**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

Nos. 10-1104 and 10-1106

**MARY SCOTT DOE, a human embryo, et al.,**

**Plaintiffs-Appellants,**

**v.**

**BARACK HUSSEIN OBAMA, in his official capacity as President of the United States, et al.,**

**Defendants-Appellees.**

**MARY SCOTT DOE, a human embryo, et al.**

**Plaintiffs-Appellants**

**v.**

**KATHLEEN SEBELIUS, in her official capacity as Secretary of the DEPARTMENT OF HEALTH & HUMAN SERVICES, et al.**

**Defendants-Appellees.**
**On Appeal from the United States District Court for the District of Maryland**

# REPLY BRIEF OF APPELLANTS

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### I. Defendants Concede That The District Court Improperly Decided The Merits In Determining That The Embryos Lack Standing.

While it asserts that "the district court correctly concluded that frozen [human] embryos are not persons for purposes of the 13th[1] and 14th Amendments," the Government advises that the Court "need not address plaintiffs' challenge to that conclusion, which, they argue, constitutes a merits, rather than a standing, determination." (Appellees' Br., p. 14.) Because it nowhere argues or makes any assertion to the contrary, the Government thereby essentially concedes Appellants' argument the District Court improperly decided the merits of Appellants' Thirteenth and Fourteenth Amendment claims under the guise of ruling on the Appellants' standing. (*See* Appellants Br., pp. 37 - 42, 51.) The Government further implicitly concedes the Appellants' contentions that (1) the Thirteenth Amendment prohibits slavery of all human beings, including prenatal human beings such as human embryos, and not just slavery of natural "persons", and that (2) human embryos *in vitro* are "persons" protected by the Fourteenth Amendment,

[1] The Government thus continues to maintain on appeal its highly dubious contention that a personhood limitation exists on the scope of the Thirteenth Amendment's application, despite the lack of support for this proposition in either the Amendment's text, history, purpose, or the case law interpreting the Amendment. (*See* Appellants' Br., pp. 26 - 37.)

are not frivolous and must therefore be taken as correct for purposes of determining the embryos' standing to sue.[2] (*See* Appellees' Br., p. 23 (Government "assume[s] for purposes of standing analysis that embryos may have constitutionally recognized interests"); *see also* Appellants Br., pp. 38-39.)

In other words, the Government has conceded that, for purposes of standing, it must be assumed that the plaintiff embryos have legally protected interests in their freedom, physical integrity and continued life under the Thirteenth and Fourteenth Amendments and that the invasion or threatened invasion of these interests can give rise to Article III standing.

**II. Plaintiffs-Appellants Have Shown The Existence Of A Particularized Harm To The Embryos, Namely A Threat Or Increased Risk Of Enslavement And Death To Each Embryo.**

While conceding for purposes of standing that the embryos may have

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[2] The Government further notes that the Court also need not "address plaintiffs' attempt to raise claims on behalf of frozen embryos without requesting a guardian *ad litem* as would be required under Fed. R. Civ. P. 17(c)[.]" (Appellees' Br., p. 14 n. 3.) The Government, however, did not raise this point below in either of its motions to dismiss, and the Court therefore could not, in any case, affirm the dismissals on this basis. In addition, the Court has previously ruled that the appointment of a guardian ad litem under Rule 17(c) is not mandatory. *Westcott v. United States Fidelity & Guaranty Co.*, 158 F.2d 20, 22 (4th Cir. 1946). Nevertheless, if the Court deems it necessary in this case, the District Court can appoint, or consider the question of appointing, an appropriate guardian *ad litem* for the plaintiff embryos on remand.

constitutionally protected interests, the Government nevertheless attempts to have this Court affirm on a basis not addressed by the District Court. Specifically, it argues that Appellants' "generalized claims regarding frozen embryos fail to state the type of particularized harm required to establish standing." (Appellees' Br., pp. 14-15.)

Concededly, to confer standing, an injury must be "particularized," meaning that it "must affect the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n. 1 (1992). In other words, "a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III claim or controversy." *Id.* at 573-574.

"But the particularity requirement does not mean, contrary to [the Government's] interpretation, that a plaintiff lacks standing merely because it asserts an injury that is shared by many people," *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 496 (7th Cir. 2005), in this case by all human embryos created by in vitro fertilization and currently kept frozen in IVF clinics around the United States. (*See* Appellees' Br., p. 15

("[P]laintiffs purport to bring suit on behalf of all frozen embryos resulting from *in vitro* fertilization, and the appellation 'Mary Scott Doe' could refer equally to any of them"). "Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and *where a harm is concrete, though widely shared, the Supreme Court has found 'injury in fact*.'" *FEC v. Akins*, 524 U.S. 11, 24 (1998) (emphasis added). *See also Massachusetts v. EPA*, 549 U.S. 497, 522 (2007) (plaintiff's "interest in the outcome of the litigation" not "minimize[d]" by fact that "climate-change risks" are "widely shared"); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 687-688 (1973) ("[S]tanding is not to be denied simply because many people suffer the same injury. . . . To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."); *cf. Lujan v. Defenders of Wildlife*, 504 U.S. at 572 (finding no standing but distinguishing a hypothetical case "where concrete injury has been suffered by many persons").

