

Inter-American Commission on Human Rights

In the Matter of

ANA VICTORIA SANCHEZ VILLALOBOS AND OTHERS (Costa Rica)
Admissibility Report No. 25/04, Petition 12.361

**BRIEF OF
THE ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC
AT YALE LAW SCHOOL
AS AMICUS CURIAE**

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INTEREST OF *AMICUS CURIAE*

The Allard K. Lowenstein International Human Rights Clinic is a Yale Law School course that gives students first-hand experience in human rights advocacy under the supervision of international human rights lawyers. The Clinic undertakes litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses. Its projects have included efforts to promote the work of regional and international organizations that develop and protect human rights. The Clinic has prepared briefs and other submissions for the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights, and various bodies of the United Nations, as well as for U.S. courts.

SUMMARY OF ARGUMENT

In March 2002 the constitutional chamber of the Costa Rican high court declared the practice of *in vitro* fertilization a violation of the right to life as protected under Article 4 of the American Convention on Human Rights (American Convention).¹ Couples seeking *in vitro* fertility therapy in Costa Rica have submitted a petition to the Inter-American Commission on Human Rights seeking a determination that the Costa Rican court's decision is inconsistent with the American Convention. This brief of *amicus curiae* Allard K. Lowenstein International Human Rights Clinic at Yale Law School concludes that (1) the Costa Rican court erred in holding that the right to life under Article 4 of the American Convention requires the prohibition of *in vitro* fertilization and (2) such a prohibition violates the right to found a family under

¹ Sala Constitucional de la Corte Suprema de Justicia de Costa Rica. Sentencia No. 2306-00 de las 15:21 horas del 15 de marzo del 2002, *available at* http://200.91.68.20/scij/index_pj.asp?url=busqueda/jurisprudencia/jur_ficha_completa_sentencia.asp?nBaseDato=1&nSentencia=128218 (website of Sistema Costarricense de Información Jurídica, last visited Sept. 2, 2005).

Article 17.

Infertility is a widespread disability that causes significant emotional and social harm. *In vitro* fertilization (IVF) and related forms of reproductive assistance have allowed couples throughout the world, including the Americas, to have children. A review of State practice in the Americas shows that other States, including those that provide strong protection for embryonic life, universally permit *in vitro* fertility therapy. This consistent practice by States in the region provides persuasive evidence that the Costa Rican high court has not properly balanced the human rights and interests at stake. Costa Rica's prohibition of *in vitro* therapy prevents infertile couples from exercising their right to found a family, protected under Article 17 of the Convention. Because this absolute restriction is not justified by Costa Rica's duty under Article 4 of the Convention, the prohibition of IVF violates the rights of those who seek medical treatment to overcome infertility.

ARGUMENT

I. INFERTILITY IS A WIDESPREAD DISABILITY THAT CAUSES GREAT EMOTIONAL AND SOCIAL HARM THAT IS ALLEVIATED THROUGHOUT THE AMERICAS BY THE USE OF *IN VITRO* FERTILITY THERAPY.

A. Infertility is a widespread disability in the Americas.

Although most couples take it for granted that they will be able to start a family when they choose, infertility – the inability to conceive without medical assistance – is, in fact, common. General estimates suggest that between 8 and 12 percent of couples worldwide have difficulty conceiving.² Infertility is experienced at even higher rates in the developing world; in

² Abdallah S. Daar & Zara Merali, *Infertility and social suffering: the case of ART in developing countries*, in CURRENT PRACTICES AND CONTROVERSIES IN ASSISTED REPRODUCTION 15, 15 (Effy Vayena et al. eds., 2002),

some countries, as many as 25 percent of couples may be unable to have children without medical assistance.³ Sources have estimated the incidence of infertility in a number of Latin American countries at 15 percent or more.⁴

A medical diagnosis of infertility is generally made when a couple seeking to conceive has failed to do so after engaging in regular intercourse for a period of at least a year.⁵ The most common causes of infertility are low sperm or egg production or damage to or abnormalities of the female reproductive system that block the sperm and egg from meeting.⁶ These immediate causes, in turn, may stem from hormonal disorders, exposure to environmental toxins, scarring from untreated sexually transmitted infections (STIs), or prior surgeries or accidents that severed the reproductive tubes.⁷ Thus, a wide range of health problems may cause either member of a couple to have a reproductive disability; a dysfunction on the part of either partner is sufficient to

available at <http://www.who.int/reproductive-health/infertility/report.pdf> (official report of the meeting “Medical, Ethical and Social Aspects of Assisted Reproduction,” convened by the World Health Organization in Geneva, Switzerland, 17-21 September 2001) [hereinafter WHO, CURRENT PRACTICES].

³ Department of Reproductive Health and Research, World Health Organization, 63 PROGRESS IN REPRODUCTIVE HEALTH RESEARCH 2, 2 (2003), available at <http://www.who.int/reproductive-health/hrp/progress/63/63.pdf> [hereinafter WHO, REPRODUCTIVE HEALTH RESEARCH]. Worldwide, it is estimated that 186 million couples are affected by infertility in developing countries, not including China. *Id.*

⁴ See, e.g., Raymundo Canales de la Fuente, *Fundamentos médicos de la reproducción asistida*, in REPRODUCCIÓN ASISTIDA: ELEMENTOS PARA EL DEBATE LEGISLATIVO 26, 26 (Rafael García Tinajero ed., 2004), available at <http://prdleg.diputados.gob.mx/publicaciones/libros/reprodasist/reprodasist.pdf> [hereinafter REPRODUCCIÓN ASISTIDA] (describing the incidence of infertility in Mexico as around 15 percent); Estela Palacios & Enrique Jadresic, *Aspectos emocionales en la infertilidad: una revisión de la literatura reciente*, 38 REV. CHIL. NEUROPSIQUIAT 94 (2000), available at www.scielo.cl (describing the incidence of infertility in Chile as approximately 15 percent); *Maduran óvulos en laboratorio*, MEDILEGIS, at <http://www.medilegis.com/BancoConocimiento/A/AM80ACGenetica/AM80ACGenetica.asp> (last visited Sept. 2, 2005) (describing the incidence of infertility in Colombia as at least 20 percent); *El 20% de parejas peruanas tendrían problemas de fertilidad*, RPP NOTICIAS, Aug. 26, 2005, at http://www.rpp.com.pe/portada/salud_y_belleza/18978_1.php (describing the incidence of infertility in Peru as around 20 percent).

⁵ Palacios & Jadresic, *supra* note 4, at introduction; see also Canales de la Fuente, *supra* note 4, at 23.

