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IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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ALISON MILLER and TODD PARRISH,  
Individually and as Special Administrator  
of the Estate of Baby Miller-Parish,

Plaintiffs-Appellees,

v.

AMERICAN INFERTILITY GROUP  
OF ILLINOIS, S.C., d/b/a CENTER FOR  
HUMAN REPRODUCTION ILLINOIS,

Defendant-Appellant.

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On Appeal from the Circuit Court of Cook County,  
Illinois County Department, Law Division  
No. 02 L 7394  
The Honorable Jeffery Lawrence, Judge Presiding

BRIEF OF *AMICUS CURIAE*  
THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS  
IN SUPPORT OF APPELLANT

Lorie A. Chaiten  
Leah A. Bartelt  
Roger Baldwin Foundation of ACLU, Inc.  
180 North Michigan Avenue  
Suite 2300  
Chicago, Illinois 60601  
312/201-9740

*Attorneys for Amicus Curiae*

**TABLE OF CONTENTS**

POINTS AND AUTHORITIES .....ii

INTEREST OF *AMICUS* .....1

ARGUMENT ..... 3

I. THE WRONGFUL DEATH ACT AND THE ABORTION  
LAW ARE NOT *IN PARI MATERIA*. ..... 3

II. EVEN IF THESE STATUTES WERE *IN PARI MATERIA*,  
JUDGE LAWRENCE’S RELIANCE ON SCIENTIFICALLY  
INACCURATE, UNENFORCEABLE DEFINITIONS FROM  
THE ABORTION LAW WAS IMPROPER. .... 6

A. The Provisions of Section 2 of the Abortion Law on  
Which Judge Lawrence Relied are Both Scientifically  
and Legally Invalid. .... 7

1. *Charles v. Carey* ..... 8

2. *Herbst v. O’Malley* .....9

B. The Abortion Law Provides no Guidance to this Court  
Concerning the Legislature’s Intent in Amending the  
Wrongful Death Act. ....11

CONCLUSION .....14

**POINTS AND AUTHORITIES**

INTEREST OF AMICUS..... 1

Abortion Law of 1975, 720 ILCS 510 (2006)..... 1

*Charles v. Carey*, 579 F. Supp. 464 (N.D. Ill. 1983), *aff'd in part, reversed in part sub nom,*  
*Charles v. Daley*, 749 F.2d 452 (7<sup>th</sup> Cir. 1984)..... 2

*Charles v. Carey*, 627 F.2d 772 (7<sup>th</sup> Cir. 1980)..... 2

*Doe v. Bolton* 410 U.S. 179 (1973) ..... 1

*Herbst v. O'Malley*, No. 84 C 5602, 1993 WL 59142 (N.D. Ill. Mar. 2, 1993)..... 2

*Hope Clinic v. Ryan*, 995 F. Supp. 847 (N.D. Ill. 1998), *vacated by* 195 F.3d 857  
(7<sup>th</sup> Cir. 1999), *vacated by* 530 U.S. 1271 (2000), *remanded to* 249 F.3d603 (7<sup>th</sup> Cir. 2001)..... 2

*Lifchez v. Hartigan*, 735 F. Supp. 1361 (N.D. Ill. 1990)..... 2, 3

*Miller v. American Infertility Group*, No. 02 L 7394 (Feb. 4, 2005) ..... 1

*Ragsdale v. Turnock*, 625 F. Supp. 1212 (N.D. Ill. 1985), *aff'd in part, vacated in part,*  
814 F.2d 1358 (7<sup>th</sup> Cir. 1988), *appeal dismissed* 503 U.S. 916 (1992)..... 2

*Roe v. Wade*, 410 U.S. 113 (1973) ..... 1

Wrongful Death Act, 740 ILCS 180 (2006)..... 1

*Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1978), *aff'd sub nom Wynn v. Carey*,  
599 F.2d 193 (7<sup>th</sup> Cir. 1978)..... 2

*Zbaraz v. Hartigan*, 584 F. Supp. 1452 (N.D. Ill. 1984), *aff'd in part, vacated in part,*  
763 F.2d 1532 (7<sup>th</sup> Cir. 1985), *aff'd*, 484 U.S. 171 (1987)..... 2

