contraception should fail." *Casey*, 505 U.S. at 856. The Court recognized that people engage in sexual intercourse for many reasons, frequently not intending or wanting to beget a child.

In the case of frozen embryos, the parents *make the choice* to beget children when they create the embryos. Unlike conception that results as an accidental effect from sexual intercourse, the conception of frozen embryos is always intended; a frozen embryo cannot be the result of an accident or failed contraceptive. People engage in sexual intercourse for many different intents and purposes, which can inadvertently result in conception; creating frozen embryos has only one purpose and the sole intent in creating frozen embryos is to beget children. The conception of frozen embryos is so contemplated that it involves lengthy contractual agreements. *See, e.g.* LF71. Furthermore, unlike sexual intercourse where, despite the parties' best efforts, a child can result, parties creating frozen embryos have exclusive control over the conception process. Parties can choose exactly how many children to beget through creating the embryos. Thus, the concerns expressed in *Casey* are not implicated here.

VI. The Circuit Court Erred in Relying on Iowa Case Law Because Iowa Law Regarding the Unborn Conflicts with Missouri Law.

The circuit court's reliance on Iowa case law was in error. In the judgment, the court stated: "This Court is particularly influenced by the Courts in the State of Iowa who have decided this issue." LF78. However, the law regarding the unborn in Iowa contrasts starkly with the law regarding the unborn in Missouri. Most notably, Iowa has no statute comparable to RSMo. § 1.205, which requires human embryos to be treated as children.

The Iowa Supreme Court determined the same issue of embryo disposition by first determining whether an embryo was a child under Iowa Domestic Relations law. *In re Marriage of Witten*, 672 N.W.2d 768, 774 (Iowa 2003). The Iowa Supreme Court considered the definition of "child" under Iowa Domestic Relations law, Iowa Code § 598.1(6), by looking to how the unborn were treated in other areas of *Iowa* law. *Id*. at 774-76. In Iowa, the viable and nonviable unborn are not considered persons. *Id*. at 774; *see also Weitl v. Moes*, 311 N.W.2d 259, 270 (Iowa 1981) (holding that a viable fetus is not a person under Iowa's survival statute) (*overruled on other grounds by Audubon-Exira Ready Mix, Inc. v. Ill. C. G. R. Co.*, 335 N.W.2d 148 (Iowa 1983)); *McKillip v. Zimmerman*, 191 N.W.2d 706 (Iowa 1971) (a nonviable fetus is not a person under the survival statute). However, under the comparable statutes in Missouri, the unborn are

treated as persons.[2] *See Connor*, 898 S.W.2d 89, 92 (holding that a non-viable fetus constituted a "person" under Missouri's wrongful death statute). By relying on the conclusion of the Iowa case on the same issue, the circuit court acted in direct contravention of Missouri law.

The court below disregarded the intent of the *Missouri* General Assembly by being "influenced" by Iowa case law interpreting the intent of the *Iowa* legislature. The circuit court ignored Missouri's significant regard for the lives of unborn children and instead implemented the policy of Iowa, which affords them little to no protection. *See Connor*, 898 S.W.2d at 93 (recognizing that the law of other jurisdictions, which lack statutes similar to RSMo. § 1.205, are not persuasive because "the decisions from these jurisdictions construe general statutes with little or no guidance as to whether unborn children, viable or not, should be considered as persons," while Missouri's § 1.205 does provide such guidance). Likewise, none of the appellate courts of other states[3] that have

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[2] Also, note that, unlike in Missouri, the unborn are not considered persons under Iowa criminal law. The Iowa Code has a special statute for the murder of the unborn, which carries a far lighter sentence than the murder of a born person. *See* Iowa Code §§ 707.2, 707.8, 902.1-902.14.

[3] *See* Massachusetts, *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); Oregon, *Dahl v. Angle*, 194 P.3d 834 (Or. Ct. App. 2008); Tennessee, *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); Iowa, *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003); New Jersey, *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); New York, *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998);

addressed custody of frozen embryos were governed by a statute or any other provision like Missouri's § 1.205.

Individual States have the power to shape their Domestic Relations law so that no State's law need be reliant on or determined by another State's law. *See Rose v. Rose*, 481 U.S. 619, 625 (1987) ("[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States."). The circuit court violated one of the fundamental principles of State sovereignty by ignoring Missouri's law to focus on the conclusion of an Iowa court: "One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting). The General Assembly did not enact § 1.205 so that courts could ignore it to rely on another State's law. Reliance on another State's law that has no controlling value in Missouri while ignoring Missouri law undermines the virtues of federalism on which this country is built. Missouri's respect for life at all stages is a social experiment that the General Assembly is not only allowed but encouraged to engage in irrespective of Iowa's stance on the same issue. A State can establish its Domestic Relations law independent from that of neighboring States. This independence

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Pennsylvania, *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2011); Texas, *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006); Illinois, *Szafranski v. Dunston*, 2015 Ill. App. LEXIS 450 (Ill. App. Ct. 2015).

includes the ability to define "children" to encompass embryos in a nonabortion context. *See Webster*, 492 U.S. at 506 (holding that, in a nonabortion context, a State can offer protections to the unborn and refusing to invalidate RSMo. § 1.205). Missouri's unique statute that its General Assembly enacted and intended courts to follow in construing all areas of Missouri State law trumps an Iowa court case. The circuit court clearly erred by following Iowa law and ignoring the express intent of Missouri's General Assembly.

For the same reasons, since Missouri law is unique, the tests[4] employed by the courts in other States to determine disposition of embryos are inapplicable. The Missouri General Assembly already laid out the test for courts to use to determine the custody of embryos—the best interest of the child analysis. *See* RSMo. §§ 452.705, 452.375. By utilizing Iowa's contemporaneous written consent requirement instead of Missouri's best interest of the child analysis, the circuit court erred and its judgment should be reversed.

[4] The tests are: (1) contractual approach, treating a prior written agreement on embryo disposition as binding; *see, e.g.*, *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); (2) balancing approach, weighing the interests of the parents to either procreate or not procreate; *see, e.g.*, *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); (3) contemporaneous mutual written consent, requiring both parties to agree in writing before anything can be done with the embryos. *See In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

CONCLUSION

Therefore, this Court should remand to the Circuit Court of the County of St. Louis with instructions that (1) embryos are children under RSMo. § 452.705(2) and (2) custody of the embryos must be determined under a best interest of the child analysis.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH RULE 84.06(b)

Pursuant to this Missouri Rule 84.06(b), I hereby certify that this Brief complies with the limitations contained in the rule and contains 7,502 words, excluding those portions excluded from the word count by Rule 84.06(b) and Local Rule 360.

Dated: December 22, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2015, a copy of the foregoing was served upon the following, using the Court's electronic filing system:

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