IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR APPOINTMENT OF A GUARDIAN AD LITEM

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The law in the D.C. Circuit is clear that "[t]he use of guardians ad litem to represent interest[s] of unborn and/or otherwise unascertainable [persons is] wholly appropriate," *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559, 566 (D.C. Cir. 1966), and this unmistakably applies to the Plaintiff Embryos in this case. Defendants do not cite a single relevant D.C. Circuit case in their opposition brief; they instead rely on various inapposite out-of-circuit authority, and their principal response to *Hatch* is that it was somehow overruled by the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). But Defendants cite no authority for this proposition, and it is incorrect. *Hatch* plainly authorizes this Court to appoint a guardian to represent the Embryo Plaintiffs.

Defendants' objections to Nightlight as a guardian are even more baseless. They argue that Nightlight's interests are somehow adverse to or in conflict with the interests of the Embryo Plaintiffs. But Defendants are mistaken, because Nightlight's strong interest in the protection of the Embryo Plaintiffs and facilitation of their adoption is perfectly aligned with the interests of the Embryos themselves.[1]

ARGUMENT

I. The Embryo Plaintiffs Qualify For A Guardian Ad Litem

Appointment of a guardian ad litem to represent the interests of the unborn is not a novel proposition. In addition to the D.C. Circuit's controlling holding in *Hatch*, numerous other courts and commentators have noted that "Rule 17(c) has been broadly interpreted and has not been limited by a narrow construction of the words 'infant' or 'incompetent person,'" and "the

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[1] Plaintiffs do not dispute that an embryo must have standing in order for the Court to appoint a guardian ad litem, but as discussed in Plaintiffs' Combined Reply Brief, Section II.C, the Embryo Plaintiffs have satisfied the requirements for standing.

scope of the rule has been extended to permit a court to appoint a guardian ad litem to represent the interests of unborn children." 6A CHARLES A. WRIGHT, ET. AL, FED. PRACTICE & PROCEDURE § 1570 (2009). *See also Hatch v. Riggs Nat'l Bank*, 284 F. Supp. 396, 399 (D.D.C. 1968) ("[N]ot only does [the court] have authority to appoint a guardian *ad litem* without statutory authority but . . . *the majority of jurisdictions and commentators agree and approve of such action*." (second emphasis added)). Indeed, several States expressly allow for guardians ad litem to represent embryos. *See, e.g.*, Utah Code Ann. § 75-7-305 (allowing guardians for "a minor, incapacitated or protected person, or *unborn individual*" (emphasis added)); Conn. Gen. Stat. § 45a-132 ("the judge or magistrate may appoint a guardian ad litem for any minor or incompetent, undetermined or *unborn person*, or may appoint one guardian ad litem *for two or more of such . . . unborn persons*" (emphasis added)); Ala. Code § 19-3B-305; Colo. Rev. Stat. § 15-10-403 ("a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, protected, *unborn*, or unascertained person . . . . [A] guardian ad litem may be appointed to represent *several persons or interests*." (emphasis added)); Del. Code. Ann. tit. 12 § 2905; Mich. Comp. Laws. § 600.2045; *Swadner v. Swadner*, 897 N.E. 2d 966, 972–73 (Ind. Ct. App. 2008); Miss. R. Civ. P. 17.

Defendants single out *Hatch*, and argue it is somehow no longer valid authority because it pre-dated *Roe v. Wade*. *Roe*, of course, imposed certain restrictions on a State's ability to limit a woman's right to abort a fetus. And in so holding, the Court noted that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158; *see also id.* at 162 ("In short, the unborn have never been recognized in the law as persons *in the whole sense*." (emphasis added)). In the very next paragraph, however, the Supreme Court explained:

> In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however,

> that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a non resident who seeks medical consultation and treatment there, *and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct*.

Id. at 162–63 (emphasis added). *See also Webster v. Reprod. Health Servs.*, 492 U.S. 490, 516 (1989) ("In *Roe v. Wade*, the Court recognized that the State has 'important and legitimate' interests in protecting maternal health and in the potentiality of human life."). In other words, the Court stressed that there *is* an "important and legitimate interest in protecting the potentiality of human life," but in the abortion context this interest must be balanced against the rights and interests of the pregnant mother. The rights of pregnant mothers are obviously not at issue here, however, because this case involves pre-implantation embryos. *Roe* itself thus directly contradicts Defendants' baseless statements, made throughout their brief, that "[u]nder *Roe*," the embryos' "purported interest in life . . . is not cognizable in this Court." GAL Opp. at 4.

