

APPLICATION BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

In the Matter of

Gretel Artavia Murillo y. Otros (“Fecundacion in Vitro”)

v.

COSTA RICA

Case. No. 12.361

Brief of

**THE PROGRAM FOR THE STUDY OF REPRODUCTIVE JUSTICE IN THE
INFORMATION SOCIETY PROJECT AT YALE LAW SCHOOL
AS AMICUS CURIAE**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. As the Commission and this Court have Recognized, The American Convention Protects the Right to Procreative Liberty as a Fundamental Right..... 4

 a. The American Convention Recognizes the Importance of Family to Individual Honor and Dignity and Explicitly Protects Family Privacy and the Right To Raise a Family 5

 b. As the Commission Held in its Opinion, Costa Rica’s IVF Prohibition is an Arbitrary Interference With the Right to Family Privacy and the Right to Raise a Family Protected by the Convention 7

 c. This Court’s Jurisprudence Requires Affirmance of the Commission’s Opinion 9

II. The Commission’s Conclusions Are Supported by United States Case Law Protecting the Right to Procreate as a Fundamental Right of Privacy 18

 a. The U.S. Supreme Court Applies the Highest Standard of Review, the Strict Scrutiny Standard, to the Fundamental Right to Procreate 20

 b. Costa Rica’s IVF Prohibition Fails Strict Scrutiny Review Under the U.S. Constitution Because It is a Complete Ban; It is Not Tailored at All, Much Less Narrowly Tailored 25

III. The Commission’s Conclusions Are Supported by Decisions of The European Court of Human Rights 27

CONCLUSION..... 38

TABLE OF AUTHORITIES

Inter-American Cases

<i>Atala Riffo and Daughters v. Chile</i> , Judgment of the Inter-American Court of Human Rights of February 24, 2012, Case No. 12.503	<i>passim</i>
<i>Fernandez Ortega v. Mexico</i> , Judgment of the Inter-American Court of Human Rights of August 30, 2010	10, 11, 27, 33
<i>Fernandez Ortega et al. v. Mexico</i> , Judgment of the Inter-American Court of Human Rights of May 15, 2011, Case No.	11
<i>Gretel Artavia Murillo y otros (Fecundacion in Vitro) v. Costa Rica</i> , Inter-American Commission on Human Rights of July 29, 2011, Case no. 12.361 Submission to IACHR	<i>passim</i>
<i>Rosendo Cantu et al. v. Mexico</i> , Judgment of the Inter-American Court of Human Rights of May 15, 2011, Case No.	11
<i>Mrs. X & Y v. Argentina</i> , Judgment of the Inter-American Commission on Human Rights of October 15, 1996, Case No. 10.506.....	15, 16, 17

United States Cases

<i>Akron v. Akron Center for Reproductive Health</i> , 462 U.S. 416 (1983).....	26
<i>Arnold v. Board of Education of Escambia County, Ala.</i> , 880 F. 2d 305 (11 th Cir. 1989)	24
<i>Avery v. County of Burke</i> , 660 F. 2d 111 (4 th Cir. 1981)	24
<i>Carey v. Population Services, Int'l</i> , 431 U.S. 678 (1977).....	25
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972)	22
<i>Gonzales v. Carhart</i> , 550 U.S. 124 (2007)	19
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965).....	<i>passim</i>
<i>In re Quinlan</i> , 355 A.2d 647 (1976)	24
<i>Kramer v. Union Free School District</i> , 395 U.S. 621 (1969)	25
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003)	<i>passim</i>
<i>Liftchez v. Hartigan</i> , 735 F.Supp. 1361 (N.D. Ill. 1990)	25, 26
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967)	20

<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923).....	20
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925)	20
<i>Planned Parenthood v. Casey</i> , 505 U.S. 833 (1992)	<i>passim</i>
<i>Rochin v. California</i> , 342 U.S. 165 (1952)	20
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	20,22
<i>Shapiro v. Thompson</i> , 394 U.S. 618 (1969).....	25
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	25
<i>Skinner v. Oklahoma</i> , 316 U.S. 535 (1942)	20,21
<i>Thornburg v. Am. Coll. of Obstetricians & Gynecologists</i> , 476 U.S. 747 (1986), <i>overruled in part on other grounds by Casey</i> , 505 U.S. at 870	19
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997)	19,25

European Court of Human Rights Cases

<i>Costa and Pavan v. Italy</i> , no. 54270/10, Press Release, ECHR 2012	28,29,30,36
<i>Dickson v. United Kingdom</i> [GC], no. 44362/05, ECHR 2007	28,31,37
<i>Evans v. United Kingdom</i> [GG], no. 6339/05, ECHR 2007-I	27,28
<i>RR v. Poland</i> , no. 27617/04, ECHR 2011-IV	33,34,35,37
<i>S.H. and Others v. Austria</i> [GC], no. 57813/00, ECHR 2011	29,30,37
<i>V. C. v. Slovakia</i> , no. 18968/07, ECHR 2011	32,33,35,36

Treaties, Constitutions, Executive Orders, Statutes

American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (<i>entered into force</i> July 18, 1978), Article 1	<i>passim</i>
American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (<i>entered into force</i> July 18, 1978), Article 11	<i>passim</i>
American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (<i>entered into force</i> July 18, 1978), Article 17	<i>passim</i>
European Convention for the Protection of Human Rights and Fundamental Freedoms, <i>signed</i> Nov. 4, 1950, 213 U.N.T.S. 222 (<i>entered into force</i> Sept. 3, 1953), Article 8.....	<i>passim</i>

European Convention for the Protection of Human Rights and Fundamental Freedoms, *signed* Nov. 4, 1950, 213 U.N.T.S. 222 (*entered into force* Sept. 3, 1953),
Article 12 3, 27, 33

European Convention for the Protection of Human Rights and Fundamental Freedoms, *signed* Nov. 4, 1950, 213 U.N.T.S. 222 (*entered into force* Sept. 3, 1953), Article 14..... 3, 27

Presidential Decree No. 24029-S (Feb. 3, 1995) Articles 9-12 4, 18, 19

United States Constitution, Fourteenth Amendment *passim*

Miscellaneous

Amicus Brief of Allard K. Lowenstein International Human Rights Clinic at Yale Law School to the Inter-American Commission on Human Rights, *Ana Victoria Sanchez Villalobos and Others* (Costa Rica), Case No. 12.361..... 17

Pamela Karlan, *Foreword: Loving Lawrence*, 102 Mich. L. Rev. 1447 2003-2004 19

John A. Robertson, *The Right To Procreate and In Utero Fetal Therapy*, 3 J. LEG. MED. 333, 339 (1982)..... 20

INTEREST OF AMICI CURIAE

Amici are scholars with the Program for the Study of Reproductive Justice in the Information Society Project (ISP) at the Yale Law School.¹ The ISP is an intellectual center at the Yale Law School addressing the implications of new information technologies for law and society; the ISP's Program for the Study of Reproductive Justice serves as a national center for academic research on reproductive health issues, including those involving new reproductive technologies. Priscilla Smith, Senior Fellow of the ISP, has a J.D. from the Yale Law School. She conducts research and writes on reproductive rights and privacy law, with a particular focus on information policy and new technologies. Prior to joining the ISP, she litigated numerous cases concerning constitutional rights to liberty, privacy and equality in federal and state courts in the United States, including in the United States Supreme Court, for 13 years. Genevieve Scott, currently a Visiting Fellow and formerly a Resident Policy Fellow at the ISP, has a J.D. from the University of Pennsylvania Law School. She conducts research and writes on reproductive rights with a particular focus on new technologies and intellectual property.

¹ The Fellows participate in this case in their personal capacity; titles are used only for purposes of identification.