Thus, the Government's argument that the particularized injury requirement has not been met because the suit claims injury to all frozen human embryos *in vitro* "is based on a flawed understanding of the particularity requirement" and

must be rejected. *See Lac du Flambeau Band v. Norton*, 422 F.3d at 496.

Furthermore, to the extent that the Government argues that the allegations of Plaintiffs-Appellants' two complaints regarding Mary Scott Doe "reduce to a generalized grievance regarding the treatment of *some* unspecified frozen embryos" (*see* Appellees' Br., p. 15 (emphasis added)), the Government misapprehends the nature of the concrete, particularized harm claimed by the Plaintiffs-Appellants. Plaintiffs are not claiming standing simply on the basis that "*some* unspecified" embryos "may be harmed" in the future (*see id.*, pp. 15, 16 (emphasis added)), but rather on the basis that *all* human embryos *in vitro* that are presently held in a frozen state at IVF clinics across the country are currently threatened with enslavement and deliberate destruction by Defendants' actions. More specifically, Plaintiffs claim standing on the basis that by virtue of Defendants' actions in permitting the use in federally funded human embryonic stem cell (hESC) research, not just of stem cell lines already existing as of a certain date (as did the Bush Administration), but also of stem cell lines derived from human embryos at any time, including at any time in the future, *all* frozen human embryos *in vitro* are now subject to an increased risk of slavery and death by deliberate destruction in scientific experimentation.

In other words, Plaintiffs do not claim standing on the basis of eventual

"harm to unspecified members of a group [of human embryos]" (*see* Appellees' Br., p. 16), but on the basis of *threatened* harm to *all* members of an identified or specified group of human embryos.

As this Court has recognized, "[c]ourts have left . . . no doubt that threatened injury to [the plaintiff] is injury in fact." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.* ["*Gaston Copper*"], 204 F.3d 149, 160 (4th Cir. 2000) (en banc). "The Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III requirements." *Id.* (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) and *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)); *see also Friends of the Earth, Inc. v. Laidlaw Envt'l Services*, 528 U.S. 167, 180-181, 185-186 (2000). "'One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.'" *Gaston Copper*, 204 F.3d at 160 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

"Threats or increased risk thus constitutes cognizable harm." *Gaston Copper*, 204 F.3d at 160. *Accord*, *Covington v. Jefferson County*, 358 F.3d 626, 638 (9th Cir. 2004) ("a concrete *risk* of harm to [the plaintiffs] . . . is sufficient for injury in fact") (emphasis added); *Central Delta Water Agency v. United States*,

306 F.3d 938, 950 (9th Cir. 2000) ("a credible *threat* of harm" constitutes "actual injury") (emphasis added); *Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001) ("evidence of a credible *threat* to the plaintiff's physical well being from airborne pollutants" sufficient to satisfy injury in fact requirement) (emphasis added); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234-1235 (D.C. Cir. 1996) (incremental increase in risk of forest fire is sufficient for standing purposes).

In *Gaston Copper*, the plaintiff property owner's lake was in the path of the defendant's toxic chemical discharge. This Court held that the plaintiff had standing to challenge the defendant's discharge violations because his fear that the water in which he swam and fished would become contaminated was reasonable, and because he filed suit to "vindicate his private interests in his and his family's well-being." 204 F.3d at 156-157. Similarly, in *Covington*, the plaintiffs lived across the street from a landfill. The risk of fires, explosions, and groundwater contamination (among other problems) was heightened because the landfill was improperly run. The Ninth Circuit held that the plaintiffs had standing to sue: because they lived close to and down gradient from the landfill, the increased risk of injury they faced was "in no way speculative." 358 F.3d at 638 & n. 14.

The concept of threats or increased risk of injury has been applied not just in

environmental cases. In *Harris v. Board of Supervisors of Los Angeles County* ["*Harris*"], 366 F.3d 754 (9th Cir. 2004), the Ninth Circuit held that a group of indigent and uninsured county residents with serious health problems had standing to sue to challenge the defendant county's decision to shut down a county hospital facility. The court reasoned that "[t]he threat of delayed treatment arising out of the County's decision to pare down its healthcare system threatens plaintiffs the same way that conditions at the improperly run landfill endangered the plaintiffs in *Covington* and toxic discharge's future impact on a nearby lake threatened the plaintiff in *Gaston Copper*—it presents the proverbial accident waiting to happen." 366 F.3d at 762. While acknowledging that it was "rely[ing] on environmental cases for the proposition that plaintiffs need only establish a *risk* or *threat* of injury to satisfy the actual injury requirement," the Ninth Circuit concluded that "[w]e see no principled distinction between those precedents and the instant case. . . . Indeed, the imminent threat here—delayed treatment, physical suffering, medical complications, and death—provides a compelling reason to permit these plaintiffs to pursue judicial resolution before suffering physical injury." *Id.* (emphasis in original). *See also Dimarzo v. Cahill*, 575 F.2d 15, 18 (1st Cir.) (holding inmates had standing to challenge government actions that created an enhanced risk of fire at the jail where they were being confined; "[o]ne need not wait for the