⁶ See Wendy Chang et al., *Diagnostic Evaluation and Treatment of the Infertile Couple*, in ESSENTIAL REPRODUCTIVE MEDICINE 359, 361 (Bruce R. Carr et al. eds., 2005).

⁷ See generally STEVEN R. BAYER ET AL., THE BOSTON IVF HANDBOOK OF INFERTILITY: A PRACTICAL GUIDE FOR PRACTITIONERS WHO CARE FOR INFERTILE COUPLES, 8-15 (2002) (describing immediate and ultimate causes of infertility); see also, Florencia Luna, *Assisted reproductive technology in Latin America: some ethical and sociocultural issues*, in WHO, CURRENT PRACTICES, *supra* note 2, at 31, 32 (describing impact of exposure to fertilizers on sperm production in agricultural workers in Guatemala); Sergio Koifman et al., *Human reproductive system disturbances and pesticide exposure in Brazil*, 18 CAD. SAUDE PUBLICA, 435 (2002) (demonstrating correlation between male infertility and exposure to pesticides in Brazil); WHO, REPRODUCTIVE HEALTH RESEARCH, *supra* note 3, at 2 (describing contribution of reproductive-tract infections to infertility in developing countries).

render a couple, as a unit, infertile. Men and women are infertile in roughly equal numbers,⁸ and in some cases, although neither partner alone is medically infertile, the couple together is unable to conceive a child.⁹

B. Infertility causes great personal, emotional, and social suffering for affected individuals.

Infertility is a physical disability that can have a tremendous impact on the mental and social well-being of those affected. The desire to conceive and give birth to biologically related children, widely shared throughout the world, may be influenced by a number of factors: a desire to experience pregnancy and childbirth;¹⁰ a desire to share certain traits, like national or ethnic ancestry, with their offspring; a desire for continuity of familial bloodline or lineage; religious traditions;¹¹ a belief that having a child is an expression of parents' values or identity or a physical manifestation of their love and union;¹² or social norms that privilege the biological connection.¹³ The determination of many couples to found a family through *in vitro* fertilization – a process that may be financially and physically burdensome – demonstrates the depth of the human desire to share a biological connection with one's children.¹⁴

Studies of the social and psychological impact of involuntary childlessness indicate that

⁸ Chang et al., *supra* note 6, at 361.

⁹ Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 634 (1991).

¹⁰ John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 423 (1983) (“The urge to procreate . . . usually involves a desire to transmit one’s own genetic heritage to the child and to participate in gestation and parturition.”).

¹¹ For example, Orthodox Judaism attributes great significance to maternal lineage, with Jewish heritage being passed on through the birth mother. Miryam Z. Wahrman, *Assisted Reproduction and Judaism*, JEWISH VIRTUAL LIBRARY (2005), at <http://www.jewishvirtuallibrary.org/jsourc/Judaism/ivf.html> (discussing the importance of assisted reproduction techniques to fulfillment of Jewish religious commands to bear children).

¹² See Lone Schmidt, *Psychosocial aspects of infertility and treatment*, in IN VITRO FERTILISATION IN THE 1990S: TOWARDS A MEDICAL, SOCIAL AND ETHICAL EVALUATION 63, 65 (Elisabeth Hildt and Dietmar Meith eds., 1998) (“People want children because children express the meaning of life and it is a way to express feelings of love between spouses.”).

¹³ In discussing the grief of infertility, Andrea Bonnicksen explains how “Infertility means a loss of the potential for the dreams of childbearing: perpetuation of the family’s gene pool; . . . affirmation of femininity, masculinity, and the couple’s validity as a pair; and the satisfaction of having control over one’s life.” ANDREA L. BONNICKSEN, IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES 53 (1989).

¹⁴ Andrews & Douglass, *supra* note 9, at 629.

infertile couples often suffer shame, depression, and grief, along with such possible consequences as marital conflict, difficulties at work, sexual dysfunction, and suicidal thoughts.¹⁵ The psychological and social harms of infertility are compounded in societies where family and fertility carry particularly strong social and cultural significance.¹⁶ Bearing children is a component of many cultures' expectations of what family means, and "[w]hen the family model is not achieved, each partner and both as a couple must go through a process of psychological re-organization to cope with this new unexpected reality."¹⁷

Infertility's impact on mental and social well-being is particularly acute for women.¹⁸ For historical and cultural reasons, the experience of giving birth and becoming a parent is particularly significant to the self-realization of women, whose adult identity may be closely tied to motherhood.¹⁹ Women, in addition to suffering the direct emotional pain of involuntary childlessness, are more likely than men to suffer mistreatment, ranging from social stigma and

¹⁵ See, e.g., Anne Martin Matthews & Ralph Matthews, *Beyond the Mechanics of Infertility: Perspectives on the Social Psychology of Infertility and Involuntary Childlessness*, 35 FAMILY RELATIONS 479, 481-84 (1986), available at www.jstor.org (reviewing the scientific literature and identifying the emotional experiences of surprise, denial, anger, guilt, depression, and grief found to be associated with infertility); Palacios & Jadresic, *supra* note 4, at 94 (describing the experience of infertility as "an emotionally debilitating life crisis" that can lead to marital conflict, depression, sexual dysfunction, and thoughts of suicide); Kattia Escalante Barboza, *Métodos de reproducción asistida: aspectos psicológicos*, 20 MEDICINA LEGAL DE COSTA RICA (2003), available at www.scielo.sa.cr (describing the emotional impact on infertile couples of partner expectations and social pressure to have children); Estela Palacios et al, *Estudio descriptivo de los aspectos emocionales asociados a la infertilidad y su tratamiento*, 67 REV. CHIL. OBSTET. GINECOL. (2002), available at www.scielo.cl (describing emotional experiences of infertile couples in Chile, characterized by emotional instability, shame, anger, anxiety, and difficulties at work).

¹⁶ Florencia Luna suggests that this is particularly the case for women in Latin America. Luna, *supra* note 7, at 38. "In a social and cultural context where motherhood is seen as necessary for the personal realization of women, the finding of infertility is a devastating experience: the infertility experience is seen as a vital crisis . . ." Silvina Ramos, *Jornadas Públicas sobre la Problemática de la Fertilización Asistida*, unpublished, cited in Luna, *supra* note 7, at 38 (ellipsis in original.)

¹⁷ Ellen Hardy & Maria Yoland Makuch, *Gender, Infertility and ART*, in WHO, CURRENT PRACTICES, *supra* note 2, at 272, 273.

¹⁸ According to Hardy and Makuch's review of the scientific literature on the emotional impact of infertility, "with almost no exception, the studies found that women reacted more strongly to infertility than men." *Id.* at 275.

