**No. 23-0727**

**In the Supreme Court of Texas**

CAROLINE ANTOUN,
*Petitioner*,
v.
GABY ANTOUN,
*Respondent*.

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CAUSE NO. 21-5535-367
APPEALED FROM THE 367TH DISTRICT COURT OF
DENTON COUNTY, TEXAS

and

NO. 02-22-00343-CV
FROM SECOND COURT OF APPEALS OF
TEXAS FORT WORTH, TEXAS

# Brief of *Amicus Curiae* American Society for Reproductive Medicine in Support of Respondent


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## IDENTITY AND INTEREST OF AMICUS CURIAE[1]

*Amicus Curiae* the American Society for Reproductive Medicine (ASRM) is the national and international leader for multidisciplinary information, education, advocacy, and standards in medicine and science aimed at addressing infertility. Founded in 1944, ASRM strives to ensure accessible, ethical, and quality medical care for every person. It has more than 9,000 members, including scientists, OB/GYN physicians, and healthcare support personnel and is dedicated to advancing the science and practice of fertility medicine and pursues this mission through educational and research efforts and advocacy on behalf of patients, physicians, and health care providers. ASRM regularly contributes *amicus* briefs on issues important to fertility medicine including advocating for continued safe access to in vitro fertilization (IVF). *See, e.g.*, Br. of *Amicus Curiae* ASRM, *LePage v. Center for Reprod. Med., P.C.*, No. SC-2022-0515 (Ala. Mar. 1, 2024).

ASRM also has a strong presence in the State of Texas. It represents doctors, nurses, and other professionals in Texas who work in fertility medicine. ASRM's affiliate organization, the Society for Assisted Reproductive Technology (SART), has thirty-six member clinics that provide IVF services in Texas. In 2022, these

[1] Per Texas Rule of Appellate Procedure 11(c), counsel for *amicus* ASRM discloses that no fee has been or will be paid for preparing this brief.

clinics provided 33,301 IVF cycles, which ultimately led to the birth of over 7,500 babies in the State.

Fertility clinics and health care providers in Texas and nationwide—most of whom are ASRM members—work closely with patients to support their goals of becoming parents or expanding their families. Not only do they provide access to necessary medical treatments, but they also facilitate important discussions and decisions regarding informed consent and the creation, use, donation, and disposition of embryos during and after IVF treatment.

Petitioner's position, if fully adopted, could impede access to IVF in Texas and also affect the many thousands of Texans who have relied on IVF to establish or grow their families.[2] The lower courts here adhered to the parties' agreement about the future handling of their frozen embryos, also commonly called cryopreserved embryos, created by IVF. Those decisions align with Texas law, and this Court should deny review. Alternatively, if it grants review, this Court should affirm.

[2] *See* CDC, *State-Specific Assisted Reproductive Technology Surveillance, United States, 2021 Data Brief* 10 (2023), https://www.cdc.gov/art/state-specific-surveillance/2021/pdf/State-Specific-ART-Surveillance-2021-Data-Brief-H.pdf (reporting that there were 18,906 assisted-reproduction technology (ART) procedures in Texas in 2021 and 43 ART clinics operated in the state).

## SUMMARY OF ARGUMENT

Because of IVF, millions of individuals have become parents.[3] For many Americans, IVF is the only path to have children because of fertility issues, long-term effects of cancer or other medical conditions, or other obstacles to pregnancy.[4] In Texas alone, many thousands of people rely on IVF each year, with over 7,500 children born from services provided by SART member clinics in the state in 2022. An overwhelming majority of Americans support keeping IVF legal.[5]

IVF involves combining an egg with sperm in a laboratory. If fertilization is successful, the cells of the resulting embryo, referred to in some sources as a "pre-

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[3] In 2021, 86,146 infants born in the U.S.—2.3% of all infants—were conceived through reproductive technology. *Fact Sheet: In Vitro Fertilization (IVF) Use Across the United States*, U.S. Dep't of Health & Human Servs. (Mar. 13, 2024), https://www.hhs.gov/about/news/2024/03/13/fact-sheet-in-vitro-fertilization-ivf-use-across-united-states.html. Overall, "[m]ore than 8 million babies have been born from IVF since 1978." Cleveland Clinic, *IVF (In Vitro Fertilization)*, https://my.clevelandclinic.org/health/treatments/22457-ivf (last visited Apr. 24, 2024).

[4] For example, "[c]ancer treatments, such as chemotherapy, radiation therapy and surgery, can have a significant impact on fertility in both men and women." Sabrina Malhi, *Alabama Embryo Ruling May Have Devastating Effect on Cancer Patients*, Wash. Post (Feb. 25, 2024), https://www.washingtonpost.com/health/2024/02/25/cancer-ivf-alabama-embryos/?_pml=1 (detailing Texas woman's fertility treatments following breast cancer diagnosis); *see also Fact Sheet: In Vitro Fertilization (IVF) Use Across the United States*, *supra* note 3 (noting that nearly 70% of individuals of reproductive age diagnosed with cancer required fertility preservation procedures and services, which is now considered a standard of care).

[5] *See* Kelly Garrity, *Americans Overwhelmingly Support Keeping IVF Legal For Women, Poll Finds*, Politico (Mar. 3, 2024),

embryo," begin to multiply. That embryo "in vitro" (outside a living organism) cannot develop a gestational sac, embryonic pole, or fetal cardiac activity—all of which are precursors to a viable pregnancy—until it has been transferred to the uterus of a woman who is undergoing specific estrogen and progesterone hormonal treatment. Providers take steps to increase the likelihood that a transferred embryo will implant, but they cannot guarantee that will happen. The chance of successful implantation depends on a number of factors, including the woman's age, potential fertility issues, and past successful pregnancy. On average, 20 to 30 percent of transferred embryos will result in the birth of a child.[6]

IVF embryos typically are not created one at a time, nor would it be practical to do so. The egg retrieval process involves the use of drugs to stimulate follicles in the ovary to develop into mature eggs, which can be removed through a surgical procedure and fertilized in a laboratory. After a period of incubation (typically five to seven days), embryos can be frozen and stored in a tank of liquid nitrogen for

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https://www.politico.com/news/2024/03/03/americans-overwhelmingly-support-ivf-legal-women-poll-00144588#; Miranda Nazzaro, *Overwhelming Majority of Americans Support Keeping IVF legal For Women: Poll*, The Hill (Mar. 4, 2024), https://thehill.com/policy/healthcare/4507514-overwhelming-majority-americans-support-keeping-ivf-legal-for-women-poll/.