SUMMARY OF ARGUMENT

There is a global consensus that the right to procreation and parenthood is an intrinsic human right, central to our sense of dignity and humanity. Whether understood as part of a broader right to privacy, liberty, dignity, or equality, the right to decide to have children and to be free to pursue the exercise of that right is recognized by legal systems across the world as a fundamental, defining feature of human existence. *Amici* are scholars who study and write on the impact of new technologies on fundamental rights. In this case, *amici* argue that State Parties should not be permitted to restrict individuals from availing themselves of new medical technologies to participate in this basic human experience.

In this brief, *amici* offer to the Court evidence of the global recognition of a fundamental right to procreate, supporting the Commission's opinion that Costa Rica's prohibition of *all* In Vitro Fertilization procedures ("IVF Prohibition") violates Articles 11, 17, and 1.1 of the American Convention on Human Rights ("American Convention"). First, we show that the Commission's decision is supported by this Court's jurisprudence on the American Convention's protections for the rights to honor and dignity, the right to protection against arbitrary or abusive interference with private life, including family privacy, the right to raise a family, and the right to exercise these rights free from discriminatory government interference. Second, we examine the jurisprudence of the United States Supreme Court and the European Court of Human Rights (ECHR). The American Convention rights at issue here have textual analogues in the United States Constitution's protections for the rights to liberty and equal protection of the laws and in the European Convention of Human Rights' ("European Convention") protection for the rights to "respect for privacy and family life," the right to marry and "found a family," and the right to be free from discrimination based on status. In addition, we demonstrate that the United States

Supreme Court and the ECHR have interpreted these texts, defining our basic rights as global citizens, to include the right to procreate as a fundamental right. As in the Inter-American system, the rights to liberty, privacy, and to found a family create a protected sphere of privacy and are understood to include the right to make decisions about whether and when to bear and beget a child, as well as the ability to access medical technology to further the exercise of this intrinsically private decision.

Finally, we demonstrate that Costa Rica's IVF prohibition fails to meet the standards applied to State regulation of fundamental rights under all three systems of law. States Parties in all three systems of jurisprudence are only permitted to interfere with the right to procreate under the narrowest of circumstances, and only when taking into account the importance of the right at issue, the nature of the interference, the importance of the interest being regulated, as well as the appropriateness of the particular regulation to serve the interests asserted with the least damage to the right itself. All three systems have disallowed *absolute* prohibitions, such as Costa Rica's IVF prohibition, on the exercise of these most important rights.

As the Commission held, rather than applying a means that is narrowly tailored to serve its claimed interest, Costa Rica has chosen the *most* restrictive means, failing to provide any protection for the interests of infertile couples and rejecting the more carefully tailored regulation in the original Presidential Decree.² A similarly broad-based ban has been held to violate the European Convention and would also fail under the jurisprudence of the U.S. Supreme Court,

² The IVF Ban resulted from a decision of the Supreme Court of Costa Rica to annul Presidential Decree No. 24029-S that had authorized and regulated IVF. See Inter-American Commission on Human Rights, *Gretel Artavia Murillo y otros (Fecundacion in Vitro) v. Costa Rica*, Case No. 12.361 Submission to IACHR (discussing Presidential Decree No. 24029-S authorizing and regulating IVF in Costa Rica). The decree prohibited insemination of more than six ovules, and required that all ovules be deposited in the woman's uterus, and that none could be discarded, eliminated, or preserved for subsequent cycles. The regulations also forbade any genetic manipulation or commercial use of embryos. In March of 2000, the Costa Rican Constitutional Court (Sala Constitucional) ruled that the decree was unconstitutional, finding that embryos are people from the moment of conception and protected by the right to life, and holding that any destruction of any embryos, regardless of intent, violates the right to life). *Ibid.*

because it prohibits exercise of the fundamental right to procreate and is not narrowly tailored to serve a compelling State interest in potential life. In affirming the Commission’s opinion that the IVF prohibition violates the American Convention, this Court would join the global community in condemning this arbitrary and impermissible interference by State Parties with individuals’ ability to fully exercise their rights under the American Convention.

ARGUMENT

I. As the Commission and this Court have Recognized, The American Convention Protects the Right to Procreative Liberty as a Fundamental Right

In its opinion, the Commission concluded that the right to procreative liberty is protected as a fundamental right under the American Convention, and held that Costa Rica’s IVF prohibition violates the right to privacy, the right to found a family, and the right to equality and non-discrimination. The opinion below is supported by the text of the American Convention, as well as previous opinions of the Commission and this Court.

a. The American Convention Recognizes the Importance of Family to Individual Honor and Dignity and Explicitly Protects Family Privacy and the Right to Raise a Family.

The American Convention explicitly protects individual honor and dignity, family privacy, the right to raise a family, and the right to equality and non-discrimination. The obligations of State parties to the American Convention are set forth in Article 1.1. Under Article 1.1, Costa Rica must respect the “rights and freedoms” protected by the American Convention;³ moreover, Costa Rica has accepted an affirmative obligation to ensure all persons

³ Article 1 provides in full: “1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. 2. For the purposes of this Convention, "person" means every human being.”

within its jurisdiction enjoy the “free and full exercise of those rights and freedoms” without discrimination.⁴

The rights to family and privacy established by the American Convention are enshrined in Articles 11 and 17. Article 11 provides that individuals have: 1) the right to the “protection of the law against interference or attacks” on their right to have their “honor respected and ... dignity recognized”; and 2) the right to the “protection of the law against” the “arbitrary or abusive interference with [their] private life, [their] family, [and their] home . . .”⁵ Article 17 establishes the “right of men and women . . . to raise a family” and emphatically praises the family as “the natural and fundamental group unit of society [that] is entitled to protection by society and the state.”⁶

This explicit textual recognition of these rights, as well as Article’s emphasis on equality of rights and the balancing of responsibilities in the marital relationship and as between children,⁷ stresses the central importance of decision-making autonomy and equality in the family to individual dignity. When read together, Articles 11, 17, and 1.1 require States to respect and ensure the free and full exercise of the rights to honor and dignity, to raise a family, and to the protection of the law against “arbitrary or abusive interference with [their] private life, [their] family, [and their] home.”

⁴ *Ibid.*

⁵ ACHR Article 11 provides in full: “ 1. Everyone has the right to have his honor respected and his dignity recognized. 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks.”

⁶ Article 17 provides in full: “1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state. 2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests. 5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock.”

⁷ *See ibid.* at Art. 17, Sections 4 and 5.

b. As the Commission Held in its Opinion, Costa Rica’s IVF Prohibition is an Arbitrary Interference With the Right to Family Privacy and the Right to Raise a Family Protected by the Convention.

As the Commission noted in its decision below (the “Submission”),⁸ one of Article 11’s *fundamental* aims is to prevent States from arbitrarily interfering with the protection of private and family life in a manner that infringes on people’s sphere of privacy.⁹ The Commission declared that this right to protection of private life is made up of several factors, all of which are essential to protecting human dignity, including “the ability to develop one’s own personality and aspirations, to determine one’s own identity and to define one’s own personal relationship,”¹⁰ the ability to maintain “physical and psychological integrity,” and the ability “to establish and develop relationships with people.”¹¹ The Commission determined that a couple’s decision to have biological children falls within Article 11’s sphere of privacy because it is integral to one’s autonomy, identity and dignity.¹²

Moreover, the Commission determined that when Article 11 is read together with Article 17, the rights to privacy, personal autonomy and dignity under the American Convention encompass the right to create a family, including the right to become a biological parent and the right to exercise that right without arbitrary or abusive interference.¹³ The right to found a family “is non-derogable in even the most extreme circumstances,”¹⁴ and the essence of the right

⁸ Inter-American Commission on Human Rights, *Gretel Artavia Murillo y otros (Fecundacion in Vitro) v. Costa Rica*, Case no. 12.361, Submission to IACHR.

⁹ *Ibid.* at Para. 70.

¹⁰ *Ibid.* at para 72.

¹¹ *Ibid.* at para 73.