More importantly, *Roe* has no bearing on this Court's interpretation of Federal Rule of Civil Procedure 17(c). *Roe* did not purport to interpret the term "person" to forever exclude the unborn from coverage under every statute or rule using that term; it specifically focused on the definition of that term at the time the Fourteenth Amendment was passed. 410 U.S. at 158. It did not overrule *Hatch* or otherwise bar the application of Rule 17(c) to embryos, and Defendants cite no authority for this claim. That *Roe* did not affect *Hatch* is evidenced by the post-*Roe* cases in which courts have appointed guardians ad litem to represent the unborn (oftentimes relying on *Hatch*). *See, e.g.*, *In re Marriage of Litowitz*, 10 P.3d 1086, 1089 (Wash. Ct. App. 2000) ("The same GAL was appointed for Micah and subsequently for the frozen preembryos."), *rev'd on other grounds*, 48 P.3d 261, 265 (Wash. 2002); *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 772–73 (E.D.N.Y. 1991) ("When faced with a modification of a trust, courts have appointed legal representatives for unborn or unascertained trust beneficiaries."), *rev'd on other*

grounds, 982 F.2d 721 (2d Cir. 1992); *see generally* 6A CHARLES A. WRIGHT, ET. AL, FED. PRACTICE & PROCEDURE § 1570 (2009); III A. SCOTT & W. FLETCHER, THE LAW OF TRUSTS § 214, at 319 (4th ed. 1988) ("The interests of beneficiaries who are under a disability or unborn or unascertained may be protected by the appointment by the court of a guardian ad litem.").[2]

Defendants ignore these authorities, and argue that "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*." GAL Opp. at 4 (second emphasis added). Defendants thus attempt to distinguish *Hatch* on the ground that the interest of the unborn in that case was financial, regarding property rights, whereas the interest here is the preservation of the embryos. In other words, although guardians may be appropriate to protect the financial or other interests of the unborn, Defendants assert that the interest in avoiding *destruction* is not a permissible basis for appointing a guardian ad litem.

This proffered distinction borders on the absurd, and has no basis in the law. As noted above, the Supreme Court in *Roe* itself acknowledged the interest in the life of the unborn, and courts have repeatedly emphasized that even though the interests of the unborn must at times be subordinated to the rights of the pregnant mother, the interest "in protecting the potentiality of human life" is "important and legitimate." *Roe*, 410 U.S. at 162. *See also Webster*, 492 U.S. at

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[2] To be sure, there are a few out-of-circuit district courts that have held otherwise, as Plaintiffs acknowledged. GAL Mot. at 4 n.1. But these cases do not alter the fact that this Court must follow *Hatch*. *See, e.g.*, *Northwest Forest Resource Council v. Dombeck*, 107 F.3d 897, 900 (D.C. Cir. 1997) ("Simply stated, there was absolutely no basis for the trial court to conclude that it was bound by the decision of the Western District of Washington on stare decisis grounds.").

516.[3] If the potential *financial* interests of the unborn are worthy of protection through appointment of a guardian ad litem, the embryos' very *existence* warrants such protection *a fortiori*. The existence and validity of the latter interest is clear not only from the Supreme Court's statements in *Roe* and elsewhere, but also from the concern expressed by numerous States that the unborn have inherent rights that are entitled to protection. *See, e.g.*, Ark. Const. amend 68, § 2 ("The policy of Arkansas is to protect the life of every unborn child from conception until birth . . . ."); La. Rev. Stat. Ann. § 40:1299.35.0 ("The Legislature does solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life . . . .").[4]

Recognizing that the law plainly acknowledges an interest in protecting the life of the unborn, Defendants argue that although "the state may have legitimate interests in protecting the unborn," these interests may not be "vindicated by a private party." *Hatch*, by appointing a private guardian to represent the interests of the unborn, rejected this proposition, and none of the cases cited by Defendants supports their argument. For example, Defendants cite *Diamond v. Charles*, 476 U.S. 54, 67 (1986), but in that case the plaintiff attempted to use the interests of the unborn to support standing *for himself*, which the court rejected on the grounds that injury to a

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[3] Defendants acknowledge this elsewhere in their brief. GAL Opp. at 5-6 ("[T]he state may have legitimate interests in protecting the unborn . . . .").