*Zbaraz v. Hartigan*, 776 F. Supp. 375 (N.D. Ill. 1991)..... 2

*Zbaraz v. Ryan*, 1996 WL 33293423 (N.D. Ill. Feb. 8, 1996)..... 2

ARGUMENT..... 3

    I.    THE WRONGFUL DEATH ACT AND THE ABORTION LAW ARE  
          NOT *IN PARI MATERIA*..... 4

Abortion Law of 1975, 720 ILCS 510 (2006)..... 5

*Chrisafageorgis v. Brandenburg*, 55 Ill.2d 368 (1973)..... 5

<i>County of Lake v. Gateway Houses Foundation, Inc.</i> , 19 Ill. App. 3d 318 (2d Dist. 1974) .....	6
<i>Estate of Finley</i> , 151 Ill.2d 95 (1992).....	5
<i>Gillespie v. City of Maroa</i> , 104 Ill. App. 3d 874 (4th Dist. 1982) .....	4
<i>In re Branning</i> , 285 Ill. App. 3d 405 (4 <sup>th</sup> Dist. 1996).....	4
<i>Miller v. American Infertility Group</i> , 02 L 7394 (Feb. 4, 2005) .....	4
Norman J. Singer, <i>Statutes and Statutory Construction</i> (6 <sup>th</sup> ed. 2000) .....	4
<i>People v. Maya</i> , 105 Ill. 2d 281 (1985).....	4
<i>People v. Shum</i> , 117 Ill.2d 317 (1987) .....	5
<i>Pioneer Trust &amp; Savings Bank v. County of Cook</i> , 71 Ill.2d 510 (1978) .....	6
<i>Smith v. Silver Cross Hosp.</i> , 312 Ill. App. 3d 210 (1 <sup>st</sup> Dist. 2000).....	5
<i>Wells v. Great Atlantic &amp; Pacific Tea Co.</i> , 171 Ill. App. 3d 1012 (1st Dist. 1988).....	4
Wrongful Death Act, 740 ILCS 180 (2006).....	4, 5

II. EVEN IF THESE STATUTES WERE *IN PARI MATERIA*, JUDGE LAWRENCE’S RELIANCE ON SCIENTIFICALLY INACCURATE, UNENFORCEABLE DEFINITIONS FROM THE ABORTION LAW WAS IMPROPER.....6

A. THE PROVISIONS OF SECTION 2 OF THE ABORTION LAW ON WHICH JUDGE LAWRENCE RELIED ARE BOTH SCIENTIFICALLY AND LEGALLY INVALID.....7

<i>Charles v. Carey</i> , 579 F. Supp. 464 (N.D. Ill. 1983), <i>aff’d in part, reversed in part sub nom</i> , <i>Charles v. Daley</i> , 749 F.2d 452 (7 <sup>th</sup> Cir. 1984).....	8, 9
<i>Charles v. Carey</i> , 579 F. Supp. 377 (N.D. Ill. 1983).....	8, 9
<i>Charles v. Carey</i> , 627 F.2d 772 (7 <sup>th</sup> Cir. 1980).....	8
<i>City of Akron v. Akron Center for Reproductive Health</i> , 462 U.S. 416 (1983).....	8, 9
<i>Herbst v. O’Malley</i> , No. 84 C 5602 (N.D. Ill. consent decree Mar. 30 1993) .....	9, 10

*Herbst v. O'Malley*, No. 84 C 5602 (N.D. Ill. Joint Memorandum in Support of Proposed Consent Decree) ..... 10

B. THE ABORTION LAW PROVIDES NO GUIDANCE  
TO THIS COURT CONCERNING THE LEGISLATURE'S  
INTENT IN AMENDING THE WRONGFUL DEATH ACT..... 11

*Charles v. Carey*, 579 F. Supp. 464 (N.D. Ill. 1983), *aff'd in part*, reversed in part sub nom, *Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984)..... 11

*Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980)..... 11

*Commonwealth Edison v. Property Tax Appeal Board*, 102 Ill. 2d 443 (1984) ..... 11

*Herbst v. O'Malley*, No. 84 C 5602 (N.D. Ill. Joint Memorandum in Support of Proposed Consent Decree)..... 12

*Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992)..... 12

Norman J. Singer, *Statutes and Statutory Construction* (6th ed. 2000). ..... 12

*Texaco-Cities Service Pipeline Co. v. McGraw*, 182 Ill. 2d 262 (1998)..... 11

*Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1978), *aff'd sub nom Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1978)..... 11