¹² *Ibid.* at para 75-76. In identifying these aspects of privacy and dignity, the Commission drew on jurisprudence from the European Court of Human Rights. *See also infra* Section III. These concepts also have their corollaries in the right to privacy and liberty under the U.S. Constitution which protects dignity, self-definition, decisional autonomy and bodily integrity. *See infra* Section II; *see also Planned Parenthood v. Casey*, 505 U.S. 833 (1992).(liberty; privacy); *ibid.* (bodily integrity, decisional autonomy); *Lawrence v. Texas*, 539 U.S. 558, 565 (2003) (self-definition) (quoting *Casey*, 505 U.S. at 852).

¹³ *Ibid.* at para 82; *see also* Articles 11 & 17.

¹⁴ *Ibid.* at para 78,

may not be impaired.¹⁵ The Commission recognized that for those families who are unable to bear children without access to IVF, Costa Rica's IVF prohibition is an outright ban on the right to create biological children.¹⁶ Therefore, the State was required to establish that the prohibition was not arbitrary.¹⁷

In determining whether the IVF prohibition constitutes a permissible interference with Articles 11 and 17, the Commission first recognized the profound impact that the IVF prohibition has on infertile couples in Costa Rica. The IVF prohibition is harmful to and/or interferes with personal identity, individual autonomy, the ability to choose to have children, the ability to control one's reproductive capacity, and the ability to develop one's life plan.¹⁸ Given its devastating impact on infertile couples who desire biological children, the Commission determined that the IVF prohibition fails the American Convention's "necessity and proportionality" test because there are numerous less restrictive means to achieve the State's claimed purpose of protecting the life of an embryo.¹⁹

Perhaps most devastating to the State's position, the original Presidential Decree No. 24029-S regulating IVF employed significantly less restrictive means to achieve the State's claimed purpose. The Decree balanced the Article 11 and 17 rights of infertile couples to dignity, autonomy, family privacy and to found a family with the right to life of an embryo by: a) allowing IVF using no more than six ovules; b) requiring use of all inseminated ovules; c) prohibiting any inseminated ovules from being discarded, eliminated or preserved for use in subsequent cycles; and d) forbidding genetic manipulation or commercial use of embryos.²⁰ The

¹⁵ *Ibid.* at para. 80.

¹⁶ *Ibid.* at para. 113.

¹⁷ *Ibid.* at 83-84.

¹⁸ *Ibid.* at para 113-114.

¹⁹ *Ibid.* at para 110.

²⁰ Presidential Decree No. 24029-S (Feb. 3, 1995) Articles 9-12.

Commission determined that in contrast to that more narrowly tailored regulation, the total prohibition on IVF “constitutes an arbitrary interference and an incompatible restriction with the American Convention for the exercise of the rights to a private and family life.”²¹

c. This Court’s Jurisprudence Requires Affirmance of the Commission’s Opinion.

This Court’s jurisprudence recognizes that the American Convention prevents governmental interference into intimate personal decisions and supports the Inter-American Commission’s (“the Commission”) opinion that the IVF prohibition violates the American Convention.

In *Fernandez Ortega et al., v. Mexico*, this Court held that the rights to privacy, personal integrity, and dignity extend to individuals’ right to make autonomous decisions that impact their physical, psychological, and moral integrity, including decisions regarding their intimate relations and sexual life.²² As this Court explained:

the concept of private life is a wide-ranging term, which cannot be defined exhaustively, but includes, among other protected forums, sexual life, and the right to establish and develop relationships with other human beings.²³

In that case, this Court found that the forcible rape of an indigenous woman in Guerrero by armed Mexican soldiers occupying that area was a violation of her right to privacy under Article 11, in relation to Article 1.1.²⁴ Noting that the provision entitled “Right to Privacy” is entitled “Protection of Honor and Dignity,” this Court found that the rape of Ms. Fernandez “violated essential aspects and values of her private life, represented an intrusion in her sexual life, and

²¹ Inter-American Commission on Human Rights, *Gretel Artavia Murillo y otros (Fecundacion in Vitro) v. Costa Rica*, Case no. 12.361, Submission to IACHR, para. 111.

²² *Case of Fernandez Ortega v. Mexico*, Judgment of the Inter-American Court of Human Rights of August 30, 2010, para. 131.

²³ *Ibid.* at para. 129.

²⁴ *Ibid.*

annulled her right to decide freely with whom to have intimate relations, causing her to lose total control over these most personal and intimate decisions, and over her basic bodily functions.”²⁵

This Court further recognized that these rights are intertwined. Interference with bodily integrity can harm dignity and deny decisional autonomy. For example, this Court quoted the Commission’s opinion below, which found that “the rape affected the physical, psychological, and moral integrity of the victim, breaking her dignity,” and that “rape invades one of the most intimate spheres of an individual’s life, invading her physical and sexual space, and taking away her ability to make autonomous decisions about her own body.”²⁶ Upholding the Commission’s opinion, this Court found that Mexico was in violation of the rights to “personal integrity, personal dignity and private life embodied in Article 11, in relation to Article 1.1.”²⁷ Subsequent requests by the state of Mexico to reinterpret the judgment and a parallel case against Mexico were denied.²⁸

As in *Fernandez Ortega*, Costa Rica’s IVF prohibition represents an intrusion on both autonomous decision-making *and* bodily integrity. It violates the American Convention’s protection of the rights to privacy, dignity, and equal application of the law recognized by this Court. The right to establish and develop relationships with other human beings set out in *Fernandez Ortega et al., v. Mexico* includes the right to decide freely whether, when, and by what means to have a child, and to avail oneself of available medical technology to exercise that right. Costa Rica’s IVF prohibition prevents individuals from controlling personal and intimate decisions regarding their ability to become parents and define their life’s course. Such a

²⁵ *Ibid.*

²⁶ *Ibid.* at para. 91.

²⁷ *Ibid.* at para. 131.

²⁸ See *Case of Fernandez Ortega et al. v. Mexico*, Judgment of the Inter-American Court of Human Rights Decision of May 15, 2011; *Rosendo Cantu et al. v. Mexico*, Judgment of the Inter-American Court of Human Rights of May 15, 2011.

restriction invades the most intimate spheres of a person's life, preventing individuals from making autonomous decisions about their bodies and reproduction in accord with their physical, psychological, and moral integrity. In so doing, Costa Rica has violated Article 11, in relation to Article 1.1, by infringing upon the personal integrity, personal dignity, and private life of individuals who are otherwise unable to conceive children, a discriminatory state interference into a protected zone of private life with indisputable psychological and moral effects on its citizens' sense of dignity and honor.

This Court reaffirmed the wide-range of the right to privacy and equal respect for rights enshrined in Articles 11 and 1.1 in *Atala Riffo and Daughters v. Chile*. In that case, the applicant, Ms. Atala, alleged international responsibility of the State for discriminatory treatment and arbitrary interference in private and family life due to the State's discriminatory consideration of her sexual orientation in the legal process that resulted in the loss of care and custody of her daughters.²⁹ This Court first described the principle of equality enshrined in Article 1.1, once again noting the relationship between rights protected by the American Convention, and explaining the intrinsic connection between equal respect for rights and the rights to family and dignity:

The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified.³⁰

²⁹ *Case of Atala Riffo and Daughters v. Chile*, Judgment Inter-American Court of Human Rights of February 24, 2012, no. para 3.

³⁰ *Ibid.* at para. 79 (citing Advisory Opinion OC-4/84, January 19 1984. Series A No. 4, para. 53).

