IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES L. SHERLEY, *et al.*,,	)	
	)	
Plaintiffs,	)	
	)	Case No. 1:09-cv-01575-RCL
v.	)	
	)	
KATHLEEN SEBELIUS, in her official capacity as Secretary of the Department of Health and Human Services, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR APPOINTMENT AS GUARDIAN AD LITEM

PRELIMINARY STATEMENT

Ignoring decades of clear Supreme Court authority holding that embryos are not persons under federal law, plaintiffs seek appointment of a guardian *ad litem* to represent all embryos "created using in vitro fertilization (IVF) for reproductive purposes and . . . no longer needed for these purposes." Complaint (Compl.) ¶ 9. Nighlight Christian Adoptions ("Nightlight"), a named plaintiff in the case, seeks to assert the embryos' "interest in protecting themselves from destruction" as an alleged result of the Guidelines for Human Stem Cell Research ("Guidelines"), 74 Fed. Reg. 32,170 (July 7, 2009), promulgated by the National Institutes of Health (NIH), an agency within the Department of Health and Human Services (HHS). *See* Memorandum in Support of Plaintiffs' Motion for Appointment as Guardian Ad Litem ("Pl. Memo"), Doc. No. 4-2 at 6.

Plaintiffs fail to cite a single case in which an embryo was permitted to sue in federal court to control its disposition, and plaintiffs ignore several cases rejecting the right of a guardian to proceed on behalf of the unborn. Instead, plaintiffs rely on a D.C. Circuit case dealing with the contingent property interests of unborn heirs, a case that is both easily distinguishable and prior to the Supreme Court's decision in *Roe v. Wade*. The embryos sought to be joined in this case do not have the kind of legally protected interests required by either Fed. R. Civ. P. 17(c) or Article III. Even were this not the case, relief under Rule 17(c) would still be inappropriate, given the vast and unidentified nature of the group of embryos Nighlight seeks to represent. Representation of a such a group is unmanageable, inconsistent with the requirement that plaintiffs establish Article III standing through specific facts, and contrary to the laws of many states.

ARGUMENT

I. Embryos Do Not Qualify for Representation by a Guardian *Ad Litem*

Embryos do not enjoy the kind of independent legal rights and interests that may be advanced in this lawsuit by a guardian *ad litem* pursuant to Fed. R. Civ. P. 17(c)(2). Rule 17(c) permits a "minor or incompetent person who does not have a duly appointed representative" to sue by a next friend or guardian *ad litem*.[1] Fed. R. Civ. P. 17(c). The minor or incompetent person remains the real party in interest, however, and must have Article III standing to sue in his own right. *See, e.g. Gonzalez v. Reno*, 86 F. Supp. 2d 1167, 1181 (S.D. Fla. 2000), *aff'd*, 212 F.3d 1338 (11th Cir. 2000) ("Rule 17(c) . . . provides mechanisms by which a child *who has standing* . . . can bring suit through a representative") (emphasis added); *see also* Fed. R. Civ. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts"). Without a legally protected interest that may be advanced in litigation, the requirements of neither Rule 17(c) nor Article III have been satisfied, and the motion to appoint a guardian *ad litem* must be denied. *See Doe v. Shalala* (*Doe*), 862 F. Supp. 1421, 1426 (D. Md. 1994), *vacated as moot*, 57 F.3d 1066 (4th Cir. 1995) (unreported); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (recognizing "invasion of a legally protected interest" as part of "irreducible constitutional minimum of standing").

Plaintiffs' assertion that embryos are "*persons* that qualify for representation under Fed. R. Civ. P. 17(c)," Compl. ¶ 9 (emphasis added), flies in the face of controlling Supreme Court authority. In *Roe v. Wade*, 410 U.S. 114 (1973), the Court held that "the unborn have never been

[1] While a next friend is typically self-appointed and a guardian *ad litem*, appointed by the Court, the terms are "essentially interchangeable." *Enk v. Brophy*, 124 F.3d 893, 895 (7th Cir. 1997). Accordingly, the analysis would be the same regardless of whether Nightlight wishes to proceed as a next friend (as indicated in the case caption) or as a guardian *ad litem*.

recognized in the law as persons in the whole sense," id. at 162, and thus do not have a right to life protected under the Fourteenth Amendment,[2] id. at 158. This conclusion has been echoed time and again by the lower courts. *See, e.g.*, *Lewis v. Thompson*, 252 F.3d 567, 585 (2d Cir. 2001) (fetus is not person under Equal Protection Clause or Fifth Amendment); *Planned Parenthood v. Rounds*, No. Civ. 05-4077, 2009 U.S. Dist. LEXIS 73970, *11 (D.S.D. Aug. 20, 2009) (concluding that neither an embryo nor a fetus is "a 'person' within the meaning of the established laws"); *Doe v. Irvine Sci. Sales Co.* (*Irvine*), 7 F. Supp. 2d 737, 742 (E.D. Va. 1998) ("embryos are not entitled to the protections granted to persons").