[6] Mahvash Zargar et al., *Pregnancy Outcomes Following In Vitro Fertilization Using Fresh or Frozen Embryo Transfer*, 25 JBRA Asst. Repro. 570, 570 (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8489809/ (reporting that in a survey of women who underwent IVF, pregnancy was achieved in 19.23% of women who underwent transfer of fresh embryos and 29.62% of women who underwent transfer of frozen embryos).

future use through a process called "cryopreservation." Studies show that transferring frozen embryos rather than fresh embryos leads to higher rates of successful IVF treatments.[7]

In the past, doctors often transferred multiple embryos to a uterus at one time to increase the chances of the patient becoming pregnant. But today most fertility providers transfer only one embryo at a time because it reduces the potential for a multiple pregnancy, which is higher risk to the patient and involves increased complications and more premature births. Cryopreservation helped enable this shift in standard of care. If the first embryo transfer is unsuccessful or a couple would like to have another child, that couple may attempt pregnancy again through transfer of an embryo that has been stored, without having to incur all the expenses, medical risks, and other burdens of repeating the entire egg retrieval and fertilization process.

Because patients may have more frozen embryos than they ultimately choose to transfer, and it is costly and unrealistic to store frozen embryos indefinitely, fertility providers commonly explain to patients the freezing process and the future options concerning their frozen embryos. If a couple chooses to freeze one or more embryos, providers typically require that before beginning IVF, they decide what they wish to do with their remaining frozen embryos in the event one or both of them dies or becomes incapacitated, or they separate or divorce. Patients will then sign

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[7] *See id.*

an agreement describing how they want providers to handle their frozen embryos in various scenarios. These agreements give patients control over the disposition of their embryos and honor patients' choices and autonomy on how they would like to handle their frozen embryos in the future. They also provide direction to fertility clinics and reduce the likelihood of disputes and litigation. These agreements are standard and widespread in the U.S. and Texas.[8]

Here, Petitioner and Respondent agreed before beginning the IVF process what would happen in the event they divorced. Resp't Merits Br. at 14. When the parties subsequently divorced, the trial court—consistent with courts in Texas and many other states that have encountered this situation—enforced the parties' agreement addressing their frozen embryos. *See Antoun v. Antoun*, No. 02-22-00343-CV, 2023 WL 4501875, at *2 (Tex. App.—Fort Worth July 13, 2023, pet. filed). Petitioner now asks this Court to hold that the parties' agreement is unenforceable because a frozen embryo is a legal "person," she has protected "parental rights" over frozen embryos, and a child custody framework must be applied. *See* Pet'r Merits Br. at 25–32, 36–62; Pet'r Reply Br. at 4–9. The Court should reject her position for several reasons.

[8] Several states have enacted laws governing agreements on the disposition of frozen embryos. *See e.g.*, Fla. Stat. Ann. § 742.17; Mass. Gen. L. Ann. 111L § 4; N.J. Stat. 26:2Z-2(b).

First and most importantly, a frozen embryo is not a legal "person" under a plain reading of Texas laws, and as such, parents' rights over the care and custody of their *children* do not apply to frozen embryos stored at a facility. Granting "personhood" status to a frozen embryo would upend IVF treatment in the State of Texas. The increased costs and liability risks would mean that fertility clinics in the State may no longer allow patients to freeze their embryos, despite that being the safest and most effective way to pursue IVF. And by disallowing parties from voluntarily contracting about the future handling of their frozen embryos, the Court would be contravening Texas's public policy of protecting and promoting IVF and respecting patients' choice and autonomy.

*Amicus* therefore asks that this Court deny review. Alternatively, if it grants review, this Court should reject the theory that a frozen embryo outside of a uterus is a legal "person" and affirm the lower courts' decisions enforcing the parties' agreement.

## ARGUMENT

### I. Many Texas Families Rely on In Vitro Fertilization to Have Children and They Expect Their Medical Providers and the Courts to Honor the Decisions They Make with Respect to Their Treatment and Use of Their Embryos.

Every year, many thousands of families seek treatment from fertility providers in Texas. Many patients come to these providers after years of struggling with infertility or after suffering an injury or medical diagnosis, such as cancer, that may

make assisted reproductive technology their best, or only, hope for becoming parents in the future. Often, IVF is the safest and most effective option available. The Texas Legislature has recognized the importance of providing access to these services, and in 2019, they enacted a law *requiring* certain group health plans to provide IVF coverage for patients with a history of infertility due to various medical conditions, including endometriosis, blockage of or surgical removal of one or both fallopian tubes, and low sperm count. *See* Tex. Ins. Code Ann. § 1366.

In Texas, there were around 9,000 pregnancies conceived by assisted reproductive technology (ART) from over 15,000 ART embryo-transfers in 2021.[9] These pregnancies would not have been possible without the support of fertility providers. This does not mean, however, that IVF is a simple or easy process. IVF may involve significant physical, financial, and emotional challenges, and even using best practices and the most current medical knowledge, the desired outcome—a smooth pregnancy and healthy baby—is not guaranteed.