conflagration before concluding that a real and present threat exists"), *cert. denied sub nom. Hall v. Di Marzo*, 439 U.S. 927 (1978).

In this case, the actions of Defendants in authorizing greatly increased federal funding of human embryo stem cell research, in authorizing the use in such federally funded research of stem cells derived from "excess" human embryos created in IVF procedures that are no longer needed or desired for reproductive purposes regardless of when such derivations took place or will take place, and in permitting the donation of human embryos for such enslaving and destructive research while keeping donors in the dark about material information affecting their decisions to donate, have substantially increased the risk or threat that the plaintiff human embryos will be donated for research purposes and then enslaved and killed. These human embryos, like the property owners in *Gaston Copper* and *Covington*, and the indigent county residents with serious medical needs in *Harris*, are "in the path of likely danger." *Harris*, 366 F.3d at 762.

The risk of injury in this case is further enhanced by the fact that it arises from an established government policy. *See Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003) (a "critical factor" weighing in favor of concluding that standing existed was "that Baur's alleged risk of harm arises from an established government policy"); *cf. 31 Foster Children v. Bush*, 329 F.3d 1255, 1266 (11th

Cir.) (recognizing that "when the threatened acts that will cause injury are authorized or part of an [established government] policy, it is significantly more likely that the injury will occur"), *cert. denied sub nom. Reggie B. v. Bush*, 540 U.S. 984 (2003); *DeShawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 344-345 (2d Cir. 1998) (concluding there was an increased likelihood of injury where the challenged interrogation methods were authorized by "officially endorsed policies").

Finally, as the D.C. Circuit has recognized, "[t]he more drastic the injury that governmental action makes more likely, the lesser the increment in probability necessary to establish standing." *Mountain States Legal Found. v. Glickman*, 92 F.3d at 1234-1235 (concluding that "the potential destruction of fire is so severe that even a modest increase in risk should qualify for standing"); *accord*, *Baur v. Veneman*, 352 F.3d at 637 (recognizing that "even a moderate increase in the risk of disease may be sufficient to confer standing"). As it is difficult to imagine a more drastic injury to a human being than slavery and death by deliberate destruction in scientific experimentation, even a modest increase in the risk of this injury being inflicted on the human embryos represented by Mary Scott Doe caused by Defendants' actions should satisfy the injury-in-fact requirement for standing.

Certainly, this imminent threat or increased risk of slavery and death to each of the plaintiff embryos adequately shows a concrete and particularized injury and provides a compelling reason to permit these plaintiffs to pursue judicial resolution before they suffer enslavement and deliberate destruction.

### III. The Injury Is Fairly Traceable To The Executive Order And NIH Guidelines.

The Government argues that the alleged injury-in-fact is not fairly traceable to the Executive Order and NIH Guidelines, asserting that "[t]hey do not provide funding for research that itself will involve the destruction of embryos." (Appellees' Br., p. 17.) In other words, the Government argues that, under the Executive Order and NIH Guidelines, federal funds can only be used for research that involves the *use* or manipulation of human embryonic stem cells, while "NIH funding of the *derivation* of stem cells from human embryos is prohibited" by the Dickey-Wicker Amendment. *See, e.g.,* NIH Guidelines, 74 Fed. Reg. 32,170, 32,175 (July 7, 2009) (emphasis added).

This use-derivation distinction goes back to the Clinton Administration. In 1999, the General Counsel for HHS, Harriet Rabb, rendered a legal opinion to the then director of NIH, Harold Varmus, stating that "the [Dickey-Wicker] statutory prohibition on the use of funds appropriated to NIH for human embryo research

would not apply to research utilizing human pluripotent stem cells because such cells are not a human embryo within the statutory definition." Letter from HHS Gen. Counsel Harriet S. Rabb to Harold Varmus, Director of NIH on "Federal Funding for Research Involving Human Pluripotent Stem Cells" (Jan. 15, 1999), as quoted in K. Devolder and J. Harris, "Compromise and Moral Complicity in the Embryonic Stem Cell Debate," in *Philosophical Reflections on Medical Ethics* 93-94 (N. Athanassoulis ed. 2005). Rabb concluded that, as a consequence, federal funding could be given to research that uses stem cells that were derived from human embryos, where the derivation process involving the killing of the embryos was funded from private sources. *Id.*