¹⁹ A Brazilian survey of adult women's attitudes toward infertility found that childless women are seen as "sad and incomplete," in comparison to women who have become mothers. Zeidi Araujo Trindade & Sonia Regina Fiorim Enumo, *Triste e incomplete: uma visão feminina da mulher infértil*, 13 PSICOLOGIA USP 151 (2002), available at <http://www.scielo.br>. See also *supra* note 16 (describing infertility's special impact on women in Latin American societies).

isolation to violence, as a result of infertility.²⁰ The greater social impact of infertility on women is not limited to developing countries; it has also been shown in research on couples seeking treatment for infertility in the United States.²¹

C. *In vitro* fertility therapy and related technologies have enabled thousands of otherwise infertile couples in the Americas to have children

A number of medical treatments enable infertile couples to conceive. Basic medical interventions to treat infertility include intrauterine insemination,²² hormonal therapy to stimulate ovulation,²³ or surgery to eliminate a tubal blockage.²⁴ However, where a woman has irreparably blocked (or absent) fallopian tubes or a man has a low sperm count, advanced techniques such as *in vitro* fertilization offer a chance at biological parenthood to couples who would otherwise have no hope of bearing a child.²⁵ *In vitro* fertilization is the most common form of a number of assisted reproductive technologies that involve bringing an egg and sperm together *in vitro*.²⁶

²⁰ ART in Developing countries – a response to individual need or a social priority?, in WHO REPRODUCTIVE HEALTH RESEARCH, *supra* note 3, at 2:

In addition to the personal grief and suffering it causes, the inability to have children – especially in poor communities – can create broader problems, particularly for the woman, in terms of social stigma, economic hardship, social isolation, and even violence. Various studies have found that childless women in developing countries are often abandoned by their husband, subjected to violence, or treated as servants by the husband’s family. In some societies, motherhood is the only way for women to improve their status within the family and the community. On a practical level, many families depend on children for economic survival. While many people, therefore, would not consider infertility a disease in itself, it can certainly be said to be a social and public health issue as well as an individual problem.

See also Daar & Merali, *supra* note 2, at 16 (“For women in developing countries, infertility may occasion life-threatening physical as well as psychological violence. Childless women are generally blamed for their infertility, despite the fact that male factor causes contribute to at least half of the cases of infertility around the world.”)

²¹ *See* A. Collins et al., *Perceptions of infertility and treatment stress in females as compared with males entering in vitro fertilization treatment*, 57 FERTILITY AND STERILITY 350-56, 1992.

²² BAYER ET AL., *supra* note 7, at 76. Intrauterine insemination is a variation of artificial insemination in which the husband’s sperm is deposited past the cervix directly into the uterus. It is useful in cases of male-factor infertility or where the woman’s cervical mucus may be impeding sperm transport. *See id.* at 12-13.

²³ *Id.* at 76.

²⁴ Chang et al., *supra* note 6, at 379. Where tubal reconstruction fails, IVF is the indicated treatment. *Id.* at 383.

²⁵ AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, FREQUENTLY ASKED QUESTIONS ABOUT INFERTILITY, at <http://www.asrm.org/Patients/faqs.html> (last visited Sept. 2, 2005). *See also* Chang et al., *supra* note 6, at 383.

²⁶ Chang et al., *supra* note 6, at 383. Related forms of assisted reproduction include gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), and intracytoplasmic sperm injection (ICSI). *Id.* *See also* BAYER ET AL., *supra* note 7, at 78. IVF is the oldest of these four techniques and still accounts for approximately 95 percent of

Although these treatments are not always successful, it is estimated that more than one million children worldwide have been born through IVF therapy, and another million through related forms of assisted reproductive technology, in the twenty-five years since these technologies were first introduced.²⁷ Between 1990 and 2002, more than 22,000 children were born in Latin America with the help of such techniques.²⁸ In 2002 alone, more than 5,500 births through assisted reproductive techniques were reported in Latin America.²⁹ In the United States, 45,751 children were born to parents who had obtained *in vitro* reproductive assistance in 2002.³⁰ Throughout the Americas, a large and growing number of children are born each year with the assistance of *in vitro* fertility therapy.

II. CONSISTENT PRACTICE IN THE AMERICAS PROVIDES COMPELLING EVIDENCE THAT BANNING IVF IS NEITHER A NECESSARY NOR AN APPROPRIATE RESPONSE TO A STATE'S INTEREST IN PROTECTING THE RIGHT TO LIFE UNDER ARTICLE 4.

Of all the American States, Costa Rica alone categorically bans *in vitro* fertilization.³¹

all instances of Assisted Reproductive Technology (ART) in the United States. *Id.*

²⁷ Karl Nygren, *International registries of assisted reproductive technologies*, in WHO, CURRENT PRACTICES, *supra* note 2, at 376, 380. Nygren's report was published in 2003; in 1978 in Great Britain, the first baby was born who had been conceived through IVF therapy. See *supra* note 26 for an explanation of the related forms of assisted reproduction.

²⁸ This figure is based on data provided by the Red Latinoamericana de Reproducción Asistida (Redlara) in a variety of published sources. Fernando Zegers-Hochschild, *The Latin American Registry of Assisted Reproduction*, in WHO, CURRENT PRACTICES, *supra* note 2, at 355, 359 (reporting 6,480 births between 1990 and 1998); RED LATINOAMERICANA DE REPRODUCCIÓN ASISTIDA (REDLARA), REGISTRO 2002, at 21, *available at* <http://www.redlara.com/fdash45o9.asp?arq=registro2002.pdf> (reporting 5688 births in 2002); REDLARA, REGISTRO 2001, at 8, *available at* <http://www.redlara.com/fdash45o9.asp?arq=registro2001.pdf> (reporting 3,615 births in 2001); RED LATINOAMERICANA DE REPRODUCCIÓN ASISTIDA, REGISTRO 2000, at 8, *available at* <http://www.redlara.com/fdash45o9.asp?arq=2000.pdf> (reporting 2,622 births in 2000); RED LATINOAMERICANA DE REPRODUCCIÓN ASISTIDA, REGISTRO 1999, at 8, *available at* <http://www.redlara.com/fdash45o9.asp?arq=1999.pdf> (reporting 3,845 births in 1999). See *infra* note 33 for more information about Redlara.

²⁹ REDLARA, REGISTRO 2002, *supra* note 28, at 21.

³⁰ DIVISION OF REPRODUCTIVE HEALTH, CENTERS FOR DISEASE CONTROL AND PREVENTION, ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORT, 13 (2002), *available at* <http://www.cdc.gov/reproductivehealth/ART02/PDF/ART2002.pdf>.