Fertility providers are committed to working with families to minimize these burdens and to maximize the chances of success, in accordance with the appropriate standard of care, applicable law, and ethical guidelines. This means, in part, that they carefully explain the process and potential outcomes to all their patients and give the patients the opportunity to make informed decisions related to their

[9] *See* CDC, *supra* note 2.

treatment, consistent with the patients' values and goals, including decisions about the storage and future use of embryos. Infertility treatment and IVF may continue for multiple years, with providers supporting and partnering with families at each stage in the process, from the initial discussion with the family about their needs to the births of one or more babies. As noted above, fertility providers also commonly discuss with patients that before beginning IVF, a couple should decide what to do with any frozen embryos in the event one or both of them dies, becomes incapacitated, or they separate or divorce.[10] Patients, in turn, usually sign agreements about the future handling of frozen embryos in the event of death, incapacitation, separation, or divorce.

Once a patient has been fully informed of their options and chooses to pursue IVF, the next step involves the use of medication to stimulate the patient's ovaries to develop multiple oocytes or eggs. After carefully monitoring the patient via laboratory testing and ultrasound, mature eggs are surgically removed.

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[10] IVF clinics' consent forms generally explain cryopreservation and request that patients decide how they would like to handle their frozen embryos in the future. *See, e.g.*, *Informed Consent for Assisted Reproduction: Intracytoplasmic Sperm Injection Assisted Hatching Embryo Freezing*, Dallas IVF 13, https://media.dallasivf.com/ivf-consent-forms.pdf (last visited Apr. 24, 2024); *MGH Fertility Center In Vitro Fertilization Process, Risk, and Consent*, MGH Fertility Ctr., https://www.massgeneral.org/assets/mgh/pdf/obgyn/fertility/consent-forms/base-ivf-consent-4.6.2020-kwl3.pdf (last visited Apr. 24, 2024); *Informed Consent for Assisted Reproduction*, Nw. Med., Ctr. for Fertility & Reprod. Med. (Mar. 6, 2020), https://fertility.nm.org/uploads/1/2/7/0/127099700/b2a._informed_consent_for_assisted_reproduction_7.5.19.pdf.

Providers typically retrieve between six and sixteen eggs, but the actual number of usable eggs depends on various factors, including the patient's age and health conditions. The eggs are then fertilized with sperm from the patient's partner or a donor. Not all eggs that are retrieved will be suitable for fertilization or will develop once fertilized. This is not necessarily the result of any particular health problem that a patient may have or problem caused by the provider—it is simply the reality that many eggs have genetic defects, or for other reasons will not develop into an embryo under any conditions.[11] This is true in nature as well, as many naturally conceived embryos will be lost before implantation or through a miscarriage, which, in most cases, is due to a chromosomal abnormality.[12] If fertilization is successful, the resulting embryo undergoes a period of incubation for approximately five to seven days, typically until they reach the blastocyst phase

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[11] *See* Columbia Univ. Irving Med. Ctr., *Study Finds Why Many IVF Embryos Fail to Develop* (2022), https://www.cuimc.columbia.edu/news/study-finds-why-many-ivf-embryos-fail-develop (describing peer-reviewed published study addressing failure of embryos to develop after fertilization because of chromosomal abnormalities and finding that "most of these mistakes are due to spontaneous errors in DNA replication in the earliest phase of cell division").

[12] Allen J. Wilcox et al., *Preimplantation Loss of Fertilized Human Ova: Estimating the Unobservable*, 35 Human Reprod. 743, 743 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8287936/ ("An estimated 40 to 50% of fertilized ova fail to implant."); ASRRM, *Evaluation and Treatment of Recurrent Pregnancy Loss: A Committee Opinion* (2012), https://www.asrm.org/practice-guidance/practice-committee-documents/evaluation-and-treatment-of-recurrent-pregnancy-loss-a-committee-opinion-2012/ ("Clinically recognized pregnancy loss is common, occurring in approximately 15–25% of pregnancies.").

when the embryo is made up of a hollow ball of cells.[13] At that point, an embryo may be transferred to the patient's uterus, or the embryos may be cryopreserved, or frozen, for future use.[14]

The IVF process is time consuming and involves physical and emotional burdens for patients. The medications necessary to stimulate ovulation and maturation of the eggs, and the egg retrieval process, all have potential risks and side effects. Given these risks and the toll on patients, fertility providers try to minimize the number of egg retrieval cycles that they must perform. Multiple retrievals may be necessary in some cases, but this is generally because of an insufficient number of eggs or because the available eggs or embryos are not suitable for transfer.

Cryopreservation helps minimize the burdens on patients by reducing the number of retrievals and ensuring that the embryos are transferred when they have the highest likelihood of resulting in a successful pregnancy. Although eggs and

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[13] *In Vitro Fertilization (IVF)*, Texas Children's, https://www.texaschildrens.org/departments/family-fertility-center/vitro-fertilization-ivf (last visited Apr. 30, 2024).

[14] Caroline A. Harman, *Comment: Defining the Third Way – The Special-Respect Legal Status of Frozen Embryos*, 26 Geo. Mason L. Rev. 515, 519–520 (2018) (citing *Embryo Storage Costs*, Reprotech Ltd., https://reprotech.com/embryo-storage-costs/ (last visited Apr. 30, 2024)).

sperm may also be cryopreserved separately, frozen eggs are less likely to survive the thawing process than a frozen embryo.[15]

Once the patient is ready, as determined by clinical testing, ultrasound, and hormonal treatment, an embryo is transferred to the patient's uterus. In accordance with practice guidelines, only one embryo is transferred in most cases because of the health risks to the patient and potential complications and premature births associated with a multiple pregnancy. Again, while fertility providers and their patients do everything in their power to maximize the likelihood of a pregnancy, there are a number of reasons why the embryo may not implant or why, after implantation, the patient may experience a miscarriage. Despite improvements in technology, the odds of carrying a pregnancy to term following a single IVF cycle is approximately 51 percent for women under 35 and less than 50 percent for women over 35.[16] Overall success rates with IVF vary with the age of the patient and a variety of other factors. But it is often impossible to pinpoint why, for any particular patient, one transferred embryo successfully implants and goes on to develop into a healthy baby, while, for another patient, multiple embryos that appeared to have

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15 Jacqueline R Ho et al., *A Comparison of Live Birth Rates and Perinatal Outcomes between Cryopreserved Oocytes and Cryopreserved Embryos*, 34 J. of Assisted Reprod. & Genetics 1359, 1362 (2017).

