IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DR. JAMES L. SHERLEY; DR. THERESA DEISHER; NIGHTLIGHT CHRISTIAN ADOPTIONS, individually and as next friend for PLAINTIFF EMBRYOS; SHAYNE AND TINA NELSON; WILLIAM AND PATRICIA FLYNN; CHRISTIAN MEDICAL ASSOCIATION, Plaintiffs, v. KATHLEEN SEBELIUS, in her official capacity as Secretary of the Department of Health and Human Services; DEPARTMENT OF HEALTH AND HUMAN SERVICES; DR. FRANCIS S. COLLINS, in his official capacity as Director of the National Institutes of Health; NATIONAL INSTITUTES OF HEALTH, Defendants.	Civil Action No. ____

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR APPOINTMENT AS GUARDIAN AD LITEM

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Under the Guidelines for Human Stem Cell Research ("Guidelines") promulgated by the National Institutes of Health ("NIH"), human embryos across the country are at risk of destruction by researchers who may now use government funds to conduct research utilizing human embryonic stem cells. Plaintiffs have filed an action against the Department of Health and Human Services ("HHS") Secretary Kathleen Sebelius, HHS, NIH Director Francis Collins, and NIH, asking the Court to enjoin the Guidelines, and seek in this motion to represent as guardians ad litem the embryos across the country who could be affected by the Guidelines. Federal Rule of Civil Procedure 17(c) authorizes this Court to appoint a guardian ad litem to protect the interests of minors and incompetents, and the embryos unquestionably qualify for, and indeed require, a guardian for their interests to be protected adequately in this lawsuit. Nightlight Christian Adoptions ("Nightlight") would be an ideal guardian, because its dedication to preserving human embryos ensures that its interests are exactly aligned with the Embryo Plaintiffs.

FACTUAL BACKGROUND

I. Plaintiffs' Lawsuit

For more than a decade, Congress has forbidden the use of federal funds to support research in which embryos are destroyed or knowingly subject to harm. *See* Balanced Budget Downpayment Act, Pub. L. No. 104-99, § 128, 110 Stat. 26, 34 (1996); Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 509, 123 Stat. 524, 803 (2009) (the "Federal Funding Ban"). Nevertheless, NIH has now implemented Guidelines authorizing funding for embryonic stem cell research. Because funding and conducting embryonic stem cell research will inevitably create a substantial risk—indeed, a certainty—that more human embryos will be destroyed in order to derive embryonic stem cells for research purposes, the Guidelines pose a clear threat to the embryos for whom Plaintiffs seek a guardian.

In order to prevent the destruction of more embryos, Plaintiffs, including the Embryo Plaintiffs, have filed a Complaint and Motion for Preliminary Injunction. Plaintiffs' Complaint alleges that: (1) Defendants' promulgation and implementation of the Guidelines are contrary to law because the Guidelines violate the Federal Funding Ban; (2) the Guidelines were not promulgated in observance of the procedures required by law because Defendants did not permit sufficient time for the public to comment on the Guidelines, did not sufficiently consider or respond to the comments that were provided, and had impermissibly closed minds on the crucial question; and (3) the Guidelines are arbitrary and capricious because they lack necessary and sufficient informed-consent safeguards, do not adequately prohibit conflicts of interest, and ignore, contradict, or are otherwise inconsistent with numerous state laws and with scientific knowledge regarding the relative research and therapeutic potential of embryonic, adult, and induced pluripotent stem cells. As a result, Plaintiffs seek an order declaring that the NIH Guidelines authorizing the funding of research involving human embryonic stem cells are contrary to law and arbitrary and capricious, and enjoining Defendants from implementing the Guidelines.

II. Nightlight Christian Adoptions

Nightlight Christian Adoptions is a non-profit licensed adoption agency located in Fullerton, California, dedicated to protecting human embryos conceived through *in vitro* fertilization. Decl. of Ronald L. Stoddart in Support of Pls.' Mot. for Appointment as Guardian ad Litem ("Stoddart GAL Decl.") ¶ 2. Through its "Snowflakes" Program, Nightlight enables adoptive parents to adopt human embryos that are being stored in fertilization clinics. *Id*. at ¶ 5. Nightlight has assisted many adoptive parents in successfully adopting and implanting these embryos, resulting in numerous births. *Id*.; *see also* Natalie Lester, *Embryo Adoption Becoming the Rage*,

Wash. Times, Apr. 19, 2009, *available at* http://washingtontimes.com/news/2009/apr/19/embryo-adoption-becoming-rage.

ARGUMENT

I. The Embryo Plaintiffs Are Entitled To A Guardian Ad Litem To Protect Their Interests

Federal Rule of Civil Procedure 17(c) provides that a "guardian" "may sue or defend on behalf of a minor or an incompetent person." Courts regularly appoint guardians ad litem to protect the interests of minors and incompetents who are unable for obvious reasons to sue on their own behalf. *Donnelly v. Parker*, 486 F.2d 402, 406–07 (D.C. Cir. 1973); *Sturdza v. United Arab Emirates*, 2009 U.S. Dist. LEXIS 63497, at *3 (D.D.C. July 23, 2009); *Foretich v. Lifetime Cable*, 777 F. Supp. 47, 48 (D.D.C. 1991). As this Court has noted, "[t]he purpose [of Rule 17(c)] is, of course, to protect the interest of the infant or incompetent." *Hatch v. Riggs Nat'l Bank*, 284 F. Supp. 396, 399 (D.D.C. 1968).