## INTEREST OF *AMICUS*

In his February 4, 2005 Memorandum Opinion, Judge Jefferey Lawrence incorporated definitions from the Abortion Law of 1975 (the “Abortion Law”), 720 ILCS 510 (2006), into the Illinois Wrongful Death Act (the “Wrongful Death Act”), 740 ILCS 180 (2006), to support the remarkable conclusion that a fertilized egg that has never been implanted into a woman’s uterus is a human being for purposes of the Wrongful Death Act. *See Miller v. American Infertility Group*, No. 02 L 7394, slip op. at 5 (Feb. 4, 2005). This conclusion is legally unsupportable for the many reasons outlined in Appellant’s brief and is at odds with decades of case law construing the Abortion Law. *Amicus curiae*, The American Civil Liberties Union of Illinois (“ACLU”), is an organization dedicated to promoting civil liberties through litigation and public education. The ACLU and its litigation arm – The Roger Baldwin Foundation of the ACLU, Inc. (“RBF”), incorporated under 29 U.S.C. § 501(c)(3) – are the pre-eminent authorities on the Abortion Law.<sup>1</sup> RBF has 30 years of experience litigating the construction of the Abortion Law on behalf of prominent Illinois physicians, including obstetricians-gynecologists and reproductive endocrinologists. *Amicus* files this brief to elucidate how Judge Lawrence’s misuse of the Abortion Law contravenes decades of litigation, injunctions and amendments to that statute.

The Abortion Law, which was enacted in 1975 in response to the U.S. Supreme Court’s decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), has been, over the last 30 years, the subject of numerous court challenges, injunctions, responsive amendments and an ongoing consent decree. RBF has played an intimate role in the

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<sup>1</sup> The ACLU of Illinois is a statewide, nonprofit, nonpartisan organization with more than 22,000 members dedicated to the protection and defense of the civil rights and civil liberties of all Americans. The ACLU of Illinois is the Illinois affiliate of its national parent organization, the American Civil Liberties Union, an organization of over 400,000 members. RBF is the ACLU’s litigation arm. RBF lawyers provide free legal services to pregnant women and teens, physicians, legislators, clinic operators and infertile couples and serve as legal advisors to numerous pro-choice organizations in Illinois.

development of Illinois law in this area, representing the plaintiffs in every lawsuit challenging the constitutionality of this statute. RBF has litigated a broad spectrum of issues relating to the validity and enforceability of the Abortion Law and related statutes, including, for example, the validity of: the Act's statement of purpose (*Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1978), *aff'd sub nom Wynn v. Carey*, 599 F.2d 193 (7<sup>th</sup> Cir. 1978); *Charles v. Carey*, 627 F.2d 772 (7<sup>th</sup> Cir. 1980); *Charles v. Carey*, 579 F. Supp. 464 (N.D. Ill. 1983), *aff'd in part, reversed in part sub nom, Charles v. Daley*, 749 F.2d 452 (7<sup>th</sup> Cir. 1984)); provisions specifying how a physician must conduct the abortion procedure (*Herbst v. O'Malley*, No. 84 C 5602, 1993 WL 59142 (N.D. Ill. Mar. 2, 1993)); provisions defining "abortifacient" in a manner that interfered with the right to access birth control, (*Charles v. Carey*, 627 F.2d 772 (7<sup>th</sup> Cir. 1980)); physical plant and administrative requirements imposing a discriminatory and medically unnecessary burden on abortion provision (*Ragsdale v. Turnock*, 625 F. Supp. 1212 (N.D. Ill. 1985), *aff'd in part, vacated in part*, 814 F.2d 1358 (7<sup>th</sup> Cir. 1988), *appeal dismissed* 503 U.S. 916 (1992)); reporting requirements jeopardizing abortion patient privacy (*Id.*; *Charles v. Carey*, 579 F. Supp. 464; *Herbst v. O'Malley*, No. 84 C 5602, 1993 WL 59142 (N.D. Ill. Mar. 2, 1993)); bans on safe and effective methods of abortion (*Hope Clinic v. Ryan*, 995 F. Supp. 847 (N.D. Ill. 1998), *vacated by* 195 F.3d 857 (7<sup>th</sup> Cir. 1999), *vacated by* 530 U.S. 1271 (2000), *remanded to* 249 F.3d 603 (7<sup>th</sup> Cir. 2001)); the imposition of mandatory parental involvement in the abortion decision (*Zbaraz v. Hartigan*, 584 F. Supp. 1452 (N.D. Ill. 1984), *aff'd in part, vacated in part*, 763 F.2d 1532 (7<sup>th</sup> Cir. 1985), *aff'd*, 484 U.S. 171 (1987); *Zbaraz v. Hartigan*, 776 F. Supp. 375 (N.D. Ill. 1991); *Zbaraz v. Ryan*, 1996 WL 33293423 (N.D. Ill. Feb. 8, 1996)); provisions interfering with the ability of physicians to provide prenatal testing (*Lifchez v. Hartigan*, 735 F. Supp. 1361 (N.D. Ill.