16 *See 2019 Assisted Reproductive Technology, Fertility Clinic and National Summary Report*, CDC 29 (2019), https://archive.cdc.gov/www_cdc_gov/art/reports/2019/pdf/2019-Report-ART-Fertility-Clinic-National-Summary-h.pdf.

potential for successful development do not implant despite several transfer attempts.

Many couples who try to conceive "naturally" experience the same types of uncertainty. Despite doing all the "right" things, couples may spend months or years trying to have a child. The reasons that they may not conceive or have a successful pregnancy are often the same reasons that a couple undergoing the IVF process may not conceive—the egg or sperm may not be suitable for fertilization, the embryo may not develop appropriately, or the embryo may fail to implant. The goal of IVF is to increase the likelihood of "success" at each step in the process, but, unfortunately, a healthy pregnancy is never guaranteed, regardless of the method used.

Fertility providers recognize the extensive physical and emotional toll that the IVF process may have on families, and they are committed to open and ongoing communication about the medical procedures and difficult decisions that must be made during this process. Providers understand that these decisions have ethical and spiritual implications for many families. They seek to share as much information as possible to facilitate informed decisions about treatment and the future use of any eggs, sperm, or embryos collected and cryopreserved during the IVF process.

One of the most important things that ASRM does is facilitate the development and publication of Practice Guidance, including Ethical Opinions about

the various aspects of infertility treatment and the complex decisions that providers and patients must make in the course of treatment.[17] These opinions serve as guidelines and best practices for fertility practices across the country, and they are frequently reviewed and updated by interdisciplinary groups of experts to ensure that they are consistent with the latest scientific evidence and appropriate ethical considerations.

Many of these opinions are designed to support providers as they engage in an informed consent process with their patients. ASRM and its members are committed to giving patients and their families control of these important and difficult decisions. These opinions align with—and support compliance with—Texas laws governing informed consent.[18]

Although the informed consent process and agreements related to the future use of embryos may not always avoid future conflicts, as in this case, ASRM and its members firmly believe that providers, and courts, should honor patients' decisions, including decisions about cryopreservation and the future use of frozen embryos.

In order to manage and make decisions about frozen embryos, fertility providers must be able to rely on the decisions expressed and commitments made by their patients in their written informed consent documents. Of course, couples may

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[17] *See* ASRM, *Ethics Committee Opinions*, https://www.asrm.org/practice-guidance/ethics-opinions/ (last visited Apr. 30, 2024).

[18] *See, e.g.*, Tex. Civ. Prac. & Rem. Code §§ 74.001-74.107.

go back to their providers to discuss and update their plans for treatment and for frozen embryos. But in the event of a future dispute, providers must be able to rely on the written, informed consent of the couple.

## II. The Real World Implications of Petitioner's Position Would Be Devastating to Fertility Clinics In Texas and The Families For Whom IVF Makes Their Dreams of Parenthood Possible.

Recognizing "personhood" status for a frozen embryo, as requested by Petitioner, would upend IVF in Texas.[19] It would call into question the legal validity of IVF patients' informed consent documents and agreements about the future handling of frozen embryos. Fertility providers would face the threat of repeatedly becoming embroiled in legal disputes; such legal limbo would make it increasingly difficult and expensive for clinics to maintain and preserve frozen embryos. Fertility clinics could effectively be required to indefinitely maintain any frozen embryos, or risk opening themselves up to future liability; neither of which is a sustainable option.

Fertility clinics cannot feasibly store frozen embryos forever. After patients complete their treatment, it is standard practice for clinics to handle any remaining

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[19] *See* Monika Jordan, *The Post-Dobbs World: How the Implementation of Fetal Personhood Laws Will Affect In Vitro Fertilization*, 57 UIC L. Rev. 248, 252 (2024) ("In the context of IVF, defining an embryo as a person would restrict IVF access and create conflicting rights and responsibilities between the state, parents, fetus, and/or doctor, which would be difficult to resolve and could lead to unintended and harmful consequences for all parties involved.").

frozen embryos as specified by the patients in their agreements. And in the event that a patient loses contact with the clinic, fails to respond to efforts to contact them, and stops paying storage fees for their frozen embryos without further instruction to the clinic, clinics' standard practice would be to discard or destroy the frozen embryos. This practice aligns with patients' interests. Many patients do not want their embryos cryopreserved indefinitely, and, after one or more pregnancies or after determining they'll be unable to achieve a successful pregnancy, they may not want to, or be physically able to, continue with additional transfers. In addition, the unfortunate reality is that cryopreservation is expensive, with storage fees ranging from $350 to $1,000 per year for the embryos retrieved from one cycle, and it is not feasible for patients or clinics to pay these costs indefinitely.[20] The costs would increase exponentially as increasing numbers of embryos are stored.

A ruling that a frozen embryo is a "person" under Texas law would inject untenable uncertainty into whether and on what terms IVF clinics can continue to operate in this State.[21] Even if a married couple consents to discarding their frozen

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[20] *Embryo Storage Costs*, Reprotech Ltd., https://reprotech.com/embryo-storage-costs/ (last visited Apr. 30, 2024).

[21] Fertility providers and clinics are protected from criminal liability for IVF-related medical procedures. *See* Tex. Penal Code Ann. § 19.06 (carving out an exception from criminal liability for "a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent as part of an assisted reproduction" including IVF). If this Court rules that frozen embryos are "persons," there are uncertainties on whether this carveout would protect providers

embryos, a clinic may hesitate to respect that couple's choice, which runs counter to providers' ethical duties of honoring patients' choice and autonomy.

Indeed, no rational medical provider would offer services for creating and maintaining frozen embryos if doing so would require them to maintain such frozen embryos indefinitely, or risk getting embroiled in custody battles despite signed agreements aimed at avoiding such disputes. Patients also may be directed to detail in their wills who will shoulder the burden of paying storage costs for frozen embryos forever.