The fact that plaintiffs' claims are grounded in federal statutory law rather than constitutional law cannot save their present motion. Even setting aside the constitutional dimension of the issue, there is no reason to believe that Congress intended to include embryos as "persons" entitled to sue under the Administrative Procedure Act (APA). *See* 5 U.S.C. § 702, 551(2); *see also McGarvey v. Magee-Womens Hosp.*, 340 F. Supp. 751, 753 (W.D. Pa. 1972) (concluding that Congress did not intend to bring the unborn within the protection of the Civil Rights Act). Had Congress intended such an extraordinary step, one would expect it to have spoken with unmistakable clarity. *See United States v. Wilson*, 290 F.3d 347, 356 (D.C. Cir. 2002) (Congress is "presumed to preserve, not abrogate, the background understandings against which it legislates."). Moreover, even though the substantive basis for plaintiffs' claims is federal statutory law, the legal interest Nightlight seeks to vindicate on the unidentified embryos'

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[2] That the present action involves embryos *ex utero*, whereas *Roe* involved a fetus *in utero* does not assist plaintiffs here. The Court's holding in *Roe* that the unborn are not persons was independent of its consideration of the rights of the pregnant mother. 410 U.S. at 156-159; *see also Doe*, 862 F. Supp. at 1426 ("The Court sees no distinction between fetuses *in utero* or *ex utero*.").

behalf is their purported interest in life. Pl. Memo at 6. Under *Roe*, this interest is not cognizable in this Court. A federal court cannot permit an embryo to sue to prevent its own destruction without doing serious violence to established constitutional principles.

So strong are these considerations and so clear is the precedent that, as far as the Government is aware, every court to have considered the issue has determined that a guardian *ad litem* may not sue in federal court on behalf of the unborn to assert their purported interest in life. When faced with an issue quite similar to the present one – a class of unnamed embryos seeking to challenge the legality of HHS action because that action would allegedly result in their destruction – a district court in Maryland denied guardian *ad litem* representation.[3] *Doe*, 862 F. Supp. at 1426. There, the court easily concluded, on the basis of *Roe*, that "embryos are not persons with legally protectable interests within the meaning of Fed. R. Civ. P. 17(c) such that appointments of guardians *ad litem* are warranted or required." *Id.* Other courts have reached similar conclusions. *See, e.g.*, *Roe v. Casey*, 464 F. Supp. 483, 486-87 (E.D. Pa. 1978) ("[U]nborn children (fetuses, embryos) are not persons with a legally protectable interest within the meaning of Fed. R. Civ. P. 17(c) or 24(a)(2) and, thus, appointment of guardians Ad litem is neither warranted nor required."), *aff'd* 623 F.2d 829 (3d Cir. 1980); *McGarvey*, 340 F. Supp. at 752-54 (unborn could not sue to prevent abortions); *cf. Irvine*, 7 F. Supp. 2d at 742 (because embryos are not persons, donors could not bring tort claim on their behalf.)

Plaintiffs would have this Court overlook directly applicable authority in favor of a 1966 D.C. Circuit opinion that held that the "use of guardians ad litem to represent [the] interest of

[3] Although the district court's opinion was vacated when the lawsuit became moot on appeal, its underlying reasoning remains sound.

unborn and/or otherwise unascertainable beneficiaries of a trust seems to us wholly appropriate."[4] *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559, 566 (D.C. Cir. 1966). Nowhere do plaintiffs explain how a D.C. Circuit case decided seven years before *Roe* and addressing the property rights of unborn heirs has any force in the present case. The unborn heirs in *Hatch* had an undeniable legal interest in the trust that plaintiff in that case sought to modify, an interest that was contingent on their birth. *Id.* at 565. Plaintiffs' perfunctory invocation of *Hatch* ignores the predicate question of whether the embryos sought to be represented have a similar cognizable interest here. That property law has for centuries recognized contingent interests of unborn heirs says nothing about the right of embryos to assert life or liberty interests. Indeed, in rejecting the existence of a right to life for the unborn, the Court in *Roe* acknowledged that guardians *ad litem* have historically been appointed to represent property interests of the unborn that are "contingent upon live birth." 410 U.S. at 162. That is not the interest Nightlight seeks to represent here with respect to the unidentified embryos. Instead, Nightlight seeks to advance a purported interest that the law does not recognize.