There is fundamental problem with the Rabb "use-derivation distinction," however. No true separation exists between the use of stem cells and their derivation: "[t]hose who use the ES cells lend support and encourage those who derive the cells *because they pay for those cells*," using federal funds. *See* Devolder & Harris, at p. 98 (emphasis added). Thus, Alex Capron, a former member of the Clinton Administration's National Bioethics Advisory Commission, after noting that "NIH, relying on the opinion of the General Counsel of DHHS, has concluded that the present [Dickey-Wicker] rider to the Department's appropriation allows the funding of research using but not deriving ES cells from

embryos," made the following candid observations regarding "the theoretical line between derivation and use research that underlies the NIH policy":

> Such a line is difficult to defend in practical terms when the question is not whether an activity is inherently licit or illicit but whether it ought to be paid for with federal research dollars. *Any such line is merely theoretical because the funding provided for research using ES cells would of course flow directly to researchers deriving those cells, perhaps even in an adjacent laboratory. The only difference would be that the federal funds would not go directly as salary and laboratory expenses for the derivation process but indirectly in the form of funds to purchase the ES cells (which funds would then pay salaries, laboratory expenses, and so forth).*

Observations of Commissioner Alexander M. Capron in *Ethical Issues in Human Stem Cell Research: Report and Recommendations of the National Bioethics Advisory Commission* ["*NBAC Report*"], Vol. I at p. 59 n.* (Sept. 1999) (emphasis added). As Mr. Capron later stated on at least two occasions, the distinction between paying for the *use* of stem cells and paying for their *derivation* "is merely a bookkeeping fiction." *See* Devolder & Harris, at 98, 107 & n. 50 (quoting A. M. Capron (2002) "Human Embryonic Stem Cell Research: Ethics and Politics in Science Policy", in Shui Chen Lee (ed.) *Proceedings of the Third International Conference of Bioethics* (University of Chungli, R.O.C. Taiwan, June), p. V–12); A. M. Capron, "Stem Cells, Ethics, Law and Politics," 20 *Biotechnology Law Rep.* 678, 693 (2001). Commentators Devolder and Harris likewise ultimately concluded that there is "no real separation between the use of ES cells and their

derivation." Devolder & Harris, at 99.

In other words, the "use-derivation distinction" created by the Clinton Administration and now adopted by the Obama Administration is merely a subterfuge for getting around the statutory prohibition of the Dickey-Wicker Amendment. "It is an old maxim of the law that a person will not be permitted to do indirectly what he cannot do directly." *Stadia Oil & Uranium Co. v. Wheelis*, 251 F.2d 269, 275 (10th Cir. 1957). This old maxim applies to federal agents, *Stonehill v. United States*, 405 F.2d 738, 746 (9th Cir. 1968) ("[A] federal agent must not be permitted to do indirectly that which he cannot do directly[.]"), *cert. denied*, 395 U.S. 960 (1969), citing *Sloane v. United States*, 47 F.2d 889, 890 (10th Cir. 1931), and to the federal government as well. *United States v. Smith*, 47 F.3d 681, 684 (4th Cir. 1995) ("The government should not be allowed to do indirectly what it cannot do directly[.]"); *see also United States v. Oliveras*, 905 F.2d 623, 627 n. 7 (2d Cir. 1990) ("The key proposition of the unconstitutional condition doctrine is that the government may not do indirectly what it cannot do directly."). The Government's position likewise ignores the ancient but equally salutary maxim, *Qui facit per allium facit per se. See* Black's Law Dictionary 1413 (4th ed. 1968) (defining this Latin phrase as meaning "[h]e who acts through another acts himself"). As Mr. Capron puts it, "[i]n effect, NIH would be supporting ES cell

derivation through an intermediary." A.M. Capron, 20 *Biotechnology Law Rep.* at 693.

In sum, the Executive Order and NIH Guidelines *do* provide for federal funding of research that will involve the destruction of embryos, through payments for the use of stem cells using federal NIH grant funds, and, thus, the threat that the plaintiff embryos will be enslaved and deliberately destroyed in scientific experimentation is fairly traceable to the E.O. and the Guidelines.

The Government further argues that federal funding will not be provided for stem cell research unless the stem cells were derived from embryos whose creator or creators have made "the *independent* decision to donate it for research," and that "[d]onors were free to provide embryos for stem cell research prior to issuance of the Guidelines, and they continue to have that choice." (Appellees' Br., pp. 17, 18 (emphasis added).) First, the Executive Order and the NIH Guidelines certainly create an increased risk that the embryos so donated, now or in the future, will be enslaved and destroyed in federally funded human stem cell research. Secondly, the decision to provide an embryo for research purposes is not at all as "independent" as the Government claims. While (as the Government points out) no payments, in cash or kind, can be offered for donated embryos, and although refusing to consent to a donation must not affect the quality of care provided to

potential donors, i.e., donors cannot be pressured into donating by threats of substandard care, nothing in the Guidelines prohibits potential donors from being informed of the putative benefits of federally funded hESC research and from being solicited to donate their "excess" embryos for use in that research. Such information and solicitations, and any resulting donations, are fairly traceable to the actions of Defendants in opening the door wide to, and providing greatly increased federal funding for, hESC research.