These logistical challenges and liability concerns may ultimately lead providers to decide that the use of cryopreservation is legally, financially, and logistically untenable. If access to cryopreservation becomes unavailable, patients using IVF have two remaining options; neither of them advisable. The first is to immediately transfer *all* available embryos to a patient's uterus.[22] However, transferring multiple embryos is linked to higher-risk pregnancies, including greater

in the event a frozen embryo is discarded or destroyed. And because the carveout only protects from criminal liability, fertility providers and clinics would likely fear potential civil liability if a frozen embryo is discarded or destroyed.

[22] *In Vitro Fertilization (IVF)*, Mayo Clinic, https://www.mayoclinic.org/tests-procedures/in-vitrofertilization/about/pac-20384716 (last visited Apr. 24, 2024).

risk of pre-term delivery and long-term complications associated with prematurity, so this is medically contraindicated.[23]

The second option is to fertilize only one egg at a time. But that would make IVF much more burdensome, risky, expensive, and less effective for patients. Even using today's best practices and most advanced scientific knowledge, the odds of a successful IVF-conceived pregnancy and birth from a single embryo transfer are less than 50 percent for most patients.[24] And if only one embryo was created in an IFV cycle and a patient does not become pregnant, she will need to undergo multiple rounds of egg retrieval and hormone therapy, which can involve serious complications (and huge financial outlays).[25] It is safer and more effective for a woman going through IVF to only undergo egg retrieval once (if possible) and to use cryopreservation to preserve embryos for future transfers.

We recently saw what happens when a state's highest court rules, as Alabama's did, that embryos created through IVF and existing only in a frozen state

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[23] *Complications of Multiple Pregnancy*, Johns Hopkins Med., https://www.hopkinsmedicine.org/health/conditions-anddiseases/staying-healthy-during-pregnancy/complications-of-multiplepregnancy (last visited Apr. 24, 2024).

[24] *See generally* CDC, *supra* note 16 (reporting a 50.5% average embryo to live birth success rate).

[25] *Prevention and Treatment of Moderate and Severe Ovarian Hyperstimulation Syndrome: A Guideline*, ASRM, 106 Fertility & Sterility 1634, 1634 (2016), https://www.fertstert.org/article/S0015-0282(16)62781-4/pdf (discussing prevention and treatment of ovarian hyperstimulation syndrome, a complication associated with IVF).

outside of a uterus are "children."[26] *See LePage v. Center. for Reprod. Med., P.C.*, No. SC-2022-0515, 2024 WL 656591, at *1 (Ala. Feb. 16, 2024). After that ruling, the three largest fertility clinics in Alabama paused IVF treatments due to the risk of potential liability.[27] Following intense public outcry and backlash against the ruling, the Alabama Legislature passed a bill granting civil and criminal immunity for IVF service providers and receivers.[28] But uncertainty remains. At least one clinic has continued to halt IVF services because it believes the new law does not sufficiently protect fertility providers.[29] If this Court holds that a frozen embryo is a legal

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[26] *See* Joshua Sharfstein, *The Alabama Supreme Court's Ruling on Frozen Embryos*, Johns Hopkins: Bloomberg Sch. of Public Health (Feb. 27, 2024), https://publichealth.jhu.edu/2024/the-alabama-supreme-courts-ruling-on-frozen-embryos; Susan Crockin & Francesca Nardi, *Alabama Supreme Court Rules Frozen Embryos are "Unborn Children" and admonishes IVF's "Wild West" Treatment*, ASRM, https://www.asrm.org/news-and-events/asrm-news/legally-speaking/frozen-embryo-destruction-and--potential-travel-restrictions-for-surrogacy-arrangements2/ (last visited Apr. 24, 2024); Dan Rosenzweig-Ziff, *Alabama Supreme Court Rules Frozen Embryos are Children, Imperiling IVF*, Wash. Post (Feb. 20, 2024), https://www.washingtonpost.com/politics/2024/02/19/alabama-supreme-court-embryos-children-ivf/.

[27] Nomia Iqbal & Chloe Kim, *Alabama Clinics Pause IVF Treatments After Frozen Embryo Ruling*, BBC News (Feb. 22, 2024), https://www.bbc.com/news/world-us-canada-68373901.

[28] *See* S.B. 159, Reg. Session (2024), https://legiscan.com/AL/bill/SB159/2024; *see also* Liz Baker, et al., *Alabama Governor Signs IVF Bill Giving Immunity To Patients and Providers*, NPR (Mar. 6, 2024), https://www.npr.org/2024/03/06/1235907160/alabama-lawmakers-pass-ivf-immunity-legislation.

[29] Lauren Mascarenhas & Isabel Rosales, *Alabama Clinics Resume Treatment under New IVF Law, But Experts Say It Will Take More Work to Protect Fertility Services*, CNN (Mar. 7, 2024), https://www.cnn.com/2024/03/06/us/alabama-ivf-fertility-protection/index.html.

"person," Texas fertility clinics will similarly be thrown into legal limbo and may be forced to stop providing IVF services.

Such a ruling also would impact current patients in Texas. Patients would be uncertain if their autonomy to make their own choices about the future handling of their frozen embryos will be respected. If the Court refuses to enforce contracts governing the future handling of the parties' frozen embryos, couples may be concerned that other IVF-related treatment decisions may not be honored. That, in turn, may cause some couples to hesitate before seeking IVF treatment if they cannot decide *ex ante* who will control (or how clinics should handle) their frozen embryos in the event of divorce, death, or incapacitation, or when they have decided to no longer pursue pregnancy.

Finding that courts must use a "child custody" framework for frozen embryos, as requested by Petitioner, rather than enforcing patients' valid agreements, would likely create unnecessary litigation and be ill-suited for resolving the dispute of who should own and control the frozen embryos. In short, Petitioner's position, if adopted, would be devastating to fertility clinics and Texans who have relied on IVF, or may need to do so in the future, to establish or grow their families.

## III. Upholding Valid Agreements About The Future Handling Of Frozen Embryos Aligns with Texas's Public Policy Of Supporting IVF and The Approach Taken By Most State Courts.