1990); and provisions interfering with the ability of physicians to assist couples in reproducing through assisted reproductive technologies such as *in vitro* fertilization (*Id.*).

Significantly, among these cases are those in which RBF successfully challenged the validity of the very statutory definitions on which Judge Lawrence relied in his February 4, 2005 opinion. An assessment of the litigation history surrounding these definitions, which Judge Lawrence failed to undertake, is critical to determining whether he erred in relying on enjoined provisions of the Abortion Law to support his conclusion that an unimplanted fertilized egg was a “human being” under the separate and very different statutory scheme embedded in the Wrongful Death Act. In his effort to look to a separate statute to give meaning to the undefined term “human being” in the Wrongful Death Act, Judge Lawrence also failed to take into account the State of Illinois’ own concessions that these enjoined provisions were not only legally invalid but were scientifically inaccurate.

*Amicus* believes that Judge Lawrence erred by importing provisions of the Abortion Law into the Wrongful Death Act, as these statutes serve different purposes and legislate in different areas, and are therefore not appropriately used to understand one another under the doctrine of *in pari materia*. However, as Judge Lawrence did, in fact, deem them *in pari materia*, *amicus* files this brief to share its knowledge of the history of Illinois abortion litigation as it relates to the Abortion Law provisions at issue here.

## ARGUMENT

### I. THE WRONGFUL DEATH ACT AND THE ABORTION LAW ARE NOT *IN PARI MATERIA*.

Section 2.2 of the Wrongful Death Act provides that “the state of gestation or development of a human being ... shall not foreclose maintenance” of a cause of action under the

statute. 740 ILCS 180/2.2. Because the phrase “human being” was not defined in the Wrongful Death Act, Judge Lawrence chose to look to the Abortion Law to determine the legislative intent behind the phrase. *Miller v. American Infertility Group*, 02 L 7394, slip op. at 5 (Feb. 4, 2005). Judge Lawrence noted that, during the debates in connection with Senate Bill 756 – which became the 1980 amendment that added section 2.2 to the Wrongful Death Act – some legislators expressed concern that the amendment might interfere with a woman’s constitutional right to choose to terminate her pregnancy. *Id.* On that basis, without further analysis, Judge Lawrence improperly deemed the Abortion Law and the Wrongful Death Act *in pari materia*. *Id.* at 6.

Under the doctrine of *in pari materia*, “statutes that relate to the same subject should be ‘considered with reference to one another so that both sections may be given harmonious effect.’” *In re Branning*, 285 Ill. App. 3d 405, 413 (4<sup>th</sup> Dist. 1996) (quoting *People v. Maya*, 105 Ill. 2d 281, 287 (1985)). Statutes are *in pari materia* if “they have the same purpose or object or relate to the same person or thing.” *Wells v. Great Atlantic & Pacific Tea Co.*, 171 Ill. App. 3d 1012, 1019 (1st Dist. 1988); *see also Gillespie v. City of Maroa*, 104 Ill. App. 3d 874, 878 (4th Dist. 1982); Norman J. Singer, *Statutes and Statutory Construction* § 51.03 (6<sup>th</sup> ed. 2000). The Abortion Law and the Wrongful Death Act do not relate to the same subject or further the same purpose; they are not in conflict, so there is no need to harmonize them. *See Maya*, 105 Ill.2d at 287; *see also Smith*, 312 Ill. App. 3d at 215 (finding no conflict between the statutes at issue, and therefore concluding that statutes need not be harmonized).