Finally, "while [the President, the Secretary of HHS, and the Director of NIH] may not be the only part[ies] responsible for the injury [, or, more accurately, the threatened or increased risk of injury,] alleged here, a plaintiff does not lack standing merely because the defendant is one of several persons who caused the harm." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d at 500 (citations omitted). *See also Natural Resources Defense Council, Inc. v. Watkins* ["*Watkins*"], 954 F.2d 974, 980 n. 7 (4th Cir. 1992), wherein this Court agreed with the Third Circuit that "in the context of standing . . . '[t]he requirement that plaintiff's injuries be 'fairly traceable' to the defendant's conduct does not mean that plaintiffs must show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs.'" *Id.* (quoting *Public Interest Research Group, Inc. v. Powell Duffryn*

*Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991)). In other words, to meet the fairly traceable requirement, a plaintiff need only show that the defendant's actions "causes *or contributes to* the kinds of injuries alleged." *See Gaston Copper*, 204 F.3d at 161 ("Rather than pinpointing the origins of particular molecules, a plaintiff 'must merely show that a defendant discharges a pollutant that causes *or contributes to* the kinds of injuries alleged' in the specific geographic area of concern," quoting *Watkins*, 954 F.2d at 980) (emphasis added).

In this case, the actions of Defendants in making federal funding available for hESC research using stem cells derived from donated embryos, regardless of when those destructive derivations take place, makes it more likely that an embryo donated for research purposes will actually be used for hESC research and hence be enslaved and destroyed in the process. The actions of the Defendants also make it more likely that a genetic parent of an embryo will be persuaded to choose to donate his or her "excess" embryos for enslaving and destructive hESC research. Consequently, as Defendants are among the persons who cause or contribute to the alleged harm, the "fairly traceable" requirement is met.

While acknowledging Plaintiffs' contentions that the NIH Guidelines keep potential donors in the dark about the availability of adoption services and the fact

that embryos donated for research will be killed or destroyed, the Government advances the bewildering argument that keeping potential donors in the dark about such material information "could not negate the independent decisions of donors." (Appellees' Br., p. 19.) However, failing to provide such material information will enable clinics to improperly influence potential donors in favor of making donations for research purposes, thereby rendering the donors decisions more prone to manipulation and less independent.

The Government also disingenuously asserts that "no basis" exists "for assuming that these independent institutions [, i.e., IVF clinics,] will fail to provide pertinent information." (Appellees' Br., p. 20.) If this were so, why was it necessary for the Guidelines to prohibit the offering of payments for donated embryo, to require policies or procedures to be in place at such clinics to ensure that refusing to donate embryos for research will not affect the quality of care provided to potential donors, and to require a clear separation between the potential donor's decision to create human embryos for reproductive purposes and his or her decision to donate human embryos for research purposes? Obviously, the Guidelines themselves demonstrate that a basis *does* exist for not trusting the clinics to provide, on their own initiative, all material information affecting a potential donor's decision.

In sum, the plaintiff embryos have suffered an injury in fact which is fairly traceable to the Executive Order and NIH Guidelines, and the District Court therefore erred in determining that the plaintiff embryos, as represented by Mary Scott Doe, lack standing to sue for violations of the Thirteenth and Fourteenth Amendments.

For these same reasons, the District Court also erred in refusing to recognize that the plaintiff embryos have standing to sue for violation of the Dickey-Wicker Amendment, especially since the interests of the embryos in freedom and continued life fall within the "zone of interests" protected by that statutory enactment. *See Valley Forge Christian College*, 454 U.S. at 475; *see also Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970). The basic premise of the Dickey-Wicker ban "is that embryos, like fetuses, deserve virtually absolute societal protection from destruction or harm in research activities." John C. Fletcher, "The Stem Cell Debate in Historical Context," in *The Human Embryo Stem Cell Debate: Science, Ethics and Public Policy* 30 (Suzanne Holland, Karen Lebacqz and Laurie Zoloth ed. 2001), http://psycholps.psy.uconn. edu/eric/hes/hES.html. Indeed, the language of the ban ("risk of injury or death") is based on earlier federal law restricting funding for fetal research. *Id.* The amendment "expresses the ethical conviction, as represented in

the United States Congress, that nascent human life should be protected, not instrumentally used in scientific research, however promising that research may be." William B. Hurlbut, M.D., "Colloquium: Ethics, Public Policy and Law: The Stem Cell Debate in the United States of America and the Federal Republic of Germany: Altered Nuclear Transfer: Scientific, Legal and Ethical Foundations," 22 *J. Contemporary Health L. & Policy* 458, 460 (2006).