This Court held that States must abstain from any action that directly or indirectly results in such discrimination, and States have a positive obligation “to take affirmative measures to reverse or change discriminatory situations that exist in their societies.”³¹

When reviewing the State’s consideration of sexual orientation as a factor pertaining to Ms. Atala’s suitability as a parent, this Court found that Ms. Atala had been subject to stereotyping in violation of Article 1.1. Quoting the Commission’s decision, this Court upheld the finding that “the State’s interference in the private life of Karen Atala was arbitrary, since the custody decision was based on discriminatory prejudices driven by her sexual orientation.”³² This Court further quoted the Commission’s determination that the State “arbitrarily interfered in [Ms. Atala’s] autonomy to make decisions on her personal life” because “the Supreme Court of Justice, based on the expression of her sexual orientation, deprived her of the custody of her daughters and a life in common with them, a fundamental aspect of her life plan.”³³ Accordingly, this Court upheld the Commission’s opinion, finding that Ms. Atala had been subject to stereotyping in violation of Article 1.1.

This Court further held that the State’s action was a violation of Article 11, admonishing that the sphere of privacy afforded to intimate private and family life is unassailable:

Article 11 of the Convention prohibits all arbitrary or abusive interference in a person’s private life, and encompasses various spheres of the intimate realm as well as the private lives of their families. In that regard, the Court has held that the realm of privacy is exempt and immune from abusive or arbitrary intrusion or aggression by third parties or by the public authorities.³⁴

The Court also emphasized the expansive nature of the privacy right encompassed by Article 11, stating:

³¹ *Ibid.* at para. 80.

³² *Ibid.* at para. 156.

³³ *Ibid.*

³⁴ *Ibid.* at para. 161

[p]rivacy is an ample concept that is not subject to exhaustive definitions and includes, among other protected realms, the sex life and the right to establish and develop relationships with other human beings. Thus, privacy includes the way in which the individual views himself and to what extent and how he decides to project this view to others.³⁵

With regard to Article 17 of the American Convention, this Court held that the right to be protected against arbitrary or unlawful interference with his or her family “is implicitly a part of the right to protection of the family.”³⁶ Accordingly, this Court held that the custody proceeding that resulted in loss of parental rights was a violation of Article 11 on the grounds that it arbitrarily interfered in the applicant’s private life, given that “sexual orientation is part of a person’s intimacy” and was irrelevant to her suitability as a parent.³⁷

Similarly, Costa Rica’s prejudicial decision discriminatorily impacts those unable to procreate without the use of medical technology and violates the right to create a family. By prohibiting IVF, Costa Rica has deprived infertile individuals who could otherwise bear biological children of the right to be a parent, an arbitrary interference in their intimate life plans that is not relevant to their suitability as parents. This arbitrary interference violates Articles 11 and 17, in relation to Article 1.1. Just as Ms. Atala’s family unit was “broken up by decisions based on prejudice,”³⁸ so too are applicants barred from achieving their concept of family. Included in an individual’s expression of self is not only his or her sexual status, but the ability to become, and status as, a parent. Procreative liberty is deeply linked to the right to establish and develop relationships with other human beings; it involves the freedom to establish and develop

³⁵ *Ibid.* at para. 162.

³⁶ *Ibid.* at 170 (noting that the right to family is also explicitly recognized by Articles 12.1 of the Universal Declaration of Human Rights, V of the American Declaration of Rights and Duties of Man, 17 of the International Covenant of Civil and Political Rights, and 8 of the European Human Rights Convention).

³⁷ *Ibid.* at 167.

³⁸ *Case of Atala Riffo and Daughters v. Chile*, Judgment Inter-American Court of Human Rights of February 24, 2012, para. 158.

among the most sacred of relationships, that between a parent and child.³⁹ Costa Rica has intruded upon “a fundamental aspect of [applicants’] life plan”⁴⁰ in violation of their rights to privacy and to found a family protected by the American Convention.

The Commission has also found that the rights to privacy and family include rights to bodily integrity that are central to an individual’s existence in society, so basic that they are non-derogable in even extreme circumstances. In *Mrs. X. v. Argentina*, the Commission found a violation of Articles 11 and 17 where the government of Argentina subjected women visitors to a prison facility to vaginal inspections each time they visited a family member.⁴¹ The Commission opined that “[t]he right to privacy guaranteed by [Article 11] covers, in addition to the protection against publicity, the physical and moral integrity of the person.”⁴² Explaining that the object of Article 11, as well as the entire American Convention, “is essentially to protect the individual against arbitrary interference by public officials,”⁴³ the Court reaffirmed that “[t]he right to privacy guarantees that each individual has a sphere into which no one can intrude, a zone of activity which is wholly one’s own. In the sense, various guarantees throughout the American Convention which protect the sanctity of the person create zones of privacy.”⁴⁴

Based upon this legal framework, the Commission held that the vaginal inspections violated the applicants’ rights to dignity, privacy, and family.⁴⁵ Noting that the Mrs. X and her daughter’s case involved a particularly intimate aspect of a woman’s private life, the Commission found that the search procedure was likely to provoke “intense feelings of shame

³⁹ Inter-American Commission on Human Rights, *Gretel Artavia Murillo y otros (Fecundacion in Vitro) v. Costa Rica*, Case no. 12.361, Submission to Inter-American Court of Human Rights

⁴⁰ *Ibid.* at 156.

⁴¹ *Case of Mrs. X & Y v. Argentina*, Judgment of the Inter-American Commission on Human Rights of October 15, 1996, Case No. 10.506, para. 1.

⁴² *Ibid.* at para. 89.

⁴³ *Ibid.* at para. 91.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* at paras. 93-94.

and anguish in almost all persons who are submitted to it.”⁴⁶ The Commission further held that the harm was not limited merely to a infringement on the right to family, but found that “Mrs. X and her daughter had a right to have their privacy, dignity, and honor respected when they sought to exercise their rights to family, even if a family member was in detention.”⁴⁷ Recognizing “the central role of the family and family-life in the individual’s existence and society, in general”⁴⁸ under Article 17, the Commission held that it is “a right so basic to the Convention that it is considered to be non-derogable even in extreme circumstances.”⁴⁹ Thus, the Commission resolved that when the State of Argentina required Mrs. X and her daughter to undergo a vaginal search or inspection each time they wished to have personal contact with their family member, it interfered with their right to family and their rights to honor and dignity in exercising that right.⁵⁰

Similarly, individuals seeking IVF have a right to have their privacy, dignity, and honor respected when they seek to exercise their rights to family. As in *Mrs. X v. Argentina*, the application of Costa Rica’s prohibition on IVF has a deep emotional impact on persons prevented from exercising the right to procreation, likely to provoke intense feelings of shame and anguish in almost all persons prevented from doing so.⁵¹ As discussed in brief of the Allard K. Lowenstein International Human Rights Clinic at Yale Law School, submitted at the admissibility stage of this case, “[b]earing children is a component of many cultures’ expectations of what family means.”⁵² Explaining the social and psychological impact on individuals facing involuntary childlessness, the brief discusses studies documenting the shame,

⁴⁶ *Ibid.* at para. 93

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* at para. 96.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.* at paras. 96, 100.

⁵¹ *See supra* n. 38

⁵² *See Amicus* Brief of Allard K. Lowenstein International Human Rights Clinic at Yale Law School to the Inter-American Commission on Human Rights, *Ana Victoria Sanchez Villalobos and Others* (Costa Rica), Case No. 12.361, at 4.

depression and grief infertile couples endure, with consequences including marital conflict, difficulties at work, sexual dysfunction, and suicidal thoughts.⁵³ These harms are compounded in societies “where family and fertility carry particularly strong social and cultural significance.”⁵⁴

As the Commission held, the right to family is so basic to the American Convention, it is non-derogable even in extreme circumstances. The sphere of privacy protected by the American Convention’s includes the right to form a family, as well as the physical and moral autonomy to make decisions about whether to use assisted reproductive technologies. These rights have been violated by the arbitrary interference of the Costa Rican Supreme Court into “the sanctity of the person” at the heart of this protected zone of privacy.