The Wrongful Death Act is a civil statute that governs the relationship between private citizens—the relatives of a decedent who has suffered a wrongful death and the person responsible for the death. Its purpose is to provide a civil, tort remedy to compensate the

decedent's relatives for their pecuniary loss. *In re Estate of Finley*, 151 Ill.2d 95, 101 (1992); *Smith v. Silver Cross Hosp.*, 312 Ill. App. 3d 210, 215 (1<sup>st</sup> Dist. 2000). By contrast, the Abortion Law is a criminal statute. It governs the relationship between the state and its citizens and, rather than a damages remedy, it imposes criminal penalties, including incarceration, for violation of its provisions. Unlike the compensatory purpose of the Wrongful Death Act, the purpose of the Abortion Law is to regulate in the area of abortion practice in a manner that balances the constitutional rights of women to decide whether and when to bear children against the state's interest in protecting women's health and the potential for life. *See* 720 ILCS 510/1.

Section 2.2 of the Wrongful Death Act, which is at issue here, was enacted for the purpose of expanding the category of decedents for whose deaths tort recovery is available. Prior to Section 2.2's enactment, recovery for the death of a fetus was limited to those whose death occurred after viability. *See, e.g., Chrisafageorgis v. Brandenburg*, 55 Ill.2d 368, 374 (1973). Section 2.2 expanded the available recovery to all "fetus[es]." 740 ILCS 180/2.2. It is because this recovery applies to the death of a fetus that the legislators sought to confirm that the amendment would in no way affect a woman's right to choose to terminate her pregnancy. As the inquiring legislators learned, this amendment did not—and could not—alter a woman's constitutional rights. The two acts at issue thus bear little relation to one another. *Cf. People v. Shum*, 117 Ill.2d 317, 358 (1987) (holding that the Abortion Law and the criminal feticide statute "address widely different interests," because the feticide statute "seeks to protect a pregnant mother and her unborn child from the intentional wrongdoing of a third party" and the Abortion Law seeks to balance a woman's right to privacy against the state's interest in protecting health and potential life).

Although both the Abortion Law and the Wrongful Death Act contain the term “human being,” the mere presence of the same word or phrase in two separate statutes does not mean the legislature intended the same meaning to apply to each. Where “words are capable of having various meanings depending on the circumstances in which they are used, the definition in one legislative act has little or no value in determining its meaning in another.” *Pioneer Trust & Savings Bank v. County of Cook*, 71 Ill.2d 510, 521 (1978) (quoting *County of Lake v. Gateway Houses Foundation, Inc.*, 19 Ill. App. 3d 318, 325 (2d Dist. 1974)). Consequently, the Abortion Law cannot be used to discern the legislature’s intent when it included the phrase “human being” in the Wrongful Death Act.

**II. EVEN IF THESE STATUTES WERE *IN PARI MATERIA*, JUDGE LAWRENCE’S RELIANCE ON SCIENTIFICALLY INACCURATE, UNENFORCEABLE DEFINITIONS FROM THE ABORTION LAW WAS IMPROPER.**

Judge Lawrence relied on three provisions of the Abortion Law, Sections 1, 2(5), and 2(6), in interpreting the meaning of the phrase “human being” as used in the Wrongful Death Act. Section 1 outlines the General Assembly’s intent in enacting the Abortion Law.

It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. Without in any way restricting the right of privacy of a woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do 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 and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother’s life shall be reinstated.

720 ILCS 510/1. Section 2 provides in pertinent part:

Definitions

....

(5) "Fertilization" and "conception" each mean the fertilization of a human ovum by a human sperm, which shall be deemed to have occurred at the time when it is known a spermatozoon has penetrated the cell membrane of the ovum.

(6) "Fetus" and "unborn child" each mean an individual organism of the species homo sapiens from fertilization until live birth.

*Id.* § 2.

In attempting to define "human being" for purposes of the Wrongful Death Act, Judge Lawrence looked to the statement in Section 1 of the Abortion Law that the General Assembly considers an unborn child to be a legal person from the time of conception. However, Section 1 defines neither "unborn child" nor "conception." *Id.* § 1. Judge Lawrence therefore turned to Section 2, where "conception" is defined as occurring at the time of fertilization, and "fetus" and "unborn child" are deemed to exist "from fertilization until live birth." *Id.* §§ 2(5), 2(6). Based on these definitions, Judge Lawrence concluded that the General Assembly must have intended for the term "human being" in the Wrongful Death Act to include a fertilized egg that has not been implanted into a uterus. *Miller*, No. 02 L 7394, at 6, 10. However, the Abortion Law provisions on which Judge Lawrence relied are scientifically inaccurate and have been enjoined by federal courts. They thus cannot be imported to give meaning to the term "human being" in the wholly separate context of Wrongful Death Act claims.