³¹ *Costa Rica Pressured to Reverse IVF Ban*, CATH. WORLD NEWS, Jan. 10, 2005, *at* <http://www.cwnews.com/news/viewstory.cfm?recnum=34533> ("In March 2000, Costa Rica became the only country in North or South

Indeed, several sources describe Costa Rica's approach to regulating IVF as the most restrictive in the world.³² The majority of States in the Americas have no laws restricting access to *in vitro* fertility therapy, and IVF clinics are known to operate in at least fourteen States in the region: Argentina, Bolivia, Brazil, Canada, Chile, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Peru, the United States, Uruguay, and Venezuela.³³ Although several American States have or are considering legislation or rules regulating *in vitro* fertilization to protect the interests of both infertile couples and children conceived through this method, neither the legislatures nor courts of any State other than Costa Rica have acted to categorically prohibit IVF.

Costa Rica justifies its prohibition of *in vitro* fertility therapy as necessary to protect embryonic human life. However, as the following discussion of State practice demonstrates, even other countries in the Americas that have codified their interest in protecting embryonic life in their constitutions or laws have not found it necessary to ban *in vitro* fertilization.³⁴ This evidence that the other countries in the region do not view IVF as inconsistent with strong protection of embryonic life suggests that Costa Rica's absolute ban is neither a necessary nor an appropriate response to the State's interest in protecting children conceived through IVF.

America to prohibit in vitro fertilization.”).

³² See, e.g., Robert L. Paarlberg, *The Great Stem Cell Race*, FOREIGN POLICY, May-June 2005, at http://www.foreignpolicy.com/story/cms.php?story_id=2831; Martin Penner, *Vatican Set to Claim Victory on Fertility as Voters Stay Away*, TIMES ONLINE, June 13, 2005, at <http://www.timesonline.co.uk/article/0,,3-1652082,00.html>; *Italian No-Shows May Kill Fertility Vote*, THE AUSTRALIAN, June 14, 2005, at http://theaustralian.news.com.au/common/story_page/0,5744,15606488%255E2703,00.html.

³³ The Latin American countries listed are those that have centers affiliated with or accredited by the Red Latinoamericana de Reproducción Asistida (Redlara). Established in 1995, Redlara is a network of 124 assisted fertility centers. It includes more than 90 percent of all such clinics operating in Latin America. REDLARA, WELCOME TO REDLARA, at <http://www.redlara.com/ing/home1.asp> (last visited Sept. 20, 2005). For an updated listing of associated centers, see REDLARA, AFFILIATED AND ACCREDITED CENTRES, at http://www.redlara.com/ing/QUEM_CENTRO.ASP (last visited Sept. 20, 2005).

³⁴ Other American States that do not protect embryonic life as strictly as these countries also permit *in vitro* fertility therapy. Canada, for example, has taken the position that the pre-implantation embryo deserves greater respect than human tissue but not respect equal to that accorded persons. Canada's Assisted Human Reproduction Act explicitly permits IVF, while prohibiting stem-cell research. See generally, Assisted Human Reproduction Act, 2004 S.C., ch. 2 (Can.), available at <http://laws.justice.gc.ca/en/A-13.4/2389.html#rid-2398>.

The Argentine constitution explicitly incorporates the American Convention on Human Rights,³⁵ which gives all persons a right to life that should be protected, “in general, from the moment of conception.”³⁶ The civil code codifies this doctrine, stating that embryos are considered to be persons from the moment of conception in the maternal womb.³⁷ Several legislative proposals have been advanced that would recognize legal personality from the moment of fertilization, whether this occurs *in utero* or *in vitro*.³⁸ The majority of these proposals have not sought to prohibit *in vitro* fertility therapy but rather permit its practice in a manner consistent with recognition of an embryonic right to life.³⁹ The bill that advanced the furthest in the legislative process was the Ley de Fertilidad Asistida, which was approved by the Argentine senate in 1997.⁴⁰ To date, however, Argentina has not enacted any legislation regulating *in vitro* fertility therapy.⁴¹ As of 2002, at least 19 assisted reproduction centers offered services in Argentina.⁴²

The Brazilian civil code also protects the unborn from the time of conception, although it

³⁵ CONST. ARG. art. 75, § 22.

³⁶ American Convention on Human Rights, art. 4(1), O.A.S.T.S. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978.

³⁷ CÓD. CIV., art. 63 (Arg.) (“Son personas por nacer las que, no habiendo nacido están concebidas en el seno materno.”). See also CÓD. CIV., art. 70 (Arg.) (“Desde la concepción en el seno materno comienza la existencia de las personas; y antes de su nacimiento pueden adquirir algunos derechos, como si ya hubiesen nacido.”).

³⁸ These bills have been proposed by the legislators Britos (1992), López de Zavalía (1992), Camaño and Corchuelo Blasco (1993) and Ruckauf and Iribarne (1993). See Dolores Anneca et al., *Los Proyectos de Ley Más Destacados, in* FECUNDACIÓN “IN VITRO” (Manuel Cobas, ed.) at <http://www.salvador.edu.ar/ua1-4-tpcobas2.htm#E.-%20LOS%20PROYECTOS%20DE%20LEY%20MAS%20DESTACADOS> (last visited Sept. 12, 2005).

³⁹ Three of the four proposals would explicitly recognize and permit the practice of *in vitro* fertility therapy, subject to certain limits. *Id.* (“Salvo el proyecto de López de Zavalía, todos los demás aceptan la fecundación *in vitro*, pero fijan un límite al número de embriones que pueden obtenerse, todos los cuales deben ser transferidos de inmediato al útero materno.”) FECUNDACIÓN “IN VITRO” does not make clear whether the López de Zavalía bill would prohibit *in vitro* fertilization or merely take no position on that matter. The Lowenstein Clinic was unable to obtain a copy of the original legislative proposal.

⁴⁰ See Ana Carolina Meli, *La fecundación asistida y las técnicas de fertilización*, in PRIMERAS JORNADAS NACIONALES DE BIOÉTICA Y DERECHO (22-23 August 2000), at <http://www.aaba.org.ar/bi170p22.htm> (last visited Sept. 12, 2005).