Allowing patients to voluntarily enter into an agreement governing how to handle frozen embryos in the event of divorce, death, or other events aligns with Texas's public policy and follows the approach taken by a majority of states to confront this issue.

For starters, Texas statutes reflect a legislative intent of protecting and promoting IVF. *See, e.g.*, Tex. Penal Code Ann. § 19.06 (carving out an exception from criminal liability for "a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent as part of an assisted reproduction" including IVF); Tex. Ins. Code Ann. § 1366 (requiring certain group health plans to provide IVF coverage for patients with a history of infertility due to various medical conditions, including endometriosis, blockage of or surgical removal of one or both fallopian tubes, and low sperm count); Tex. Fam. Code Ann. § 160.102(2) (defining "assisted reproduction" as "a method of causing pregnancy other than sexual intercourse," including "in vitro fertilization and transfer of embryos"); *see generally Amici* Tex. Right to Life Br. at 21 (noting "IVF is legal in Texas").

In *Roman v. Roman*, a Texas appellate court correctly acknowledged that Texas public policy permits an agreement governing how to handle frozen embryos,

before implantation, in the event of a divorce. *See* 193 S.W.3d 40, 49–50 (Tex. App.—Houston [1st Dist.] 2006, pet. denied), *reh'g denied*, 552 U.S. 1258 (2008) ("[T]he public policy of this State would permit a husband and wife to enter voluntarily into an agreement, before implantation, that would provide for an embryo's disposition in the event of a contingency, such as divorce, death, or changed circumstances."). There, the appellate court reversed a trial court's judgment for improperly rewriting the husband and wife's agreement "instead of enforcing what the parties had voluntarily decided." *Id.* at 55.

Since that decision, nearly 50 courts and over 100 secondary sources have cited *Roman*. *See Amici* Tex. Right to Life Br. at 40 (noting similar); *see, e.g.*, *Evanston Ins. Co. v. Legacy of Life, Inc.*, 645 F.3d 739, 748 (5th Cir. 2011) (*Roman* "seemed to presume that an embryo is at least in some sense an item of property, in holding that individuals may validly enter into contracts about the future handling of the embryos."); *Jocelyn P. v. Joshua P.*, 302 A.3d 1111, 1133 (Md. App. Ct. 2023) (citing *Roman* as an example of a state court upholding a preexisting agreement on the disposition of frozen embryos in the event of divorce); *Bilbao v. Goodwin*, 217 A.3d 977, 986 (Conn. 2019) (same); *Szafranski v. Dunston*, 993 N.E.2d 502, 507 (Ill. App. Ct. 2013) (same); *In re Marriage of Dahl & Angle*, 194 P.3d 834, 840 (Or. Ct. App. 2008) (same); *Kotkowski-Paul v. Paul*, 204 N.E.3d 66, 77 (Oh. Ct. App. 2022); *Smith v. Smith*, 892 S.E.2d 832, 838 (Ga. Ct. App. 2023) (same); *Jessee v.*

*Jessee*, 866 S.E.2d 46, 53 (Va. Ct. App. 2021) (same); *In re Marriage of Rooks*, 429 P.3d 579, 587 (Co. 2018) (similar).

The Texas legislature has taken no steps since *Roman* was decided to outlaw the IVF consent process or agreements about the future handling of frozen embryos. Indeed, in the nearly 20 years since that decision, "the legislature has done nothing to change the law as pronounced in *Roman*." *Antoun*, 2023 WL 4501875, at *6. That the legislature has not sought to legislatively overturn *Roman* suggests that it has acquiesced its holding. *See id.*; *City of San Antonio v. Tenorio*, 543 S.W.3d 772, 779 (Tex. 2018) (explaining that if the legislature believed a nearly 20-year old decision on statutory construction "imposed unclear requirements," the legislature "could have clarified those requirements"); *see also Moss v. Gibbs*, 370 S.W.2d 452, 458 (Tex. 1963) (concluding it was "now a policy matter" when the legislature had not amended a statute in over 20 years since the Texas Supreme Court interpretated it).

Moreover, permitting agreements about the future handling of frozen embryos promotes contract freedom and respects patients' freedom and autonomy. *See generally Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 481 (Tex. 2017) (noting "Texas's strong public policy favoring freedom of contract"); *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 230 (Tex. 2019) (same). There are significant benefits to allowing patients before beginning IVF, the

choice to decide how they would like to handle frozen embryos in the future, rather than waiting until an event such as divorce occurs. *See Bilbao*, 217 A.3d at 986 (explaining the benefits of permitting preexisting agreements on the disposition of frozen embryos). Such agreements promote serious discussions between couples considering IVF and afford patients time to fully understand their options and choices on how to handle frozen embryos before a potential dispute occurs.

Couples also have the added benefit of being able to make uniquely personal decisions, based on their values, pertaining to their frozen embryos.[30] Considering that decisions surrounding IVF are often very personal, emotionally challenging, and patient-specific, preexisting agreements amplify a patient's voice in telling fertility providers how to treat their frozen embryos in the future. Preexisting agreements also resolve any uncertainty if individuals abandon their frozen embryos, and ensure that facilities are able to satisfy their ethical obligations. And informed consent discussions and agreements reduce the likelihood of misunderstandings and

[30] *See Kass v. Kass*, 91 N.Y.2d 554, 565 (N.Y. 1998) (agreements on the disposition of frozen embryos "minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision"); Allyson Wade, Comment, *Using Contract Law to Resolve Frozen Pre-Embryo Disputes*, 81 Md. L. Rev. 1049, 1068 (2022) ("the contractual approach more appropriately upholds the procreational autonomy of both parties, and recognizes that there are circumstances where the interest in procreation is stronger than the interest in avoiding procreation"); *see also* Ashley Alenick, Note, *Pre-Embryo Custody Battles: How Predisposition Contracts Could Be the Winning Solution*, 38 Cardozo L. Rev. 1879, 1889 (2017).

litigation arising between a couple. But in the event litigation does occur (like in this case), a court doesn't have to second-guess the parties' intentions and instead can refer to a memorialized contract that honors and respects the patients' interests.