In apparent acknowledgment that federal law does not recognize the unborn as persons with independent legal interests, plaintiffs alternatively urge the appointment of a guardian *ad litem* for the plaintiff embryos "in order to effectuate the concern that numerous States have expressed in protecting the viability and interests of human embryos." Pl. Memo at 4. This argument, no less than their others, runs afoul of Supreme Court precedent. Although the state

[4] Plaintiffs attempt to expand the narrow holding of *Hatch* to a much broader proposition that "[t]he use of guardians ad litem to represent interest[s] of unborn and/or otherwise unascertainable [persons is] wholly appropriate." Pl. Memo at 3 (brackets in Memo, indicating plaintiffs' replacement of the original words in *Hatch*). This gloss on *Hatch* proves too much. It cannot seriously be contended, for example, that the D.C. Circuit has approved the appointment of guardians *ad litem* to sue on behalf of any unascertainable persons.

may have legitimate interests in protecting the unborn, *see, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007), this is not an interest that may be vindicated by a private party, including one seeking to act on behalf of the unborn. *See Diamond v. Charles*, 476 U.S. 54, 67 (1986) (private individual may not assert interests of the unborn); *see also Keith v. Daley*, 764 F.2d 1265, 1271 (7th Cir. 1985) ("[I]t is the state alone who can assert an interest in the unborn"); *cf. Gonzales v. Carhart*, 548 U.S. 938 (2006) (summarily denying motion to serve as guardian *ad litem* for fetuses).

II. Even If Representation for an Embryo Were Hypothetically Permissible, It Is Not Appropriate Here

Even if federal law did not clearly foreclose embryos from suing to prevent their own destruction, appointment of a guardian *ad litem* to represent the claims of thousands of unidentified embryos would still not be appropriate. Without moving as such, plaintiffs seek to bring a de facto class action on behalf of thousands of unidentified embryos. Such a tactic is inappropriate, because it seeks to circumvent Article III standing requirements, would create a class that is unmanageable by the Court, and would entangle the Court in state law disputes over who may properly make decisions about the disposition of embryos.

By attempting to join such a vague class of embryos, defined only as those "created using in vitro fertilization (IVF) for reproductive purposes and . . . no longer needed for these purposes," Compl. ¶ 9, plaintiffs apparently attempt to skirt the requirement that they establish a concrete injury-in-fact upon which to base the embryos' ostensible claims. Without any identifiable embryos in this lawsuit, there is no way of determining several essential elements of the jurisdictional inquiry, including whether plaintiff embryos are actually subject to a threat of destruction; if so, whether that threat is the result of actions of defendants, rather than those of

third parties (*e.g.*, the embryo's donors, or a scientist or laboratory supported by non-federal funds); and whether, but for the defendants' actions, these embryos would be "adopted" or otherwise implanted and thereafter born. *See Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1262 (Ariz. Ct. App. 2005) ("Unlike a viable fetus, many variables affect whether a fertilized egg outside the womb will eventually result in the birth of a child. This makes it speculative at best to conclude that 'but for the injury' to the fertilized egg a child would have been born and therefore entitled to bring suit for the injury.") (internal citation omitted). Even if the Guidelines were set aside, there is no reason to believe that plaintiffs or their lawyers would be able to cause an embryo to be "adopted" over the objections of the donors, especially in the numerous states that have recognized donors' control over the disposition of their embryos.[5]

In their motion, plaintiffs suggest that they seek representation only for those embryos "across the country who could be affected by the Guidelines." Pl. Memo at 1. That does nothing to identify class members or narrow the purported class. The standing requirement cannot be satisfied by resort to tautology. Nor can the Court simply assume that, among the thousands of embryos sought to be joined, there must be one that has standing. Injury in fact must be established rather than presumed. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998). The standing requirement would be but a hollow exercise if plaintiffs could manufacture

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[5] *See, e.g.*, Cal. Health & Safety Code § 125315(b); Conn. Gen. Stat. § 19a-32d(c); Fla. Stat. Ann. § 742.17; 410 ILCS 110/5; Kans. Stat. Ann. § 65-6702; Md. Code Economic Development § 10-438(c); Mass. Gen. Laws Ann. ch. 111L, § 4 (West Supp. 2008); Mich. Const. art. 1, § 27(2)(b); Mo. Const. art. 3, § 38(d); N.J. Stat. Ann. § 26:2Z-2; *see also, e.g., Cahill v. Cahill,* 757 So.2d 465, 468 (Ala. Civ. App. 2000); *In re Marriage of Witten*, 672 N.W.2d 768, 783 (Iowa 2003); *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998); *In re Marriage of Dahl*, 194 P.3d 834, 839 (Or. App. 2008), *review denied*, 204 P.3d 95 (Or. 2009); *Davis v. Davis*, 842 S.W.2d 588, 602-03 (Tenn. 1992); *Roman v. Roman*, 193 S.W.3d 40, 50 (Tex. App; 2006), *cert. denied*, 128 S. Ct. 1662 (2008); *Litowitz v. Litowitz*, 48 P.3d 261, 271 (Wash. 2002).