Collectively, the opinions of this Court and the Commission establish a wide-ranging zone of privacy surrounding decisions about reproduction. Costa Rica’s prohibition intrudes on its citizens’ physical, moral, and reproductive autonomy, right to make decisions about family relationships, and right to determine one’s life’s course, in violation of Articles 11 and 17 of the American Convention, in relation to Article 1.1. Depriving citizens of access to medical technologies that enable fundamental, non-derogable rights is a discriminatory and unjustifiable governmental interference that this Court should not permit.

II. The Commission’s Conclusions Are Supported by United States Case Law Protecting the Right to Procreate as a Fundamental Right of Privacy

Like this Court, the U.S. Supreme Court has long interpreted the U.S. Constitution to protect a broad sphere of privacy. Although there is no explicit protection for “privacy” in the text of the U.S. Constitution, as there is in the American Convention, the U.S. Supreme Court grounds constitutional protections for these decisions in the explicit protection for liberty found

⁵³ *Ibid.* at 4-5.

⁵⁴ *Ibid.* at 5.

in the Due Process Clause of the Fourteenth Amendment.⁵⁵ As the Court notes, “the guarantees of due process . . . considered as procedural safeguards against executive usurpation and tyranny, have in this country become ‘bulwarks also against arbitrary legislation.’”⁵⁶ As the Court noted in its 2003 decision in *Lawrence v. Texas* where it struck down the Texas law banning homosexual sex:

“[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”⁵⁷

The Court often also makes secondary reference in these cases to the Constitution’s protection against denial of equal protection of the laws.⁵⁸ As the Court noted in *Lawrence*, “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”⁵⁹

As the U.S. Supreme Court has held, the “liberty” protected by the Due Process Clause protects more than the absence of physical restraint.⁶⁰ The Clause also provides heightened protection against government interference with certain fundamental rights and liberty

⁵⁵ The relevant Section of the Fourteenth Amendment provides:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, Sec. 1.

⁵⁶ *Planned Parenthood v. Casey*, 505 U.S. at 846 (internal citations omitted).

⁵⁷ *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (internal citations omitted).

⁵⁸ See, e.g., *Lawrence*, 539 U.S. at 575. See also Pamela Karlan, *Foreword: Loving Lawrence*, 102 Mich. L. Rev. 1447 2003-2004 (explaining how the U.S. Supreme Court interprets the liberty clause and the equal protection clause to work together to protect individual privacy and dignity).

⁵⁹ *Ibid.* See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 897-98 (1992) (while striking down portion of statute on liberty grounds, Court noted that stereotyped views of women’s status “are no longer consistent with our understanding of the family, the individual, or the Constitution”); *Thornburg v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (emphasis added), *overruled in part on other grounds by Casey*, 505 U.S. at 870, 882–83; see also *Gonzales v. Carhart*, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting).

⁶⁰ *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997) (internal citations omitted) (discussing scope of due process liberty right).

interests.⁶¹ In a long line of cases protecting family privacy, decisional autonomy, and bodily integrity, the Court has held that the “liberty” protected by the Due Process Clause includes the rights to marry,⁶² to procreate,⁶³ to direct the education and upbringing of one's children,⁶⁴ to marital privacy and to use contraception,⁶⁵ to bodily integrity,⁶⁶ to abortion,⁶⁷ and to consensual adult sexual relationships with same-sex partners.⁶⁸ These cases also have “doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.”⁶⁹

a. The U.S. Supreme Court Applies the Highest Standard of Review, the Strict Scrutiny Standard, to the Fundamental Right to Procreate.

The first U.S. Supreme Court case to hold that procreation, the right infringed in this case, is a “fundamental” right, indeed one of the “basic civil rights of man,” was *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).⁷⁰ In that case, a unanimous Court held that forced sterilization of prisoners convicted of two or more felonies involving “moral turpitude” violated the Equal Protection Clause. The Court points out “the inequalities in th[e] law,” which, for example, subjects to sterilization someone who is twice convicted of grand larceny but not someone twice convicted of embezzlement, even though the nature of the two crimes is intrinsically the same and they otherwise are punishable in the same manner.⁷¹ As the Court wrote:

⁶¹ *Ibid.*

⁶² *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating ban on interracial marriage).

⁶³ *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

⁶⁴ *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁶⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

⁶⁶ *Rochin v. California*, 342 U.S. 165 (1952).

⁶⁷ *Roe v. Wade*, 410 U.S. 113, 155-56, 93 S. Ct. 705, 728, 35 L. Ed. 2d 147 (1973), *holding modified by Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

⁶⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁶⁹ *Lawrence*, 539 U.S. at 575 (citing *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278 (1990)).

⁷⁰ See also John A. Robertson, *The Right To Procreate and In Utero Fetal Therapy*, 3 J. LEG. MED. 333, 339 (1982).

⁷¹ *Id.* at 539.

[W]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. . . [A person subjected to the law is] forever deprived of a basic liberty.⁷²

Following *Skinner*, the U.S. Supreme Court held that the right to privacy protected under the U.S. Constitution also protected the right to decide *whether and when* to procreate and the right to access medical devices and procedures in exercising that right. First, in *Griswold*, the Court invalidated a law prohibiting the use of contraceptive drugs or devices and counseling aiding the use of contraceptives, finding that the law unconstitutionally “operates directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation.”

Ibid. at 482. As the Court noted:

We deal with a right of privacy older than the Bill of Rights- older than our political parties, older than our school system. Marriage is a coming together for better or worse, hopefully enduring, and intimate in the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.⁷³

The Court asked, “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marital bedroom.”⁷⁴

Just a few years later, in its 1972 decision in *Eisenstadt v. Baird*, the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons, finding that the privacy right to make decisions about procreation applies equally to married and unmarried persons.⁷⁵

The Court’s discussion of the Equal Protection Clause centered upon the extension of the privacy

⁷² *Id.* at 541.

⁷³ *Ibid.*

⁷⁴ *Ibid.* at 485-86.

⁷⁵ *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).

rights initially afforded to married couples to all individuals, recognizing that the fundamental right to decide whether to bear or beget a child applies to all individuals:

. . . the marital couple is . . . an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.⁷⁶

These opinions informed the Court's decision in *Roe v. Wade*,⁷⁷ which struck down a criminal law banning abortion, "recogniz[ing] the right of a woman to make certain fundamental decisions affecting her destiny."⁷⁸ In *Roe*, the Court relied on its precedent protecting the rights to bodily integrity and decisional autonomy within the right to privacy,⁷⁹ and held that the state's view that life begins at conception was insufficient to override the fundamental privacy rights of women making decisions about their reproductive health.⁸⁰

In *Planned Parenthood v. Casey*,⁸¹ the Supreme Court reaffirmed its holding in *Roe* while modifying the standard of review that applied to government regulation of abortion. First, the Court noted that the right to make decisions about becoming a parent are central to the dignity and autonomy protected by the liberty right:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood, were they formed under compulsion by the State.⁸²

Recognizing the disagreement over the issue, the Court went on:

⁷⁶ *Ibid.* at 453.

⁷⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

⁷⁸ *Lawrence v. Texas*, 539 U.S. 558, 565 (2003) (discussing *Roe v. Wade*).

⁷⁹ *Roe*, 410 U.S. at 152-153.

⁸⁰ *Ibid.* at 162 (stating, "we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.").

⁸¹ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁸² *Casey*, 505 U.S. at 851.

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.⁸³

While reaffirming the right, the Supreme Court did modify the standard of review that applied to government regulation of abortion from *Roe's* strict scrutiny test to a new test allowing government regulations unless they impose an “undue burden” on the right to abortion.⁸⁴ An “undue burden” exists if the regulation imposes a substantial obstacle in the path of the woman seeking the abortion.⁸⁵

This lower level of scrutiny for abortion does not, however, apply to the right *to* procreate.⁸⁶ As U.S. courts have held, government officials abuse their power in violation of the Constitution where they interfered with women’s right to procreate and her right to decide whether or not to undergo medical treatment. For example, in one case, the Court held that government officials violated the Constitution where they coerced a minor to have an abortion.⁸⁷ In another, a county agency violated the Constitution when it misled a teenage girl into believing that she had the sickle cell trait in order to induce her to undergo unwanted sterilization.⁸⁸ Moreover, the Supreme Court of the State of New Jersey held that the right to privacy included a patient’s right to refuse medical treatment and authorized removal of life-support for a woman

⁸³ *Ibid.* at 850.