⁴¹ Private correspondence from Manuel O. Cobas, Professor of Juridical Sciences at la Universidad del Salvador in Buenos Aires (Sept. 14, 2005) (on file with the Lowenstein Clinic); see also Hernán Cappiello & Jesica Bossi, *El destino de los embriones congelados*, LA NACIÓN, June 26, 2005, available at <http://www.biotech.bioetica.org/ap71.htm>

⁴² See REDLARA REGISTRO 2002, *supra* note 28, at 13.

considers birth to be the beginning of civil personhood.⁴³ In Brazil, *in vitro* fertility therapy is currently unregulated, although a number of bills have been proposed to permit and regulate IVF.⁴⁴ The proposed legislation that has advanced the furthest would permit *in vitro* fertility therapy, while regulating it to protect the interests of both prospective parents and children conceived through IVF.⁴⁵ The Brazilian civil code has also been revised to ensure that children born through *in vitro* fertilization and other assisted fertility techniques are recognized as legitimate.⁴⁶ As of 2002, more than 40 clinics, including some public institutions,⁴⁷ offered

⁴³ Código Civil, art. 2 (Brazil), available at http://www.mj.gov.br/sal/codigo_civil/indice.htm (“A personalidade civil da pessoa começa do nascimento com vida; mas a lei põe a salvo, desde a concepção, os direitos do nascituro.”)

⁴⁴ Since 2003, seven bills have been proposed in the national assembly, all of which permit the practice of *in vitro* fertility therapy while subjecting it to regulations to protect the public interest. Projeto de Lei No. 4889/05 (Deputado Salvador Zimbaldi), available at <http://www.camara.gov.br/sileg/integras/282844.pdf> (limiting the number of eggs that may be fertilized at one time); Projeto de Lei 4686/04 (Deputado José Carlos Araújo), available at http://www.ghente.org/doc_juridicos/pl4686.htm (providing a right to knowledge of one’s biological parentage for persons born through assisted reproduction); Projeto de Lei No. 4555/04 (Deputado Henrique Fontana), available at http://www.ghente.org/doc_juridicos/pl4555.htm (permitting the use of embryonic stem cells created through *in vitro* fertility therapy for research and therapeutic purposes); Projeto de Lei No. 2061/03 (Deputada Maninha), available at http://www.ghente.org/doc_juridicos/pl2061.htm (permitting the provision of assisted fertility services at public and private medical centers, limiting to four the number of eggs fertilized at a time, and permitting the cryopreservation and adoption of embryos); Projeto de Lei No. 1184/03 (Senado Federal), available at http://www.ghente.org/doc_juridicos/pl1184.htm (limiting to two the number of eggs fertilized at a time and prohibiting the cryopreservation of embryos); Projeto de Lei No. 1135/03 (Deputado Pinotti), available at http://www.ghente.org/doc_juridicos/pl1135.htm (limiting to three the number of eggs fertilized at a time, specifying informed consent requirements, and permitting cryopreservation and embryo adoption); Projeto de Lei No. 120/03 (Deputado Roberto Pessoa), available at http://www.ghente.org/doc_juridicos/pl120.htm (providing a right to knowledge of one’s biological parentage for persons born through assisted reproduction). For a discussion of earlier legislative proposals, see generally Dirce Guilhem, *New Reproductive Technologies, Ethics and Legislation in Brazil: A Delayed Debate*, 15 *BIOETHICS* 218, 224–226 (2001); Debora Diniz, *New Reproductive Technologies, Ethics and Gender: The Legislative Process in Brazil*, 2 *DEVELOPING WORLD BIOETHICS* 144, 147–148 (2002).

⁴⁵ The bill permits the fertilization of up to two embryos per cycle, both of which must be transferred immediately. Projeto de Lei No. 1184/03 (Senado Federal), art. 13 § 1, available at http://www.ghente.org/doc_juridicos/pl1184.htm. The Senado transmitted the bill to the Câmara dos Deputados on June 4, 2003. For the most recent status of the proposed legislation, see http://legis.senado.gov.br/pls/prodasen/PRODASEN.LAYOUT_MATE_DETALHE.SHOW_MATERIA?P_COD_MAT=1304. For a comparison to earlier versions of the draft legislation, Projeto de Lei No. 90/99 and Projeto de Lei No. 90-01, see http://www.ghente.org/doc_juridicos/comparativo.htm.

⁴⁶ C.C., art. 1597 (Brazil), available at http://www.mj.gov.br/sal/codigo_civil/parte_especial4.htm#CAPÍTULO II Da Filiação:

Presumem-se concebidos na constância do casamento os filhos. . .

. . . .

III - havidos por fecundação artificial homóloga, mesmo que falecido o marido;

IV - havidos, a qualquer tempo, quando se tratar de embriões excedentários, decorrentes de concepção artificial homóloga;

V - havidos por inseminação artificial heteróloga, desde que tenha prévia autorização do marido.

⁴⁷ See Luna, *supra* note 7, at 31.

assisted reproduction services in Brazil.⁴⁸

The Chilean constitution explicitly requires legal protection of unborn life.⁴⁹ The first Chilean birth through *in vitro* fertilization occurred in 1985.⁵⁰ In that year, the national ministry of health issued non-mandatory guidelines for *in vitro* fertilization and embryo transfer, based on the recognition of a constitutional right to procreate as well as the duty to protect embryonic life.⁵¹ To date, however, Chile has adopted no legally binding regulation of *in vitro* fertility therapy.⁵² At least eight medical centers offer assisted reproduction services in Chile;⁵³ one of these is publicly operated.⁵⁴

Colombia's constitutional court has ruled that the Colombian constitution requires strict protection of human life from the moment of conception.⁵⁵ Accordingly, Colombia's regulation of abortion is the most restrictive in the Americas, absolutely prohibiting the practice even when continuing a pregnancy would endanger a woman's life.⁵⁶ However, Colombia has not sought to

⁴⁸ REDLARA REGISTRO 2002, *supra* note 28, at 13-14.

⁴⁹ Constitución Política de Chile, ch. III art. 19, *available at* <http://www.camara.cl/legis/const/c03.htm> ("La ley protege la vida del que está por nacer.")

⁵⁰ See Villafrade, *Embriones congelados para fertilización "IN VITRO" ¿qué pasa con los que sobran?* EL MERCURIO ONLINE, 30 Aug. 2002, *at* <http://www.zocalo.cl/infertilidad/archivo/losquesobran.htm> ("Aliro Franco, el primer niño nacido in vitro [sic] en Chile, tiene 17 años y está estudiando en la universidad.")

⁵¹ Ministerio de Salud, Ministerial Directive No. 1072, June 1985, *reprinted in* 15 ANNU. REV. POPUL. LAW 53 (1988), summary *at* http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=pubmed&dopt=Abstract&list_uids=12289597&query_hl=4 (last visited Sept. 15, 2005) ("The Guidelines are based on the assumption that the constitutional guarantee of the right of the child to be born includes the right to procreate. . . . They also recommend the requirement that all normal and fertilized ovules be returned to the mother and not stored or used for research.")