**A. The Provisions of Section 2 of the Abortion Law on Which Judge Lawrence Relied are Both Scientifically and Legally Invalid.**

The definitions contained in Section 2(5) and 2(6) were amended into the Abortion Law by Public Act 83-1128, adopted in 1984. These amended definitions contain language that is nearly identical to that of earlier provisions of the Abortion Law that were struck down as

unconstitutional by the federal courts. Sections 2(5) and 2(6) subsequently followed in their predecessors' footsteps and were enjoined based on their medical and legal invalidity.

1. Charles v. Carey

In *Charles v. Carey*, 579 F. Supp. 377 (N.D. Ill. 1983) (hereafter *Charles II*),<sup>2</sup> the plaintiffs challenged the constitutionality of various provisions of Public Act 81-1078, a 1979 amendment to the Abortion Law of 1975.<sup>3</sup> The 1979 amendments included two provisions that deemed human life to begin at fertilization:

Section 2. Definitions:

(8) "Human being" means the individual from fertilization until death.

(9) "Fetus" and "unborn child" each mean a human being from fertilization until birth.

*Id.* at 379 (quoting P.A. 81-1078). On the plaintiffs' motion for a preliminary injunction, the district court concluded, "there can be no question that sections 2(8) and 2(9) are written so as to espouse the State's theory of life." *Id.* These definitions declared that an individual at fertilization is a human being, which is the same as saying "that life begins at fertilization, a theory clearly eschewed by the [United States] Supreme Court." *Id.* at 379-80. The definitions in the Abortion Law therefore directly contravened the Supreme Court's holding in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 444 (1983), that "a State may not adopt

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<sup>2</sup> There are three published federal court opinions captioned *Charles v. Carey*, all of which addressed the constitutionality of various provisions of P.A. 81-1078 – the 1979 amendments to the Abortion Law. The Seventh Circuit's decision in *Charles v. Carey*, 627 F.2d 775 (7th Cir. 1980) (hereafter *Charles I*), addressed the plaintiffs' appeal of the district court's denial of a preliminary injunction of certain sections of the law. *Charles II* resolved issues raised in plaintiffs' Renewed Motion for Preliminary Injunction following the appellate proceedings in *Charles I*. The same court later issued a permanent injunction in *Charles v. Carey*, 579 F. Supp. 464 (N.D. Ill. 1983) (hereafter *Charles III*).

<sup>3</sup> The 1979 amendments passed over the veto of then-Governor Thompson who declared that the amendments imposed "a plethora of unreasonable restrictions on the woman's freedom of choice" and "represented an attempt to prohibit abortions under the guise of regulation..." *Charles I*, 627 F.3d at 775 n.1 (quoting Thompson veto message).

one theory of when life begins to justify its regulation of abortions.”<sup>4</sup> On that basis, the district court in *Charles v. Carey* held that sections 2(8) and 2(9) were unconstitutional and enjoined their enforcement. *Charles II*, 579 F. Supp. at 380 (granting preliminary injunction); *Charles III*, 579 F. Supp. at 466 (granting permanent injunction).

## 2. *Herbst v. O’Malley*

In 1984, the General Assembly again amended the Abortion Law, by enacting Public Act 83-1128. Among other things, these amendments added Sections 2(5) and 2(6), as quoted above, *see supra* at 7, which contained language nearly identical to that in Sections 2(8) and 2(9) that had been enjoined the year before in *Charles v. Carey*. A class of Illinois physicians immediately challenged the 1984 amendments, *see Herbst v. O’Malley*, No. 84 C 5602 (N.D. Ill. filed July 1, 1984), arguing that they restricted the performance of abortions, limited the rights of physicians to practice medicine in accordance with the highest professional standards, and impermissibly impeded their patients’ ability to effectuate their decisions to have an abortion. *Herbst v. O’Malley*, No. 84 C 5602 (N.D. Ill. consent decree Mar. 30 1993) (attached at A-001—A-022) (hereinafter “*Herbst Consent Decree*”). The *Herbst* court issued a temporary restraining order barring enforcement of the law. *Id.* at A-008.