⁸⁴ *Casey*, 505 U.S. at 877.

⁸⁵ *Ibid.* (noting “[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus”).

⁸⁶ In *Casey*, the Court even seemed to differentiate between certain abortion decisions, noting that decisions about whether or not to procreate “involv[ing] personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it,” 505 U.S. at 852-853, were analogous to decisions to use contraception with certain abortion decisions that are made responsibly and with respect for human life. Deciding to procreate and the decision to use IVF certainly evidences a strong respect for life and the desire to take responsibility for it.

⁸⁷ *Arnold v. Board of Education of Escambia County, Ala.*, 880 F. 2d 305, 311 (CA11 1989).

⁸⁸ *Avery v. County of Burke*, 660 F. 2d 111, 115 (CA4 1981).

whose vital processes were maintained by mechanical respirator and who would never resume cognitive life.⁸⁹

Where fundamental liberty interests, such as the right to procreate, are regulated by the government, the U.S. Constitution requires courts to apply the strictest judicial scrutiny. As the U.S. Supreme Court explained in its 1997 decision in *Washington v. Glucksberg*, the Fourteenth Amendment:

forbids the government to infringe ... ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.⁹⁰

Where laws interfere with the ability to exercise fundamental rights, they must be narrowly tailored to serve a compelling state interest, meaning the restriction must be the least restrictive means of achieving the state’s ends.

b. Costa Rica’s IVF Prohibition Fails Strict Scrutiny Review Under the U.S. Constitution Because It Is A Complete Ban; It is Not Tailored At All, Much Less Narrowly Tailored.

As discussed above in Section I, the Costa Rican IVF prohibition is a complete prohibition that resulted from a rejection of a more narrowly tailored ban; *a priori*, it fails the narrowly tailored test. Reasoning in a similar case, the United States District Court for the Northern District of Illinois in *Liftchez v. Hartigan* found that regulations on assisted reproductive technology infringe upon privacy rights of infertile individuals:⁹¹

⁸⁹ *In re Quinlan*, 355 A.2d 647, 663-64 (1976), cert. denied *sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976).

⁹⁰ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Reno v. Flores*, 507 U.S. 292 302(1993)). *See also*, e.g., *Carey v. Population Services, Int’l*, 431 U.S. 678, 688 (1977) (regulation of contraception “may be justified only by a ‘compelling state interest’ . . . and . . . must be narrowly drawn to express only the legitimate state interests at stake.”); *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969) (where “fundamental rights” to freedom of speech are involved, regulation limiting these rights may be justified only by a “compelling state interest”); *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969) (First Amendment); *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965 (1963) (First Amendment); *Griswold v. Connecticut*, 381 U.S., at 485, 85 S.Ct., at 1682 (right to contraception).

⁹¹ *Liftchez v. Hartigan*, 735 F.Supp. 1361 (N.D. Ill. 1990).

Embryo transfer is a procedure designed to enable an infertile woman to bear her own child. It takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy.⁹²

The court held that the law was unconstitutional because there was no compelling interest sufficient to intrude upon the right to procreate.⁹³ Quoting *Carey v. Population services*, the Court wrote: “[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices.”⁹⁴ Based on this line of Supreme Court case law, the court held that there is a constitutionally protected right to access a medical procedure to bring about pregnancy.

Moreover, even if the “undue burden” standard that applies under the U.S. Constitution to the right *not to* procreate were applied, Costa Rica’s complete ban on IVF, unlike the more narrowly tailored Presidential Decree, would fail as an “undue burden” on the right to procreate because it places “a substantial obstacle in the path” of an infertile couple seeking to procreate.⁹⁵

Finally, this brief does not address the validity of the State’s claimed interest in the ban, the right to life of the fetus. This interest is being addressed in other amicus briefs and we do not wish to burden the Court with duplicate arguments. It must be noted, however, that the claimed interest is at the least suspect in the circumstances of this case, where individuals seek to participate in the creation of life, a case “involving personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it.”⁹⁶

⁹² *Ibid.* at 1377.

⁹³ *Ibid.* (internal citations omitted); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 450 (1983).

⁹⁴ *Ibid.*

⁹⁵ *Planned Parenthood v. Casey*, 505 U.S. 810, 877 (1992) (discussing “undue burden” standard).

⁹⁶ *Ibid.*, 505 U.S. at 852-853 (1992).

III. The Commission’s Conclusions Are Supported by Decisions of The European Court of Human Rights

The text of the European Convention on Human Rights (“European Convention”) parallels the American Convention in its protections for the right to “respect for privacy and family life” enshrined in Article 8,⁹⁷ the right to marry and “found a family” in Article 12,⁹⁸ and the right to be free of discrimination based on status in Article 14.⁹⁹ The European Court of Human Rights (“ECHR”) has interpreted these provisions to protect the right to conceive genetic offspring using medical technology, including IVF, using reasoning that mirrors that of this Court.

For example, in language reminiscent of this Court’s discussion in *Fernandez Ortega and Atala Riffo and Daughters v. Chile*, the ECHR held in *Evans v. United Kingdom* that “private life” is a broad term encompassing aspects of an individual’s physical and social identity, including the rights to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world, as well as the right to respect for both the decision to become and the decision not to become a parent.¹⁰⁰ Moreover, in numerous cases, the ECHR has specifically held that Article 8 protects the right to decide to become a genetic parent.¹⁰¹

⁹⁷ Article 8, entitled Right to Respect for Private and Family Life, states: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

⁹⁸ Article 12, entitled Right to Marry, states: Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

⁹⁹ Article 14, entitled Prohibition of Discrimination, states: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

¹⁰⁰ *Evans v. United Kingdom* [GG], no. 6339/05, § 71, ECHR 2007-I.

¹⁰¹ *Dickson v. United Kingdom* [GC], no. 44362/05, § 66, ECHR 2007 (citing *E.L.H. and P.B.H. v. the United Kingdom*, nos. 32094/96 and 32568/96, Commission decision of 22 October 1997, DR 91-A, p. 61; *Kalashnikov v.*

Specifically, in addressing access to medical technologies, while some countries have placed limited restrictions on the use of IVF and associated technologies in the past, most recently, the ECHR rejected a ban on technology associated with IVF. As the Court held, “[s]uch a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be.”¹⁰² Earlier this year, in a case analogous to the case presently before the Court, the ECHR unanimously held in *Costa and Pavan v. Italy* that a regulation preventing a couple from screening embryos for IVF violated Article 8.¹⁰³ That case concerned an Italian couple who were healthy carriers of cystic fibrosis and wanted to have a child using in vitro fertilization after screening embryos to avoid transmitting the disease to their child. The Italian Government claimed the prohibition served to protect the State’s interests in the health of the mother and child, the dignity and freedom of conscience of the medical professionals, and avoiding the risk of eugenic abuses.¹⁰⁴ The Court found that the couple’s desire to have children using assisted reproductive technology and screening to have a baby that did not suffer from cystic fibrosis was a form of expression of their private and family life that fell within the scope of Article 8.¹⁰⁵

Moreover, the Court highlighted the inconsistency in Italian law that denied the couple access to embryo screening but authorized medically-assisted termination of pregnancy if the fetus showed symptoms of the same disease.¹⁰⁶ Noting that such an inconsistency left the applicants with a choice that would lead to anxiety and suffering, the Court held that a total

Russia (dec.), no. 47095/99, ECHR 2001-XI; *Aliiev v. Ukraine*, no. 41220/98, § 187-89, 29 April 2003; and *Evans v. the United Kingdom* [GC], no. 6339/05, § 71-72, ECHR 2007-I).