⁵² The website www.bioetica.org, which reports on legislation relevant to assisted fertilization and other themes related to bioethics, listed no past or present legislation relevant to assisted fertility techniques in Chile. BIOÉTICA.ORG, LEGISLACIÓN – CHILE (2005), *at* <http://www.bioetica.org/chile.htm> (last visited Sept. 15, 2005). *See also*, María Teresa Villafrade, *supra* note 50 ("Chile no cuenta con una legislación de tratamiento de embriones . . .")

⁵³ See REDLARA REGISTRO 2002, *supra* note 28, at 14.

⁵⁴ The facility is the Hospital San Borja Arriarán. Villafrade, *supra* note 50.

⁵⁵ La Corte Constitucional, Decision No. C-133 of March 17, 1994, *available at* <http://web.minjusticia.gov.co/jurisprudencia/CorteConstitucional/1994/Constitucionalidad/C-133-94.htm> (last visited Sept. 15, 2005) ("El Estado tiene la obligación de establecer, para la defensa de la vida que se inicia con la concepción, un sistema de protección legal efectivo, y dado el carácter fundamental del derecho a la vida . . .").

⁵⁶ Código Penal Colombiano, art. 122-24 (Colombia), *available at* <http://www.derechos.org/nizkor/colombia/doc/penal.html>. The penal code provides for reduced penalties where the pregnancy is a result of rape, but it does not provide an exception for cases where the pregnancy endangers a woman's health or life.

regulate or restrict *in vitro* fertility therapy. Colombia's constitution, as revised in 1991, explicitly contemplates the continued practice of *in vitro* fertility therapy, guaranteeing equal rights to children "conceived naturally or with scientific assistance."⁵⁷ In 2002, at least six private fertility clinics were operating in Colombia.⁵⁸

Mexico's ministry of health licenses assisted reproduction clinics; Mexico does not, however, regulate *in vitro* fertility therapy.⁵⁹ Legislation proposed in 2002 would regulate *in vitro* fertility therapy in a manner "protecting life from the very moment of conception, as well as the legitimate right of couples to become parents."⁶⁰ One Mexican state, Tabasco, has already enacted a similar reform, revising its civil code to recognize the right to medically-assisted reproduction as part of the right to procreate and providing for protection of *in vitro* embryos.⁶¹ In 2002, at least twelve assisted reproduction clinics were operating in Mexico.⁶²

The United States has not explicitly authorized the use of IVF therapy. However, a law passed in 1992 implicitly recognizes the practice by requiring all IVF facilities to report their rates of success to the Secretary of Health and Human Services.⁶³ Several U.S. states have passed legislation designating conception as the moment at which life begins.⁶⁴ Although U.S.

⁵⁷ Constitución Política de Colombia, art. 42 (Colombia), available at <http://www.banrep.gov.co/regimen/resoluciones/cp91.pdf> ("Los hijos. . . procreados naturalmente o con asistencia científica, tienen iguales derechos y deberes.")

⁵⁸ See REDLARA REGISTRO 2002, *supra* note 28, at 14.

⁵⁹ Lorena Rios, *Urge regular la reproducción asistida*, VÉRTIGO, March 13, 2004, available at <http://www.revistavertigo.com/historico/13-3-2004/reportaje8.html> (last visited Sept. 15, 2005) ("A través de la norma mexicana 003 SSA/2-1993, la Secretaría de Salud emite los permisos a las clínicas especializadas en las técnicas de reproducción asistida, sin embargo no existe una regulación . . .").

⁶⁰ Rafael Maya, *El PAN busca regular la reproducción asistida y la procreación no natural: siempre y cuando sea dentro del matrimonio*, CIMACNOTICIAS.COM, May 15, 2002, available at <http://www.cimacnoticias.com/noticias/02may/02051501.html> (" . . . tutelando la vida desde el preciso instante de la concepción, así como el derecho legítimo de las parejas a lograr la paternidad"). As of March 13, 2004, the bill was still under consideration. Rios, *supra* note 59.

⁶¹ Mariana Dobernik Gago, *El derecho comparado en la reproducción asistida*, in REPRODUCCIÓN ASISTIDA, *supra* note 4, at 11, 23.

⁶² See REDLARA REGISTRO 2002, *supra* note 28, at 15.

⁶³ Fertility Clinic Success Rate and Certification Act of 1992, Pub. L. No. 102-493, 106 Stat. 3146 (1992).

⁶⁴ For example, the Arkansas Constitution was amended in 1988 to declare that "[t]he policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal

states have the authority within the federal system to regulate IVF and other assisted reproductive technologies, those states that recognize life from the moment of conception have not banned IVF in their jurisdictions. To the contrary, the legal regimes in these states continue to allow such reproductive assistance while protecting life from the moment of conception; hundreds of couples in these states receive reproductive assistance through IVF.⁶⁵

As this comparative account shows, many States in the Americas share Costa Rica's strong commitment to protecting early embryonic life. However, none of these States has banned *in vitro* fertility therapy or even taken legislative steps toward banning it. As described above, Argentina, Brazil, and Mexico have proposed legislative measures that would permit and regulate *in vitro* therapies. Chile, Colombia, Mexico, and the United States, as well as some U.S. states, have passed constitutional amendments, enacted laws, or promulgated regulations that recognize the practice of IVF. The effective regional consensus is that infertile couples should be permitted to benefit from *in vitro* fertility therapy. Costa Rica's position that the right to life under Article 4 of the American Convention requires a ban on *in vitro* fertility therapy⁶⁶ is

Constitution," ARK. CONST. amend. 68, § 2 (1988). Missouri legislation provides, "The life of each human being begins at conception." MO. REV. STAT. § 1.205(1) (1986). A Louisiana statute states, "A viable in vitro fertilized human ovum is a juridical person" LA. REV. STAT. ANN. § 9:129 (West 1986). This statute also prohibits a viable IVF embryo from being intentionally destroyed.

⁶⁵ For example, in 2002, there were more than 400 instances of couples receiving assisted reproduction therapy in Arkansas, more than 500 in Louisiana, and more than 900 in Missouri. THE NATIONAL CENTER FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION OF THE CENTERS FOR DISEASE CONTROL AND PREVENTION, 2002 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 85–86 (2004), available at <http://apps.nccd.cdc.gov/ART2002/clinlist02.asp?State=AR> (reporting numbers of treatments received in 2002 in the two clinics in Arkansas); THE NATIONAL CENTER FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION OF THE CENTERS FOR DISEASE CONTROL AND PREVENTION, 2002 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 240–245 (2004), available at <http://apps.nccd.cdc.gov/ART2002/clinlist02.asp?State=LA> (reporting numbers of treatments received in 2002 in the six clinics in Louisiana); THE NATIONAL CENTER FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION OF THE CENTERS FOR DISEASE CONTROL AND PREVENTION, 2002 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 279–285 (2004), available at <http://apps.nccd.cdc.gov/ART2002/clinlist02.asp?State=MO> (reporting numbers of treatments received in 2002 in the seven clinics in Missouri).