**IV. The Adoptive Parents Have Standing To Sue.**

Notwithstanding the Government's argument to the contrary, the harm to the plaintiff adoptive parents is "cognizable" and not "far too speculative." (Appellees' Br., pp. 21, 22.) The allegations of the complaints are not simply that these plaintiffs have expressed an intent that they may "some day" possibly adopt a human embryo. Rather, the allegations show that the plaintiff adoptive parents have already engaged in substantial family building activities through the adoption of children as human embryos and that they are continuing to do so. It is an ongoing activity, with which the actions of Defendants threaten to interfere by reducing the number of embryos available for adoption. The cases that the Government cites and relies on all involved possible future contingencies, not ongoing activities. *See Lujan v. Defenders of Wildlife*, 504 U.S. at 564 (allegations

that two members of plaintiff organization intended to return at some unspecified time in the future to try to see endangered species of animals in foreign countries; Court ruled that such "'some day' intentions" were insufficient to secure standing); *Friends for Farrell Parkway, LLC v. Stasko*, 282 F.3d 315, 322 (4th Cir. 2002) (it was "pure conjecture" whether, absent the sale by the City of Virginia Beach of the right-of-way for a proposed parkway [the Farrell Parkway] to a developer, the parkway would be built by the city anytime in the near future); *Keith v. Daley*, 764 F.2d 1265, 1271 (7th Cir.) (mere expression of interest by four members of organization in adopting fetuses "born alive" after abortions, was "far too speculative" an interest to support organization's intervention in lawsuit), *cert. denied sub nom. Illinois Pro-Life Coalition, Inc. v. Keith*, 474 U.S. 980 (1985).

The Government complains that "Plaintiffs' predictions about the future supply of embryos available for adoption are . . . highly conjectural." (Appellees' Br., p. 22.) But to show standing Plaintiffs are not required to demonstrate a decrease in the future supply of embryos with "scientific certainty." *See Gaston Copper*, 204 F.3d at 161; *Watkins*, 954 F.2d at 980 n. 7. Furthermore, "Supreme Court precedent teaches us that the injury in fact requirement . . . is qualitative, not quantitative in nature." *Baur v. Veneman*, 352 F.3d at 637 (quoting *Association of Community Organizations for Reform Now v. Fowler*, 178 F.3d 350, 357-358 (5th

Cir. 1999)). An injury need not measure more than an "identifiable trifle." *United States v. SCRAP*, 412 U.S. at 689 n. 14.

It is therefore sufficient that Plaintiffs demonstrate that, due to the finite supply of embryos *in vitro* and the increased demand for the adoption of children as embryos, there is an incremental risk of a decline in the future supply of embryos available for adoption due to Defendants' actions allowing for the use of stem cells derived from embryos *in vitro* donated for research purposes in federally funded hESC research. Plaintiffs do not have to show to a scientific certainty that such a decline will actually occur.

The Government further argues that it is "wholly unclear" why the plaintiff adoptive parents, "based on the allegation that they might adopt one such embryo, could properly assert the interests of all frozen embryos[.]" (Appellees' Br., p. 23.) First, the plaintiff adoptive parents collectively have already adopted a number of children as embryos, and there is nothing in the record to support the Government's assertion that they plan to adopt only "one" more such embryo. Secondly, give their ongoing concrete interest in building their families by adopting human embryos, bringing them to term, birthing them, and then raising them as children, the plaintiff adoptive parents would appear to be ideally suited to assert the interests in freedom and continued life of all human embryos *in vitro*

currently stored in a frozen state in IVF clinics across the Nation.

As for the Government's reference to the purported conflicting "interests and concerns of the donors" (Appellees' Br., p. 23), the genetic parents of a human embryo have no more legitimate right or interest in donating an embryo for enslavement and deliberate destruction in scientific experimentation than would the parents of a baby or minor child have in making a similar donation of their offspring so he or she could be enslaved and killed in a science experiment. By contrast, the mother of the daughter in *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004), had a legitimate interest and constitutional right to inculcate her child with respect and admiration for the Pledge of Allegiance, an interest which conflicted with that of the daughter's father Newdow, an atheist, who wished to prevent his daughter being exposed to the Pledge, thereby precluding the Newdow from having standing to sue to stop the recitation of the Pledge at his daughter's school on Establishment Clause grounds.

In short, the district court also erred in determining that the adoptive parents lacked standing to sue.