¹⁰² *Dickson v. United Kingdom* [GC], no. 44362/05, § 79, ECHR 2007 (citing *Hirst v. the United Kingdom* (no. 2) [GC], no. 74025/01, § 82 ECHR 2005-IX).

¹⁰³ *Costa and Pavan v. Italy*, no. 54270/10, Press Release, ECHR 2012.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

prohibition on using these technologies was disproportionate, in violation of Article 8's protection of the rights to privacy and family.¹⁰⁷

In an earlier case based on a law enacted in May of 2000, *S.H. and others v. Austria*, the ECHR reviewed provisions of the Austrian Artificial Procreation Act, prohibiting the use of donated ova or sperm for IVF. The Court recognized that the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is protected by Article 8, as an expression of private and family life.¹⁰⁸ While the Court did not consider the restriction imposed by Austria to be a violation of Article 8, the Court emphasized that the legislation was not an all-out ban,¹⁰⁹ observing that the Austrian legislature had not completely ruled out IVF. Moreover, in contrast to the total ban at issue in *Costa and Pavan v. Italy*, the Court emphasized that its ruling was based upon the Austrian Legislature's thorough and careful examination of the complex moral issues surrounding assisted reproductive technologies.¹¹⁰ Rather than claiming that the rights of the embryo outweighed the right to privacy of the parents, as does Costa Rica here, and rather than extinguishing the parents' right entirely, the Austrian legislature was balanced parents' rights against the State's interest in avoiding parental rights disputes, preventing potential risks of eugenic selection and their abuse, and preventing the risk of exploitation of women in vulnerable situations as ovum donors.¹¹¹ The legislature "tried to reconcile the wish to make medically assisted procreation available and the existing unease among large sections of society as to the role and possibilities of modern reproductive medicine."¹¹²

¹⁰⁷ *Ibid.*

¹⁰⁸ *S.H. and Others v. Austria* [GC], no. 57813/00, ECHR 2011.

¹⁰⁹ *Ibid.* at § 104.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.* at § 105.

¹¹² *Ibid.* at § 104.

Importantly, the ECHR highlighted the need to continue to review this issue in the future because of “the clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of in vitro fertilization, which reflects an emerging European consensus.”¹¹³ Noting the fast moving medical and scientific developments in this field, the Court admonished that it should keep pace with emerging scientific developments and norms.¹¹⁴ As discussed above, the ECHR earlier this year reconsidered the issue and held in *Costa and Pavan* that Italy’s prohibition on technology associated with IVF violated the European Convention.

Also protecting the right to access reproductive technologies, in *Dickson v. United Kingdom*, the ECHR found that the right to use artificial insemination techniques to found a family is protected by Article 8.¹¹⁵ In that case, the Court found an Article 8 violation where a prisoner was refused artificial insemination facilities that would enable him to have a child with his wife. The Court held that prison officials’ refusal of artificial insemination facilities concerned their private and family lives, “which notions incorporate the right to respect for their decision to become genetic parents.”¹¹⁶ The Court observed that while the prison policy preventing prisoners from using insemination facilities could be overcome in exceptional circumstances, the policy was structured so as to effectively exclude any real weighing of competing interests.¹¹⁷ The Court further observed there was no evidence that when fixing the policy the Secretary of State sought to weigh the relevant competing individual and public

¹¹³ *Ibid.* at § 96.

¹¹⁴ *Ibid.* at § 96-97.

¹¹⁵ *Dickson v. United Kingdom* [GC], no. 44362/05, § 66, ECHR 2007.

¹¹⁶ *Ibid.* (citing *E.L.H. and P.B.H. v. the United Kingdom*, nos. 32094/96 and 32568/96, Commission decision of 22 October 1997, DR 91-A, p. 61; *Kalashnikov v. Russia* (dec.), no. 47095/99, ECHR 2001-XI; *Aliiev v. Ukraine*, no. 41220/98, § 187-89, 29 April 2003; and *Evans v. the United Kingdom* [GC], no. 6339/05, § 71-72, ECHR 2007-I).

¹¹⁷ *Ibid.* at § 82.

interests or assess the proportionality of the restriction.¹¹⁸ Further, since the policy was not embodied in primary legislation, the various competing interests were never weighed, nor issues of proportionality ever assessed, by Parliament.¹¹⁹ The Court reasoned that the absence of such an assessment regarding a matter of significant importance for the applicants “must be seen as falling outside any acceptable margin of appreciation,” finding that a fair balance was not struck between the competing public and private interests involved.¹²⁰ Accordingly, the Court held that the prisoner’s right to become a genetic parent was violated by the policy preventing access to medical technology to further the exercise of his privacy right.¹²¹

*V.C. vs. Slovakia*¹²² further established the right to respect for reproductive autonomy and the right to procreate. In that case, the ECHR held that Slovakia violated Article 8 where the State sterilized a woman in a public hospital without her full and informed consent.¹²³ The Court found that the applicant experienced fear, anguish, and feelings of inferiority as a result of sterilization, finding that she suffered both physically and psychologically.¹²⁴ Moreover, the applicant’s sterilization resulted in the deterioration of her relationship with the father of her children and impaired her standing in the Roma community.¹²⁵ Noting that “[t]he essential object of Article 8 is to protect the individual against arbitrary interference by public authorities,” the Court held that the lack of legal safeguards giving special consideration to the applicant’s reproductive health resulted in a gross disregard for her right to autonomy and choice as a patient, in violation of Article 8.¹²⁶

¹¹⁸ *Ibid.* at § 83.

¹¹⁹ *Ibid.* (citing *Hirst*, § 79, and *Evans*, §§ 86-89).

¹²⁰ *Ibid.* at § 83.

¹²¹ *Ibid.* at § 66.

¹²² *V. C. v. Slovakia*, no. 18968/07, ECHR 2011.

¹²³ *Ibid.* at §§ 9, 10, 15.

¹²⁴ *Ibid.* at § 118.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* at §§ 119, 139.

The Court further discussed the protections afforded under Article 12, protecting a person's right to respect for his or her family life, opining that Article 12 of the Convention secures the fundamental right of a man and woman to marry and to found a family.¹²⁷ As in *Fernandez Ortega*, the Court described the close affinity between the rights to privacy and family life protected under Articles 8 and 12 of the European Convention¹²⁸ and explained that the exercise of the right to found a family must not be restricted or reduced by national laws in such a way or to such an extent that the very essence of the right is impaired.¹²⁹ Accordingly, the Court held that the sterilization performed on the applicant affected her reproductive health status and had serious repercussions on her private and family life, in violation of Article 8.¹³⁰

Finally, the ECHR has applied the right to privacy in cases affirming the right to access to medical technology. In *R.R. v Poland*, the ECHR found that Polish law violated Article 8 for failing to include an effective mechanism to access diagnostic services to test for fetal malformation.¹³¹ Again reiterating the broad concept of “private life” encompassing the rights to personal autonomy and personal development,¹³² the Court admonished that the notion of private life applies to decisions both to have or not to have a child or become a parent.¹³³ “The decision of a pregnant woman to continue her pregnancy or not belongs to the sphere of private life and

¹²⁷ *Ibid.* at §§ 156-159.

¹²⁸ *V. C. v. Slovakia*, no. 18968/07, § 159, ECHR 2011 (citing *Muñoz Díaz v. Spain*, no. 49151/07, § 78, 8 December 2009); see also *ibid.* (see *Frasik v. Poland*, no. 22933/02, § 90, ECHR 2010).

¹²⁹ *Ibid.* at § 159 (citing *Muñoz Díaz v. Spain*, no. 49151/07, § 78, 8 December 2009).

¹³⁰ *Ibid.* at § 160.