Finally, allowing preexisting agreements aligns with the approach taken by a majority of state courts that have confronted the issue. *Smith*, 892 S.E.2d at 838 ("A majority of states that have addressed the issue apply the contractual approach as the first step in deciding a disagreement over pre-embryos in the event of divorce."); *Bilbao*, 217 A.3d at 985–986 (similar); *In re Marriage of Witten*, 672 N.W.2d 768, 776 (Iowa 2003) (similar); *see, e.g.*, *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) ("an agreement regarding disposition of any untransferred preembryos in the event of contingencies" such as divorce "should be presumed valid and should be enforced as between the progenitors"); *In re Marriage of Katsap*, 214 N.E.3d 945, 966 (Ill. App. Ct. 2022) (explaining where "there is no oral or written agreement, the embryo custody issue is properly assessed using the balancing approach"); *In re Marriage of Dahl & Angle*, 194 P.3d at 839 (concluding "the contractual right to possess or dispose of the frozen embryos is personal property that is subject to a 'just and proper' division").[31]

[31] *See also In re Marriage of Rooks*, 429 P.3d at 581 ("a court should look first to any existing agreement expressing the spouses' intent regarding disposition of the couple's remaining pre-embryos in the event of divorce"); *Jocelyn P. v. Joshua P.*, 250 A.3d 373, 402 (Md. Ct. Spec. App. 2021) (similar); *J.B. v. M.B.*, 783 A.2d 707,

## IV. Petitioner's Arguments Are Legally and Factually Flawed.

Petitioner's position—that such agreements are unenforceable—lacks legal and factual support. Although Petitioner and *amici* Texas Right to Life assert that a frozen embryo should be treated as a legal "person" in divorce disputes, *see* Pet'r Reply Br. at 7; *Amici* Tex. Right to Life Br. at 13, 16, 22, 29–32, no state statutory provision supports the position that a frozen embryo is a legal "person." A frozen embryo cannot grow into a living child unless it is successfully thawed, transferred into a uterus, and implants there—and even then, fewer than half of transferred IVF embryos will ultimately result in live births. For that same reason, Petitioner's claim that she has protected "parental" rights over frozen embryos also fails. Parents have protected rights in the care and custody of their *children*, not frozen embryos.

### A. A Frozen Embryo Is Not A Legal "Person" Under Texas Law.

Petitioner and *amici* Texas Right to Life rely on statutory provisions defining "unborn child" to support their position. But those provisions are specifically codified in the pregnancy context and do not apply to frozen reproductive tissue in a lab. The provisions' plain text offers no support for the theory that the legislature

719 (N.J. 2001) (adopting rule "to enforce agreements entered into at the time in vitro fertilization is begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos"); *Kass*, 91 N.Y.2d at 565 (holding agreements between gamete donors regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them).

intended to recognize frozen embryos as "children" in divorce disputes. *See Southwest Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 404 (Tex. 2016) (noting courts should ascertain legislative intent "from the plain meaning of the words used in the statute, if possible"); *see also Antoun*, 2023 WL 4501875, at *6 (explaining the legislature has not "addressed the legal status of frozen embryos or the rights to ownership or possession of frozen embryos upon the divorce of the parties creating the frozen embryos").

In 2003, for example, the Texas legislature passed an act providing criminal penalties and civil remedies for "the death of or injury to an unborn child." Act of May 31, 2003, ch. 822, 2003 Tex. Gen. Laws 2607. As noted by Petitioner and *amici* Texas Right to Life, that Act defines "individual" as "a human being who is alive, including an unborn child at every stage of *gestation* from fertilization until birth." *See* Tex. Penal Code Ann. § 1.07(a)(26) (emphasis added); Tex. Civ. Prac. & Rem. Code Ann. § 71.001(4) (emphasis added). An "unborn child" is therefore statutorily confined to a being in the "gestation" stages. *See* Tex. Penal Code § 1.07(a)(26); Tex. Civ. Prac. & Rem. Code Ann. § 71.001(4).

"Unborn child" cannot simply mean "from fertilization until birth," as claimed by *amici* Texas Right to Life. *See Amici* Tex. Right to Life Br. at 38. That understanding of "unborn child" would render the phrase "stage of gestation" superfluous. But courts "must not interpret the statute in a manner that renders any

part of the statute meaningless or superfluous." *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 390 (Tex. 2014) (internal quotation marks and citation omitted). As such, the phrase "every stage of gestation" being placed before "from fertilization" necessarily limits the meaning of "fertilization" to only fertilizations occurring within "gestation." The undefined term "gestation" receives its "ordinary meaning" at the time the legislature enacted the Act in 2003. *Greater Houston P'ship v. Paxton*, 468 S.W.3d 51, 58 (Tex. 2015) (citation omitted); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 78 (2012) ("Words must be given the meaning they had when the text was adopted."); *see Antoun*, 2023 WL 4501875, at *4 n.3.

At that time, "gestation" was understood to occur *within* a uterus. *See, e.g.*, Stedman's Med. Dictionary (28th Ed. 2006) (defining "gestation" as "pregnancy"); Dorland's Illustrated Med. Dictionary (31st Ed. 2007) (same). "Gestation" has a similar meaning today.[32] *See, e.g.*, Dorland's Illustrated Med. Dictionary (33rd Ed. 2020) (defining "gestation" as "pregnancy" and defining "pregnancy" as "the condition of having a developing embryo or fetus *in the body*") (emphasis added); Merriam-Webster Dictionary (defining "gestation" as "the carrying of young in the

[32] Modern day dictionaries may more accurately reflect the way "gestation" was understood in 2003. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 419 ("Dictionaries tend to lag behind linguistic realities—so a term now known to have first occurred in print in 1900 might not have made its way into a dictionary until 1950 or even 2000.").

uterus" and "gestate" as "to carry in the uterus during pregnancy");[33] Oxford Eng. Dictionary (defining "gestation" as the "action or process of carrying young; the condition of being carried in the womb during the period between conception and birth");[34] The American Heritage Dictionary of the Eng. Language (defining "gestate" as to "carry within the uterus from conception to delivery").[35] Because a frozen embryo is a microscopic group of cells located outside a uterus, it does not fall within a "stage of *gestation* from fertilization until birth." *See* Tex. Penal Code Ann. § 1.07(a)(26); Tex. Civ. Prac. & Rem. Code Ann. § 71.001(4). A frozen embryo is thus not an "unborn child" under the Act. *See Crosstex Energy Servs., L.P.*, 430 S.W.3d at 390 ("We presume the Legislature chose statutory language deliberately and purposefully.").