Although Rule 17(c) does not specify that it allows appointment of guardians for embryos, 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). Indeed, "[t]he district court's power to appoint a guardian ad litem under 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 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, *Federal Practice & Procedure* § 1570

(2009).[1] Here, as in *Hatch*, a group of unborn individuals has a common interest in the litigation that warrants protection, and which can only be protected by a representative. Appointment of a guardian ad litem to represent the Embryo Plaintiffs would thus be "wholly appropriate." *Hatch*, 361 F.2d at 566.

Moreover, the Court should appoint a guardian for the Embryo Plaintiffs in order to effectuate the concern that numerous States have expressed in protecting the viability and interests of human embryos. The Supreme Court has clearly held that States have a legitimate interest in preserving the lives of the unborn, *see, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 156–57 (2007), and numerous States have passed laws that protect the interest and viability of human embryos generally, *see, e.g.*, Utah Code Ann. § 76-7-301.1 ("unborn children have inherent and inalienable rights that are entitled to protection by the state of Utah"); 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

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[1] *See also Hatch*, 284 F. Supp. at 399 ("[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."); *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 772–73 (E.D.N.Y. 1991), *rev'd on other grounds*, 982 F.2d 721 (2d Cir. 1992); *see generally* 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.").

To be sure, a few district courts in other circuits have disagreed with *Hatch*, *see Doe v. Shalala*, 862 F. Supp. 1421, 1426–27 (D. Md. 1994); *Roe v. Casey*, 464 F. Supp. 483, 486–87 (E.D. Pa. 1978), but these decisions have no bearing on the controlling law in this Circuit. Indeed, one court noted its express disagreement with D.C. Circuit law. *See Doe*, 862 F. Supp. at 1426 (citing *Hatch* for the proposition that it is "proper to appoint [a] guardian ad litem for unborn beneficiaries of [a] trust").

legal person for purposes of the unborn child's right to life . . . ."),[2] and even specifically 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*" (emphasis added)).[3] Thus, in addition to the *Hatch* court's mandate that guardians are "wholly appropriate" for embryos under federal law, the Court should help respect and effectuate the plainly expressed interest of numerous States in the protection of embryos, and appoint a guardian to represent the interests of the Embryo Plaintiffs in this case.

The number and location of the Embryo Plaintiffs does not make this case any different from the host of other cases in which courts have regularly appointed guardians to represent groups of plaintiffs from multiple jurisdictions, and should not preclude appointment of a guardian here. For example, in *Hatch*, the D.C. Circuit dismissed any objection based on the ascertainability of the group the guardian sought to represent 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.3d at 566. Guar-

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[2] *See also, e.g.*, 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."); Ark. Const. amend 68, § 2 ("The policy of Arkansas is to protect the life of every unborn child from conception until birth"); Mo. Ann. Stat. § 1.205.1(1) ("The life of each human being begins at conception"); 720 Ill. Comp. Stat. Ann. § 510/1; Ky. Rev. Stat. Ann. § 311.710(5).

[3] *See also, e.g.*, Ala. Code § 19-3B-305; Colo. Rev. Stat. § 15-10-403; 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.

dians and other representatives have, in several contexts, represented diffuse and broad classes of individuals. *See, 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). And the fact that the Embryo Plaintiffs come from both inside and outside the District of Columbia is irrelevant, because there is no bar to guardians representing minors or incompetents from multiple jurisdictions. *See, e.g., Hatch*, 361 F.2d at 566; *In re Air Crash Disaster*, 476 F. Supp. 521, 525 (D.D.C. 1979). The Embryo Plaintiffs share a common interest in protecting themselves from destruction by research pursuant to federal grants, and the number of embryos and their location has no bearing on that uniform interest, which can be protected only by the appointment of a guardian ad litem.

II. Nightlight Christian Adoptions Would Be An Excellent Guardian Ad Litem

In determining the suitability of a particular guardian, courts look primarily to the best interests of the minor(s) or incompetent(s) whom the guardian will represent. *Gibbs v. Carnival Cruise Lines*, 314 F.3d 125, 136 (3d Cir. 2002) (Rule 17(c)'s "polestar appears to be the protection of the infant's interests"); *Garrick v. Weaver*, 888 F.2d 687, 693 (10th Cir. 1989) ("Rule 17(c) flows from the general duty of the court to protect the interests of infants and incompetents in cases before the court.").

In this case, Nighlight Christian Adoptions would be the ideal guardian ad litem to represent the Embryo Plaintiffs because it shares their unqualified interest in preserving embryos from destruction. *See* Stoddart GAL Decl. ¶ 5. Indeed, the very purpose of the Nightlight organ-

tion is to place unwanted embryos with adoptive families—as noted above, Nightlight's "Snowflakes" program seeks to preserve embryos, to help genetic families who face a difficult choice about the future of their unwanted embryos, and to assist adoptive families who can provide a loving home for these children. *Id.* Nighlight's mission, experience, and dedication to the rights of the embryos thus unquestionably qualify it to be the best guardian ad litem for the Embryo Plaintiffs.

CONCLUSION

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

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Respectfully Submitted,

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