⁶⁶ Petition 12.361, Ann. Rept. Inter-Am C.H.R. 237, OEA/ser. L./V/II.122 doc. 5 rev. 1, at paras. 29–33 (2004), available at <http://www.cidh.oas.org/annualrep/2004eng/CostaRica.12361eng.htm> [hereinafter Ana Victoria Sanchez Villalobos Admissibility Statement].

directly contradicted by consistent State practice within the Americas. The regional trend toward recognizing IVF, even in States with strong legal commitments to protect embryonic life, provides compelling evidence that a ban on *in vitro* fertilization is unnecessary and inappropriate.

III. COSTA RICA’S PROHIBITION OF *IN VITRO* FERTILITY THERAPY PREVENTS MEDICALLY INFERTILE COUPLES FROM EXERCISING THEIR RIGHT UNDER ARTICLE 17 TO FOUND A FAMILY.

The inconsistency of Costa Rica’s ban with the regional consensus reflects the failure of the Costa Rican court to take adequate account of the right of infertile couples to raise a family. The Inter-American Court has not had the opportunity to consider the scope of the right to raise a family under Article 17 of the American Convention. Examining this right in light of other sources of human rights law, according to the principles of interpretation specified by the Convention,⁶⁷ makes clear that this right includes the right to obtain medical assistance to conceive a child.

A. The right to found a family includes the right to conceive children with the chosen partner.

Article 17 of the American Convention obligates States to protect the family as the “natural and fundamental group unit of society” and to respect “[t]he right of men and women of

⁶⁷ American Convention, *supra* note 36, at art. 29 (Restrictions Regarding Interpretation):

No provision of this Convention shall be interpreted as:

- a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

marriageable age to marry and to raise a family.”⁶⁸ This provision parallels the “right to found a family” recognized in Article 23 of the International Covenant on Civil and Political Rights (ICCPR), to which Costa Rica is a party.⁶⁹ The International Covenant on Economic, Social and Cultural Rights, to which Costa Rica is also a party, further obligates States to provide the “widest possible protection and assistance . . . to the family . . . particularly for its establishment.”⁷⁰

The U.N. Human Rights Committee, established by the ICCPR to interpret the treaty’s provisions and to monitor State compliance, has explained that the right to found a family encompasses both the biological aspect of procreation and the social aspect of child rearing: “The right to found a family implies, in principle, the possibility to procreate and live together.”⁷¹ The Committee expressed particular concern that any family planning policies that States enact be consistent with the ICCPR and neither discriminatory nor compulsory.⁷² Restricting the ability of infertile couples to conceive and bear the desired number of children is incompatible with this principle.

The right to found a family inheres in every person. This principle is considered so important within the inter-American human rights system that the Protocol of San Salvador

⁶⁸ American Convention, *supra* note 36, art. 17.

⁶⁹ International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 23, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976). Although the English version of the American Convention uses the word “raise” while the ICCPR uses the term “found,” the Spanish versions of both documents employ the same term, “*fundar*.” Accordingly, this submission uses the two phrasings interchangeably. If, however, the difference in language suggests a difference in meaning, the provision should be interpreted to include the right to “found” a family, in accordance with Article 29(b) of the American Convention, which has been interpreted to specify that the Commission is “duty bound to give legal effort to the provision(s) . . . with the higher standard(s) applicable to the right(s) or freedom(s) in question.” Juan Carlos Abella, Case 11.137, Inter-Am. Ct. H.R., Ann. Rept. Inter-Am. C.H.R. 271, 309, at para. 165, OEA/Ser.L/V/II.98, doc. 7 rev. (1998).

⁷⁰ International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, art. 10, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976) [hereinafter International Covenant on Economic, Social, and Cultural Rights]. Costa Rica ratified the Covenant on Jan. 3, 1976.

⁷¹ *General Comment No. 19: Protection of the Family, the Right to Marriage, and the Equality of Spouses (Art. 23)*, U.N. GAOR, Hum. Rts. Comm., 39th Sess., at para. 5 U.N. Doc. (1990), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.4 at 106 (2000) [hereinafter Human Rights Committee General Comment 19].

⁷² *Id.*

specifically reaffirms that “[e]veryone has the right to form a family.”⁷³ States cannot exclude individuals with reproductive disabilities from the protection of this right. These individuals’ interest in becoming parents is no less legitimate than that of people fortunate to have healthy reproductive systems. Although it may be possible for some infertile couples to establish a family by adoption, the availability of this option does not relieve the State of its obligation to respect and promote the right of couples to seek to conceive and bear biologically related children.⁷⁴

B. The right to found a family includes the right of access to assisted reproduction therapy.

The right to raise a family does not require the State to guarantee every couple a successful pregnancy and childbirth, just as the right to marry does not require the State to provide a spouse for every person. However, the State must not unnecessarily or unreasonably restrict individuals’ and couples’ attempts to realize these rights. Where couples require medical assistance to realize their right to found a family, the State’s denial of access to such assistance fails to respect and protect this right.

Article 10 of the Protocol of San Salvador recognizes the “right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.”⁷⁵ The International Covenant on Economic, Social and Cultural Rights also includes the right to enjoy

⁷³ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”), Nov. 17, 1988, art. 15(2), O.A.S.T.S. 69, 28 I.L.M. 156 [hereinafter Protocol of San Salvador]. Costa Rica ratified the Protocol of San Salvador on November 16, 1999.

⁷⁴ Acknowledging the right of couples to pursue a biological connection with their offspring does not diminish the value and authenticity of families that are not biologically related. However, whether a couple seeks to found a family that is genetically related is a private decision that couples have the right to make. Moreover, the availability of adoption is not an adequate substitute for the right to bear one’s own children, because 1) it is not available to all infertile couples, particularly poor couples and those in cultures where most orphans and abandoned children are taken in by extended families, and 2) it does not address the social and psychological significance of biological reproduction described in Section I.B.