[4] *See also* La. Rev. Stat. Ann. § 9:123 ("An in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with law."); Mo. Ann. Stat. § 1.205.1(1) ("The life of each human being begins at conception"); Utah Code Ann. § 76-7-301.1 ("[U]nborn children have inherent and inalienable rights that are entitled to protection by the state of Utah pursuant to the provisions of the Utah Constitution."); 720 Ill. Comp. Stat. Ann. § 510/1; Ky. Rev. Stat. Ann. § 311.710(5).

third party cannot support standing. In *Keith v. Daley*, 764 F.2d 1265, 1271 (7th Cir. 1985), the court rejected a party's attempt to *intervene*, because the interest it wanted to represent related to pre-viability fetuses in an abortion challenge, which the court held was barred by the Supreme Court's abortion precedents. Defendants' citation of *Gonzales v. Carhart*, 548 U.S. 938 (2006), is particularly egregious; there, the Supreme Court denied a motion to appoint a guardian ad litem "to represent children unborn *and born alive* . . . ." *Id.* (emphasis added). Whatever the Supreme Court's reason was for denying the motion, it obviously did not hold that guardians are *per se* inappropriate for both unborn and born children, and *Gonzales v. Carhart* therefore provides no support for Defendants' argument.

Defendants further argue that appointment of a guardian "on behalf of thousands of unidentified embryos" is inappropriate because it "would create a class that is unmanageable by the Court." GAL Opp. at 6. Here again, Defendants ignore controlling precedent that Plaintiffs discussed at length in their motion. The D.C. Circuit in *Hatch* rejected this very argument in the context of unborn potential future beneficiaries of a trust because, although "the [unborn] persons whose interests the guardian ad litem represents would be unascertainable as individuals, they are identifiable as a class and their interest, as such, [is] recognizable." 361 F.2d at 566. There, as here, the precise identities of the unborn plaintiffs were irrelevant, because the *interest* of the unborn beneficiaries was uniform. *See also, e.g.*, *In re Asbestos Litig.*, 90 F.3d 963, 972 (5th Cir. 1996), *rev'd on other grounds sub nom Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Matter of Chicago, Rock Island & Pac. R. Co.*, 788 F.2d 1280, 1282 (7th Cir. 1986); *In re Amatex Corp.*, 755 F.2d 1034, 1043 (3d Cir. 1985); *Moore v. Halliburton Co.*, 2004 WL 2092019, at *9 (N.D. Tex. Sept. 9, 2004); *Meyer v. Citizens & S. Nat'l Bank*, 677 F. Supp. 1196, 1200 (M.D. Ga. 1988); *In re Air Crash Disaster*, 476 F. Supp. 521, 525 (D.D.C. 1979); Conn.

Gen. Stat. § 45a-132 (appointment of guardian appropriate "*for two or more . . . unborn persons*" (emphasis added)); Colo. Rev. Stat. § 15-10-403 ("[A] guardian ad litem may be appointed to represent *several persons or interests*." (emphasis added)).

It is unassailable that, as between destruction for research and preservation or potential adoption, the Embryos in this case have an unqualified interest in preservation of their lives. Nightlight's role as a guardian in this case is therefore quite straightforward, and it would not be "unmanageable" for the Court to supervise Nightlight.

Finally, Defendants' claim that appointing a guardian would embroil the Court in disputes over state law is baseless. Defendants' discussion about state property rights that donors may have in their embryos is totally irrelevant to this case, because the Plaintiffs do not seek any relief as to the *donors'* rights or conduct. There is therefore no conceivable way that the state property law to which Defendants point could be implicated by this case. Plaintiffs seek an injunction barring the *Government* (not the donors) from funding embryonic stem cell research, which is solely a question of federal law.

II. Nightlight Would Be An Excellent Guardian For The Embryo Plaintiffs

Defendants claim, without citation of any authority, that Nightlight "would not qualify as a guardian *ad litem* in this case," because Nightlight is supposedly not "a neutral observer" and "has its own agenda and interests, as demonstrated by its status as a plaintiff in this case." GAL Opp. at 10. But Nightlight's so-called "agenda" is the preservation of the lives of the embryos, which in this case is the precise interest the Embryos have in the outcome of the case. Defendants point to no possible scenario whereby Nightlight's interests would be adverse or in any way different from those of the Embryo Plaintiffs, and Nightlight therefore would be an excellent guardian for the Embryos.

CONCLUSION

For the foregoing reasons, the Court should appoint Nightlight Christian Adoptions as guardian ad litem representing the Embryo Plaintiffs.

Dated: September 28, 2009

Respectfully Submitted,

/s/ Thomas G. Hungar

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Certificate of Service

I hereby certify that on September 28, 2009, I caused a true and correct copy of the foregoing Reply Brief In Support Of Plaintiffs' Motion For Appointment Of A Guardian Ad Litem to be served on Defendants' counsel electronically by means of the Court's ECF system.

/s/ Bradley J. Lingo
Bradley J. Lingo