After extensive and wide-ranging discovery, and arduous negotiation, the parties settled the *Herbst* litigation in 1992 pursuant to a consent decree entered by the court in 1993, which permanently enjoined enforcement of numerous provisions of the law. *See generally id.*; *see*

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<sup>4</sup> At issue in *City of Akron* was an ordinance that required a physician to make specific statements to a patient seeking an abortion “to insure that the consent for an abortion is truly informed consent.” *City of Akron*, 462 U.S. at 423 (quoting ordinance). Among other statements, the ordinance required the physician to tell the patient seeking an abortion “the unborn child is a human life from the moment of conception.” *Id.* at 444. The Supreme Court struck this section of the ordinance on the ground that it was “inconsistent with the Court’s holding in *Roe v. Wade* that a State may not adopt one theory of when life beings to justify its regulation of abortions.” *Id.*

also *Herbst v. O'Malley*, No. 84 C 5602 (N.D. Ill. Joint Memorandum in Support of Proposed Consent Decree) (attached at A-023 – A-073) (hereinafter *Herbst* Joint Memorandum). As a part of the Decree, the defendants – the Attorney General of Illinois, the Director of the Illinois Department of Public Health and the State's Attorneys from all 102 Illinois counties (jointly the "State Defendants") – were enjoined from enforcing Sections 2(5) and 2(6) "to extent [they] define[] 'conception' 'fetus' and 'unborn child.'" *Herbst* Consent Decree at A-014. In the Joint Memorandum filed in support of the Consent Decree, the State Defendants conceded that, in enacting the definitions of "human being," "fetus," and "unborn child" in Sections 2(5) and 2(6), the General Assembly had essentially reenacted the same definitions that had been declared unconstitutional in *Charles II*. See *Herbst* Joint Memorandum at A-043 (acknowledging that the *Charles II* definitions were "predecessors" of Sections 2(5) and 2(6)). The State Defendants further agreed that the definitions of "conception," "fetus," and "unborn child" contained in Sections 2(5) and 2(6) were "scientifically inaccurate, as attested to by the medical experts of both plaintiffs and defendants." *Id.* at A-039:

Conception is not a single stage or one step process, nor is it synonymous with "fertilization," which section 2(5) "deem[s] to have occurred at the time when it is known a spermatozoon has penetrated the cell membrane of the ovum." Instead, fertilization of the ovum by the sperm is but the first stage in conception. ... If the cell division is successful, "conception" e.g., pregnancy, occurs six to seven days after fertilization when the fertilized egg, now called a blastula or blastocyst, becomes implanted in the uterine wall.

Defining "conception" and "fertilization" as synonymous with each other (section 2(5)), and with the terms "fetus" and "unborn child," (section 2(6)) is inconsistent with accepted medical standards.

*Id.* at A-040 – A-041 (citations omitted).

In the 13 years since the *Herbst* Consent Decree was approved and Sections 2(5) and 2(6) enjoined, the General Assembly has not amended Sections 2(5) or 2(6), nor added provisions to the Abortion Law that would have espoused the view that human life begins at fertilization.

**B. The Abortion Law Provides no Guidance to this Court Concerning the Legislature’s Intent in Amending the Wrongful Death Act.**

Judge Lawrence relied on the definitions contained in Section 2(5) and 2(6) to conclude that the General Assembly, in enacting the Wrongful Death Act, intended for the term “human being” to include an unimplanted fertilized egg. While Judge Lawrence purports to have relied on Section 1 as well, that provision states only that an “unborn child is a human being from the time of conception.” It defines neither “unborn child” nor “conception.” Nor does it make any reference to an unimplanted fertilized egg.<sup>5</sup> The definitions in Section 2 are the only provisions of the Abortion Law that purport to equate conception with fertilization, and, consequently, fertilization with the beginning of human life. Judge Lawrence’s decision to take these scientifically inaccurate and legally unenforceable definitions from the abortion context and apply them to significantly alter the meaning of the Wrongful Death Act was improper.

A legislature has the power to define a term used within a statute, but a court will only apply that definition if the definition is *reasonable*. *Texaco-Cities Service Pipeline Co. v. McGraw*, 182 Ill. 2d 262, 275 (1998); *see also Commonwealth Edison v. Property Tax Appeal Board*, 102 Ill. 2d 443, 457 (1984) (legislative definitions must be reasonable). “If the definition is arbitrary, ... or so discordant to common usage as to generate confusion, it should not be