¹³¹ *RR v. Poland*, no. 27617/04, ECHR 2011-IV.

¹³² *Ibid.* at § 180 (citing *Bensalbid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I). The Court has held that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III). The notion of private life concerns subjects such as gender *ibid*entification, sexual orientation and sexual life (*Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41, and *Laskey, Jaggard and Brown v. the United Kingdom*, judgment of 19 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 131, § 36) a person's physical and psychological integrity (*Tysic v. Poland*, § 107, ECHR 2007-IV).

¹³³ *Ibid.* at §180 (citing *Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-IV).

autonomy.”¹³⁴ The Court examined its prior case law, explaining that “the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms claimed by a mother or a father in relation to one another or *vis-à-vis* the fetus”¹³⁵ and upheld its prior determination that States have a positive obligation to secure to its citizens their right to effective respect for their physical and psychological integrity.¹³⁶

While the Court found that the issue of when the right to life begins comes within the margin of appreciation afforded to States, the Court considered that “there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion and that most Contracting Parties have in their legislation resolved the conflicting rights of the fetus and the mother in favor of greater access to abortion”¹³⁷ and noted its prior finding that “prohibition of the termination of pregnancies sought for reasons of health and/or well-being amounted to an interference with the applicants’ right to respect for their private lives.”¹³⁸ The Court went on to reason that “[w]hile the State regulations on abortion relate to the traditional balancing of privacy and the public interest, they must – in case of a therapeutic abortion – also be assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be.”¹³⁹ Expanding on the connection between reproductive freedom and personal autonomy, the Court opined:

¹³⁴*Ibid* at. §181. Consequently, also legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus (Eur.Comm. HR, *Bruggeman and Scheuten v. Germany*, cited above; *Boso v. Italy* (dec.), no. 50490/99, ECHR 2002-VII; *Vo v. France* [GC], no. 53924/00, § 76, ECHR 2004-VIII; *Tysiāc*, §§ 106-107; *A, B and C v. Ireland* [GC], no. 25579/05, § 212, 16 December 2010).

¹³⁵ *Ibid.* (citing *Vo v. France* [GC], no. 53924/00, § 76, ECHR 2004-VIII).

¹³⁶ *Ibid.* at §§ 180, 185 (citing *Glass v. the United Kingdom*, no. 61827/00, §§ 74-83, ECHR 2004-II; *Sentges v. the Netherlands* (dec.) no. 27677/02, 8 July 2003; *Pentiacova and Others v. Moldova* (dec.), no. 14462/03, ECHR 2005; *Nitecki v. Poland* (dec.), no. 65653/01, 21 March 2002; *Odièvre v. France* [GC] § 42).

¹³⁷ *Ibid.* at § 186 (citing *A, B and C v. Ireland* [GC], 16 December 2010, §§ 235 and 237)

¹³⁸ *Ibid.* at § 188 (citing *A., B., and C. v. Ireland*, cited above, § 216).

¹³⁹ *Ibid.* at § 189 (citing *Tysiāc v. Poland*, cited above, § 107).

The effective exercise of this right is often decisive for the possibility of exercising personal autonomy, also covered by Article 8 of the Convention by deciding, on the basis of such information, on the future course of events relevant for the individual's quality of life (e.g. by refusing consent to medical treatment or by requesting a given form of treatment).¹⁴⁰

Accordingly, the Court held that the denial of access to medical technology to acquire full information about the health of a fetus was “precisely that... access to medical procedures” that is protected under Article 8.¹⁴¹

Collectively, these cases set out clear protections for procreative liberty, including the right to determine whether, when, and how to found a family and to access medical technology to exercise that right. In the present case, the applicants' desire to have genetic children using IVF is a form of expression of their private and family lives that is protected by Articles 8, 12, and 14 of the European Convention on Human Rights. Costa Rica's prohibition on IVF results in a gross disregard for the applicants' rights to autonomy and reproductive choice, as well as their right to respect for private and family life.¹⁴² For infertile couples, the ability to access reproductive technology is the only way to exercise their decisional autonomy concerning their desire to bear children. Being prevented from forming a family using this safe technology has a profound impact upon individuals' physical, psychological, and moral integrity.¹⁴³

Moreover, by prohibiting IVF entirely, Costa Rica has impaired the very essence of these rights.¹⁴⁴ The ECHR treats a State's legislation with greater deference when that State has weighed competing interests and engaged in a serious and thoughtful review of the complex issues regulated by that legislation. In contrast, the Court reviews total prohibitions on access to fundamental rights with caution, often finding such regulations disproportionate. While

¹⁴⁰ *Ibid.* at § 197 (citing *Pretty v. the United Kingdom*, cited above, § 61, ECHR 2002-III).

¹⁴¹ *Ibid.* at § 198.

¹⁴² *V. C. v. Slovakia*, no. 18968/07, §§ 119, 139 ECHR 2011

¹⁴³ *Ibid.* at § 118

¹⁴⁴ *Ibid.*, no. 18968/07, § 159, ECHR 2011 (citing *Muñoz Díaz v. Spain*, no. 49151/07, § 78, 8 December 2009).

carefully balanced regulations on assisted reproductive technologies may in some circumstances be allowed, a total ban on access to IVF technology equivalent to that in Costa Rica is a clear violation of the right to privacy and the right to found a family under the European Convention.

As in the ECHR's unanimous decision in *Costa and Pavan v. Italy*, the IVF prohibition in Costa Rica denies individuals access to medical technologies that further their fundamental rights, in violation of individuals' rights to privacy and to found a family.¹⁴⁵ Mirroring the weakness of the prohibition in *Costa and Pavan v. Italy*, Costa Rica's prohibition is undermined by a fatal inconsistency; Costa Rica seeks to protect life by preventing individuals from creating life. As in Italy, Costa Rica's total prohibition on IVF is disproportionate.¹⁴⁶

This reasoning is consistent with the Court's opinions in *S.H and Others v. Austria*¹⁴⁷ and *Dickson v. United Kingdom*,¹⁴⁸ which have similarly held that policies "structured so as to effectively exclude any real weighing of competing interests"¹⁴⁹ that do not include a careful examination of complex issues,¹⁵⁰ are not embodied in legislation,¹⁵¹ and do not assess issues of proportionality "must be seen as falling outside any acceptable margin of appreciation."¹⁵² Costa Rica's court-imposed prohibition of IVF has similarly excluded any real weighing of competing interest or examination of the complex moral issues at hand. The prohibition is not embodied in legislation, and was not accompanied by an assessment of issues of proportionality or consideration of how the prohibition on IVF should be assessed against Costa Rica's positive

¹⁴⁵ *Costa and Pavan v. Italy*, no. 54270/10, Press Release, ECHR 2012.

¹⁴⁶ *Ibid.*

¹⁴⁷ *S.H. and Others v. Austria* [GC], no. 57813/00, ECHR 2011.

¹⁴⁸ *Dickson v. United Kingdom* [GC], no. 44362/05, ECHR 2007.

¹⁴⁹ *Ibid.* at §§ 82-83.

¹⁵⁰ *S.H. and Others v. Austria* [GC], no. 57813/00, §104, ECHR 2011; *see also RR v. Poland*, no. 27617/04, §§ 180, 181, 185, ECHR 2011-IV.

¹⁵¹ *Dickson v. United Kingdom* [GC], no. 44362/05, §§ 82-83, ECHR 2007.

¹⁵² *Ibid.*

obligation to protect rights.¹⁵³ Accordingly, the prohibition on IVF must be seen as falling outside of any acceptable margin of appreciation.¹⁵⁴

¹⁵³ *RR v. Poland*, no. 27617/04, §§ 180, 181, 185, ECHR 2011-IV.

¹⁵⁴ See *Dickson v. United Kingdom* [GC], no. 44362/05, §§ 82-83, ECHR 2007.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court strike down the prohibition on IVF in Costa Rica.

Respectfully submitted,

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