Nor does the Human Life Protection Act of 2021 support Petitioner's position. Pet'r Reply Br. at 7–8; *see also Amici* Tex. Right to Life Br. at 12, 20, 27. That Act took effect after the Supreme Court issued its judgment overturning *Roe v. Wade* and prohibits abortion with certain exceptions. *See* H.B. 1280, 87th Reg. Session (2021). As with any statutory term, the terms used in this statute must "be read in

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[33] *Available at* https://www.merriam-webster.com/dictionary/gestation; https://www.merriam-webster.com/dictionary/gestate.

[34] *Available at* https://www.oed.com/dictionary/gestation_n?tab=meaning_and_use&tl=true#3121215.

[35] *Available at* https://www.ahdictionary.com/word/search.html?q=gestate.

context." *Crosstex Energy Servs., L.P.*, 430 S.W.3d at 390 (quoting Tex. Gov't Code Ann. § 311.011 on "common and technical usage of words").

The term "unborn child" appears in a chapter of the Texas Code entitled "Performance of Abortion." Tex. Health & Safety Code Ann. §§ 170A.001–170A.007. "Abortion" is defined as "the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child *of a woman known to be pregnant*." *Id.* § 245.002(1) (emphasis added). And "pregnant" in turn is defined as "the female human reproductive condition of having a living unborn child *within the female's body* during the entire embryonic and fetal stages of the unborn child's development from fertilization until birth." *Id.* § 170A.001(3) (emphasis added). In sum, the Act forbids the abortion of an "unborn child" "within the female's body" except in certain circumstances.

The term "unborn child" is exclusively defined in the pregnancy context under the Human Life Protection Act. It has no application to this marital dispute concerning how to handle frozen embryos stored in a tank of liquid nitrogen. *Greater Houston P'ship*, 468 S.W.3d at 58 ("even if an undefined term has multiple meanings, we recognize and apply only the meanings that are consistent with the statutory scheme as a whole"); *see Antoun*, 2023 WL 4501875, at *5 (rejecting

"wife's argument that the cryogenically preserved fertilized embryos are 'unborn children' for purposes of this proceeding").

Frozen embryos plainly do not fit within the statutory definitions of "unborn child." *See generally Kotkowski-Paul*, 204 N.E.3d at 81–82 (ruling a party failed to prove that frozen embryos are legal persons under state law and holding that abortion laws were not implicated because a destruction of non-implanted embryos did not involve termination of a human pregnancy).

That leaves the definition of "child" in the Texas Family Code. The Texas Family Code defines a "child" as "a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes," or "a person over 18 years of age for whom a person may be obligated to pay child support." Tex. Fam. Code Ann. § 101.003(a), (b). Nothing in this definition of "child" indicates that the legislature intended for frozen embryos to be treated as children during divorce disputes.

### B. There Are No Constitutionally Protected Parental Rights Over Frozen Embryos Stored in A Facility.

Acknowledging that Texas statutory support for her claim is "weak," Petitioner also asks this Court to interpret the U.S. Constitution and Texas Constitution as creating "parental" rights over frozen embryos. Pet'r Merits Br. at 27–32, 36, 39–48. That position is unprecedented. Her argument is inherently grounded in the theory that frozen embryos have personhood status, thereby

triggering parents constitutional rights in the care and custody of their *children*. But frozen embryos are not children for the reasons explained above. A frozen embryo cannot grow into a living person *unless* it survives the thawing process, is transferred to a uterus, implants there, develops a gestational sac, embryonic pole, and fetal cardiac activity, and then advances past the point of viability. Nothing in Texas law supports that the legislature intended to recognize a frozen embryo as a legal "person."

In addition, a due process claim under federal and Texas law requires deprivation of a protected liberty interest without constitutionally sufficient procedures. U.S. Const. amend. XIV; Tex. Const. art. I, § 19; *University of Tex. Med. Sch. Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995) (traditionally following "contemporary federal due process interpretations of procedural due process issues"). But no court has found a constitutionally protected liberty interest includes "parental" rights over reproductive tissue in a lab. *Dobbs* did not recognize such an interest. *See generally Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 263 (2022) ("Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth.").[36]

[36] Any due process claim would additionally be deficient. Petitioner has identified no state action. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982); *Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 91 (Tex. 1997). This case involves the enforceability of a *private* agreement.

## CONCLUSION

For the above reasons, *Amicus* ASRM asks that this Court to deny review. Alternatively, if it grants review, this Court should reject the theory that a frozen embryo outside of a uterus is a legal "person" and affirm the lower courts' decisions enforcing the parties' agreement.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this petition complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e), because it has been printed in a conventional typeface no smaller than 14-point except for footnotes, which are no smaller than 12-point. This document also complies with the word-count limitations of Texas Rule of Appellate Procedure 9.4(i), because it contains 7,846 words, excluding any parts exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

*/s/* Maria Wyckoff Boyce
Maria Wyckoff Boyce

## CERTIFICATE OF SERVICE

On May 2, 2024, I electronically filed this Amicus Brief in Support of Respondent with the Clerk of Court using the eFile.TXCourts.gov electronic filing system, which will send notification of the filing to all parties of record.

/s/ Maria Wyckoff Boyce
Maria Wyckoff Boyce