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<sup>5</sup> Section 1 has been challenged twice based on its assertion of a policy of treating fetuses as human beings from the time of conception. In each case, the courts have refused to declare Section 1 unconstitutional on the grounds that it contains a clear statement of the General Assembly’s intention to “reasonably regulate abortion in conformance with [*Roe v. Wade* and *Doe v. Bolton*],” *see Wynn v. Scott*, 449 F. Supp. at 1314; *Charles I*, 627 F.2d at 779, and because it has no practical impact on the regulation of abortion, *see Charles III*, 579 F. Supp. at 466; *Wynn v. Scott*, 449 F. Supp. at 1314 n.9.

used.” Norman J. Singer, *Statutes and Statutory Construction* § 47.07 (6<sup>th</sup> ed. 2000). *Cf.* *Lamprecht v. FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) (in the context of assessing appropriate level of deference to Congressional fact finding, then-Judge Thomas explained: “[i]f a legislature could make a statute constitutional simply by ‘finding’ that black is white or freedom, slavery, judicial review would be an elaborate farce.”).

As the State Defendants and their medical experts agreed in the *Herbst* litigation, the Section 2 terms on which Judge Lawrence relied are inconsistent with their scientific meaning and with accepted medical standards. *Herbst* Joint Memorandum at A-040–A-041. As the State Defendants agreed: “[c]onception is not a single stage or one step process, nor is it synonymous with ‘fertilization.’” *Id.* They explained that “fertilization of the ovum by the sperm is but the first stage in conception. If cell division is successful, ‘conception’ e.g., pregnancy occurs six to seven days after fertilization when the fertilized egg...becomes implanted in the uterine wall.” *Id.* See also Brief of Appellant American Infertility Group, at 19-20 (discussing common medical terminology at the time of the enactment of the Abortion Law).

Judge Lawrence’s statutory interpretation – importing wholesale these unenforceable definitions from one statute into another, unrelated statute – is then patently unreasonable and would lead to absurd, and even harmful, results if allowed to stand.

The repercussions from Judge Lawrence’s ruling – if left in place – would be enormous. Every fertilized egg would have the rights of a human being, leaving reproductive endocrinologists in the daunting position of caring for the egg as a human being or facing the prospect of wrongful death litigation. It would not take long for these circumstances to have a dangerously chilling impact on health care professionals who treat patients in this area and conduct research with the goal of advancing reproductive technologies. The ultimate irony, of

course, is that if Appellees prevail in this litigation, they will have impeded others from benefiting from the very assisted reproductive technologies – such as *in vitro* fertilization – from which they sought to benefit. They will also deny society the benefits of research designed to advance these technologies to further assist infertile couples like the Millers in their attempts to reproduce.

Taken to its logical end, Judge Lawrence's ruling could lead to truly absurd results. For example, physicians treating patients who seek to increase their chances of a healthy pregnancy through preimplantation genetic diagnosis – where fertilized eggs are evaluated for genetic defects and only the healthiest implanted – face the nearly unanswerable question of what to do with the unimplanted fertilized eggs that show signs of a genetic defect. Do these eggs have to be implanted? This, of course, would undercut one of the purposes of preimplantation genetic diagnosis – to avoid a pregnancy that suffers from a genetic defect and thus avoid the possibility of pregnancy termination after traditional prenatal testing such as chorionic villus sampling or amniocentesis.

What if a woman agreed to donate her unused fertilized eggs for research that rendered them ineffective for implantation, and her partner disagreed with her choice. Could her partner sue her for wrongful death? What about a woman who uses an intrauterine birth control device, which can prevent fertilized eggs from implanting in her uterus? Could her partner sue her for wrongful death? What if she is breastfeeding – also an act that can have the effect of preventing a fertilized egg from implanting in her uterus? Would her partner have a cause of action against her?

Judge Lawrence's ruling is legally improper, patently unreasonable and based on scientifically baseless, unenforceable definitions. It should not be permitted to stand.

## CONCLUSION

For the reasons stated in the Brief of Appellant and herein, *amicus curiae*, The American Civil Liberties Union of Illinois, respectfully requests that this Court reverse the trial court ruling.

Respectfully submitted,

A handwritten signature in black ink, reading "Lorie A. Chaiten". The signature is written in a cursive style with a horizontal line underneath.

One of the Attorneys for *Amicus Curiae* The  
American Civil Liberties Union of Illinois

Lorie A. Chaiten  
Leah A. Bartelt  
Roger Baldwin Foundation of ACLU, Inc.  
180 N. Michigan Avenue,  
Suite 2300  
Chicago, Illinois 60601