## CONCLUSION

In view of the arguments made and authorities cited above, as well as in the Appellants' initial brief, Plaintiffs-Appellants respectfully request that (1) the Order entered November 24, 2009 granting the Defendants-Appellees' motion to dismiss in *Doe v. Obama* be reversed, and that (2) the Order of the District Court entered December 11, 2009 granting the Defendants-Appellees' motion to dismiss in *Doe v. Sebelius* be reversed, and that (3) both matters be remanded to the District Court for further proceedings.

Respectfully submitted,


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**Comment [1]:** <!--[if gte mso 9]><xml>
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<o:Template>Normal.dotm</o:Template>
<o:Revision>0</o:Revision>
<o:TotalTime>0</o:TotalTime>
<o:Pages>1</o:Pages>
<o:Words>63</o:Words>
<o:Characters>335</o:Characters>
<o:Company>Law Office of Gary Cargill</o:Company>
<o:Lines>6</o:Lines>
<o:Paragraphs>1</o:Paragraphs>
<o:CharactersWithSpaces>442</o:CharactersWithSpaces>
<o:Version>12.0</o:Version>
</o:DocumentProperties>
<o:OfficeDocumentSettings>
<o:AllowPNG/>
</o:OfficeDocumentSettings>
</xml><![endif]-->

**Comment [2]:** <!--[if gte mso 9]><xml>
<w:WordDocument>
<w:Zoom>0</w:Zoom>
<w:TrackMoves>false</w:TrackMoves>
<w:TrackFormatting/>
<w:PunctuationKerning/>
<w:DrawingGridHorizontalSpacing>18 ... [1]

**Comment [3]:** <!--[if gte mso 9]><xml>
<w:LatentStyles DefLockedState="false" LatentStyleCount="276">
</w:LatentStyles>
</xml><![endif]-->

**Comment [4]:** <!--[if gte mso 10]>
<style>
/* Style Definitions */
table.MsoNormalTable
{mso-style-name:"Table Normal"; ... [2]

**Comment [5]:** <!--StartFragment-->

**Comment [6]:** <!--[if gte mso 9]><xml>
<o:DocumentProperties>
<o:Template>Normal.dotm</o:Template>
<o:Revision>0</o:Revision>
<o:TotalTime>0</o:TotalTime> ... [3]

**Comment [7]:** <!--[if gte mso 9]><xml>
<w:WordDocument>
<w:Zoom>0</w:Zoom>
<w:TrackMoves>false</w:TrackMoves>
<w:TrackFormatting/> ... [4]

**Comment [8]:** <!--[if gte mso 9]><xml>
<w:LatentStyles DefLockedState="false" LatentStyleCount="276">
</w:LatentStyles>
</xml><![endif]-->

**Comment [9]:** <!--[if gte mso 10]>
<style>
/* Style Definitions */
table.MsoNormalTable
{mso-style-name:"Table Normal"; ... [5]

**Comment [10]:** <!--StartFragment-->

## CERTIFICATE OF COMPLIANCE

**No. 10-1104 and 10-1106 Captions: Doe v. Obama, Doe v. Sebelius**

**CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)**
Certificate of Compliance With Type-Volume Limitations
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

X this brief contains _____ words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

____ this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

X this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 12.1.9 in 14-point font and Times New Roman type style.

___ this brief has been prepared in a monospaced typeface using _____ with _____.

_____

Attorney for Appellants

Dated: _____

## CERTIFICATE OF SERVICE

I, R. Martin Palmer, do hereby certify that two true and correct copies of the foregoing Reply Brief of Appellants has been served, by depositing the copies, postage prepaid, in the United States mail on this ___ day of June, 2010, on each of the following counsel for Defendants:

Bejamin S. Kingsley
Attorney, Appellate Staff
Civil Division, Room 7261
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

_____
R. Martin Palmer

Comment [11]: <!--EndFragment-->

Comment [12]: <!--EndFragment-->

**Page 27: [1] Comment [2]** **6/1/2010 4:20:00 PM**

```
<!--[if gte mso 9]><xml>
 <w:WordDocument>
  <w:Zoom>0</w:Zoom>
  <w:TrackMoves>false</w:TrackMoves>
  <w:TrackFormatting/>
  <w:PunctuationKerning/>
  <w:DrawingGridHorizontalSpacing>18 pt</w:DrawingGridHorizontalSpacing>
  <w:DrawingGridVerticalSpacing>18 pt</w:DrawingGridVerticalSpacing>
  <w:DisplayHorizontalDrawingGridEvery>0</w:DisplayHorizontalDrawingGridEvery>
  <w:DisplayVerticalDrawingGridEvery>0</w:DisplayVerticalDrawingGridEvery>
  <w:ValidateAgainstSchemas/>
  <w:SaveIfXMLInvalid>false</w:SaveIfXMLInvalid>
  <w:IgnoreMixedContent>false</w:IgnoreMixedContent>
  <w:AlwaysShowPlaceholderText>false</w:AlwaysShowPlaceholderText>
  <w:Compatibility>
   <w:BreakWrappedTables/>
   <w:DontGrowAutofit/>
   <w:DontAutofitConstrainedTables/>
   <w:DontVertAlignInTxbx/>
  </w:Compatibility>
 </w:WordDocument>
</xml><![endif]-->
```