standing by seeking Rule 17(c) representation for a group that is defined in such a manner that it would presuppose injury. Plaintiffs cannot use Rule 17(c) to "extend . . . the jurisdiction of the district courts" in this manner. Fed. R. Civ. P. 82. Granting plaintiffs' motion would permit precisely what Article III standing requirements were designed to prevent – litigation of policy disputes not by specific individuals suffering concrete harm but by those with "merely an ideological interest – passionate and motivating as such interests can be – in the litigation." *Enk*, 124 F.3d at 897 (child advocate with only an "ideological stake" in lawsuit found ineligible to sue as child's next friend). Because plaintiffs have failed to put forward allegations that would permit a finding of an injury-in-fact to any given embryo traceable to the challenged Guidelines, their Rule 17(c) motion must be denied.

Moreover, appointment of a guardian *ad litem* to represent this group of embryos would not be appropriate, even were the requirements of Article III satisfied. As the district court recognized in *Doe*, appointment of a guardian *ad litem* "for an unspecified embryo, much less for a class of some 20,000, would present the Court with an impossible task." 862 F. Supp. at 1426. Plaintiffs cannot show that they "can fairly represent" the interests of potentially thousands of unidentified, and even unknown, embryos. *Id.* Another court of this district has noted the absence of "any case in any context in which counsel has been allowed to pursue habeas *(or other)* relief on behalf of a non-class of unidentified plaintiffs or petitioners where plaintiffs' actual identity is unknown by counsel representing such plaintiffs at the time of filing." *Does 1-570 v. Bush*, 2006 U.S. Dist. LEXIS 79175, at *24 (D.D.C. Oct. 31, 2006) (CKK) (emphasis added) (party could not proceed as next friend to 570 unidentified Guantanamo detainees).

Special considerations counsel against appointment of a guardian *ad litem* for the unidentified plaintiff-embryos here. As mentioned previously, many states accord donors a right to control over their own genetic material, whether that right is characterized as a property interest, *see, e.g.*, *York v. Jones*, 717 F. Supp. 421, 425 (E.D. Va. 1989), or a liberty interest,[6] *see, e.g.*, *Davis v. Davis*, 842 S.W.2d 588, 602 (Tenn. 1992) (recognizing liberty interest under state constitution to prevent implantation of embryo containing one's genetic material). *See supra*, note 5. Insofar as the only embryos subject to research under the Guidelines are those made available by the consent of the donor, *see* 74 Fed. Reg. at 32,174, and insofar as Nightlight seeks to prevent such research, Nightlight's representation of the embryos would necessarily be antagonistic to the interests of donors. Granting plaintiffs' motion would therefore directly conflict with the property and liberty rights granted to donors by many states' laws, thus making it questionable whether an appointment could even be effective. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17 (2004) (father did not have right to proceed as next friend in federal court where state law deprived him of next friend status).

The appointment of a guardian *ad litem* is a more complicated proposition than plaintiffs' motion suggests. "After appointing a guardian ad litem, a court maintains a continuing obligation to supervise the guardian ad litem's work." *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 652 (2d Cir. 1999). This Court should decline to take on such continuing oversight, which would inevitably enmesh this Court in an area committed to state law, and would require resolution of competing claims on embryos that have nothing to do with the substance of this

[6] The fact that each state regards the relationship between embryos and donors in a slightly different – and sometimes changing – manner is alone sufficient reason to deny plaintiffs' motion to represent embryos across the country: it is not possible for the Court to determine the propriety of guardian *ad litem* representation under such circumstances.

lawsuit. *Cf. Newdow*, 542 U.S. at 12 (declining to "intervene [in] the realm of domestic relations"); *Enk*, 124 F.3d at 897 (denying next friend status to avoid situation where child was represented by two antagonistic guardians – one in state court and one in federal court).

Finally, plaintiff Nightlight would not qualify as a guardian *ad litem* in this case even if one could properly be appointed. Nightlight is hardly a neutral observer that could be called upon to objectively evaluate the interests of those it seeks to represent. Nightlight obviously has its own agenda and interests, as demonstrated by its status as a plaintiff in this case.

CONCLUSION

The practical and legal impediments to the relief requested by the plaintiffs cannot be overcome by their assertion of the "personhood" of an embryo – a position that has been repeatedly and expressly rejected by the federal courts. Accordingly, plaintiff's Motion for Appointment as Guardian Ad Litem should be denied.

Dated: September 14, 2009

Respectfully submitted,

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