**Page 27: [2] Comment [4]** **6/1/2010 4:20:00 PM**

```
<!--[if gte mso 10]>
<style>
 /* Style Definitions */
table.MsoNormalTable
        {mso-style-name:"Table Normal";
        mso-tstyle-rowband-size:0;
        mso-tstyle-colband-size:0;
        mso-style-noshow:yes;
        mso-style-parent:"";
        mso-padding-alt:0in 5.4pt 0in 5.4pt;
        mso-para-margin:0in;
        mso-para-margin-bottom:.0001pt;
        mso-pagination:widow-orphan;
        font-size:12.0pt;
        font-family:"Times New Roman";
        mso-ascii-font-family:Cambria;
        mso-ascii-theme-font:minor-latin;
        mso-fareast-font-family:"Times New Roman";
        mso-fareast-theme-font:minor-fareast;
        mso-hansi-font-family:Cambria;
        mso-hansi-theme-font:minor-latin;
```

```
        mso-bidi-font-family:"Times New Roman";
        mso-bidi-theme-font:minor-bidi;}
</style>
<![endif]-->
```

**Page 27: [3] Comment [6]** **6/1/2010 4:21:00 PM**

```
<!--[if gte mso 9]><xml>
 <o:DocumentProperties>
  <o:Template>Normal.dotm</o:Template>
  <o:Revision>0</o:Revision>
  <o:TotalTime>0</o:TotalTime>
  <o:Pages>1</o:Pages>
  <o:Words>304</o:Words>
  <o:Characters>1612</o:Characters>
  <o:Company>Law Office of Gary Cargill</o:Company>
  <o:Lines>29</o:Lines>
  <o:Paragraphs>3</o:Paragraphs>
  <o:CharactersWithSpaces>2129</o:CharactersWithSpaces>
  <o:Version>12.0</o:Version>
 </o:DocumentProperties>
 <o:OfficeDocumentSettings>
  <o:AllowPNG/>
 </o:OfficeDocumentSettings>
</xml><![endif]-->
```

**Page 27: [4] Comment [7]** **6/1/2010 4:21:00 PM**

```
<!--[if gte mso 9]><xml>
 <w:WordDocument>
  <w:Zoom>0</w:Zoom>
  <w:TrackMoves>false</w:TrackMoves>
  <w:TrackFormatting/>
  <w:PunctuationKerning/>
  <w:DrawingGridHorizontalSpacing>18 pt</w:DrawingGridHorizontalSpacing>
  <w:DrawingGridVerticalSpacing>18 pt</w:DrawingGridVerticalSpacing>
  <w:DisplayHorizontalDrawingGridEvery>0</w:DisplayHorizontalDrawingGridEvery>
  <w:DisplayVerticalDrawingGridEvery>0</w:DisplayVerticalDrawingGridEvery>
  <w:ValidateAgainstSchemas/>
  <w:SaveIfXMLInvalid>false</w:SaveIfXMLInvalid>
  <w:IgnoreMixedContent>false</w:IgnoreMixedContent>
  <w:AlwaysShowPlaceholderText>false</w:AlwaysShowPlaceholderText>
  <w:Compatibility>
   <w:BreakWrappedTables/>
   <w:DontGrowAutofit/>
   <w:DontAutofitConstrainedTables/>
   <w:DontVertAlignInTxbx/>
  </w:Compatibility>
 </w:WordDocument>
```

</xml><![endif]-->

**Page 27: [5] Comment [9]** **6/1/2010 4:21:00 PM**

```
<!--[if gte mso 10]>
<style>
 /* Style Definitions */
table.MsoNormalTable
	{mso-style-name:"Table Normal";
	mso-tstyle-rowband-size:0;
	mso-tstyle-colband-size:0;
	mso-style-noshow:yes;
	mso-style-parent:"";
	mso-padding-alt:0in 5.4pt 0in 5.4pt;
	mso-para-margin:0in;
	mso-para-margin-bottom:.0001pt;
	mso-pagination:widow-orphan;
	font-size:12.0pt;
	font-family:"Times New Roman";
	mso-ascii-font-family:Cambria;
	mso-ascii-theme-font:minor-latin;
	mso-fareast-font-family:"Times New Roman";
	mso-fareast-theme-font:minor-fareast;
	mso-hansi-font-family:Cambria;
	mso-hansi-theme-font:minor-latin;
	mso-bidi-font-family:"Times New Roman";
	mso-bidi-theme-font:minor-bidi;}
</style>
<![endif]-->
```