⁷⁵ Protocol of San Salvador, *supra* note 73, at art. 10(1).

the “highest attainable standard of physical and mental health.”⁷⁶

Although Costa Rica correctly asserts that *in vitro* fertilization is not an emergency treatment or a cure for the diseases that may cause infertility,⁷⁷ it is a treatment that helps individuals to overcome reproductive disabilities caused by disease or accident and to enjoy the healthy functioning of their bodies’ reproductive capacity. By enabling otherwise infertile couples to conceive and bear children, treatments such as IVF promote “the enjoyment of the highest level of physical, mental, and social well-being,” which defines the right to health within the inter-American human rights system.⁷⁸

The right to health does not require States to guarantee everyone immediate access to all forms of health care. Instead, it requires States to take steps to progressively realize this right. However, States have an immediate duty not to deny individuals’ access to services that enable them to seek the highest level of health.⁷⁹ By denying infertile couples access to appropriate

⁷⁶ International Covenant on Economic, Social and Cultural Rights, *supra* note 70, at art. 12(1): “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” This understanding of the right to health is further reinforced by the Constitution of the World Health Organization, which emphasizes that “[h]ealth is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.” Constitution of the World Health Organization, *opened for signature* July 22, 1946, Preamble, 62 Stat. 2679, 14 U.N.T.S. 185.

⁷⁷ See Ana Victoria Sanchez Villalobos Admissibility Statement, *supra* note 66, at para. 32: “[T]he State argues that the technique of *in vitro* fertilization is not an emergency treatment to save lives. It maintains that infertility or sterility should not be considered a disease, because it does not involve an alteration of a person’s health, but is rather a biological condition or consequence of a disease. It maintains that *in vitro* fertilization is not an emergency treatment nor a cure for a disease, since it does not resolve its causes: it is, instead, an artificial recourse that seeks to overcome that biological condition.”

⁷⁸ See *supra* note 76 and accompanying text. The understanding of the right to health under the American Convention is further informed by the Cairo Programme of Action, which states that “[r]eproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people . . . have the capability to reproduce and the freedom to decide if, when and how often to do so.” *Report of the International Conference on Population and Development, International Conference on Population and Development, Cairo, Egypt, 5-13 Sept. 1994*, at para. 7.2, U.N. Population Fund, U.N. Doc. A/CONF.171/13/Rev.1 (1995), available at http://www.unfpa.org/icpd/docs/icpd/icpd-poa-04reprint_eng.pdf.

⁷⁹ See *General Comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, at para. 33, Comm. on Econ., Soc., and Cultural Rts., 22d Sess., 5 U.N. Doc. (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003) (“The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*. . . . The obligation to *respect* requires States to refrain from interfering directly or indirectly with the

assisted-reproduction services, Costa Rica fails to respect the right to health and the closely related right to found a family.

IV. THE RIGHT TO LIFE UNDER ARTICLE 4 OF THE AMERICAN CONVENTION NEITHER REQUIRES NOR JUSTIFIES COSTA RICA'S LIMITATION OF THE RIGHT TO FOUND A FAMILY.

Although the American Convention recognizes a State duty to protect developing human life prior to birth, this duty does not justify prohibiting *in vitro* fertilization. The Costa Rican court's decision to ban *in vitro* fertilization fails to recognize that the duty to protect life prior to birth is not absolute and must accommodate the human rights of others, including the right to found a family. Furthermore, because of natural factors, the majority of human embryos – whether conceived *in utero* or *in vitro* – do not survive to become children. Costa Rica's interpretation of Article 4 to prohibit assisted conception – even though it entails similar risks and benefits as unassisted conception – discriminates arbitrarily and unfairly against couples with reproductive disabilities.

A. Under Article 4, the right to life prior to birth is not absolute, and its scope may be limited by the duty to respect the rights of other persons.

Article 4 imposes a duty on States to protect persons' right to have their life respected, "in general, from the moment of conception."⁸⁰ The duty to protect unborn life is not, however, absolute. Rather, the phrase "in general" represents the recognition that the scope of this protection may be limited in some cases. The Commission has determined that the American

enjoyment of the right to health."). Indeed, there is a "strong presumption that retrogressive measures taken in relation to the right to health are not permissible." *Id.* at para. 32. A State's legal action eliminating the availability of a medical service critical to realizing the right to health conflicts with this duty not to take retrogressive measures.⁸⁰ American Convention, *supra* note 36, at art. 4(1) ("Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.").

Convention does not set forth an absolute right to life from the moment of conception but rather provides a wide margin of discretion for countries to determine what protection to provide for life prior to birth.⁸¹ This approach is consistent with the practice of other bodies asked to consider the human rights of the unborn. The European Court of Human Rights, for example, has held that the right to life, to the extent it applies to the unborn, is implicitly limited by the rights and interests of the woman within whom that life is developing.⁸² Similarly, the German constitutional court has, like the American Convention, recognized a right to life from the moment of conception but has explicitly held that protection of this right must be weighed against the burdens placed on the rights of others.⁸³

Article 4 does not require States to prohibit abortion;⁸⁴ it surely may not be interpreted to prohibit *in vitro* fertility therapy that is provided in ways that respect and protect early embryonic life. Although Costa Rica may, like other States in the region, provide greater protection to unborn life than required by the Convention, it may not, by relying on an absolute interpretation of Article 4, completely prevent the exercise of other protected rights. By asserting the right to life to justify a prohibition on *in vitro* fertility therapy – the only hope many couples have of realizing their right to found a family – Costa Rica contradicts the requirement of Article 29 that “[n]o provision of this Convention shall be interpreted as . . . permitting any State Party . . . to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention..”⁸⁵

⁸¹ Resolution 23/81, Case 2141 (United States), March 6, 1981, Ann. Rept. Inter-Am C.H.R., OEA/Ser.L/V/II.54, doc. 9, rev. 1, at paras. 18-30., (1981), available at <http://www.cidh.oas.org/annualrep/80.81eng/USA2141.htm> [hereinafter Case 2141 (United States)] (holding U.S. law permitting abortion did not violate the right to life, because, *inter alia*, the American Convention does not establish an absolute right to life from the moment of conception).

⁸² *Vo v. France*, Eur. Ct. H.R., 40 Eur. H.R. Rep. 12, at para. 80 (2005).

⁸³ 88 BVerfGE 203, reprinted in DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 349-351 (2d ed. 1997). Within this constitutional framework, Germany strictly protects early embryonic life under the Embryo Protection Law, Embryonenschutzgesetz 12/13/1990. Accordingly, German law permits *in vitro* fertility therapy, while prohibiting the destruction of embryos.

⁸⁴ See *supra* note 81 and accompanying text.

⁸⁵ American Convention, *supra* note 36, art. 29.

B. Prohibiting *in vitro* fertility therapy arbitrarily discriminates against couples with reproductive disabilities.

Under any interpretation of Article 4, the duty to protect life “from the moment of conception” does not require a ban on *in vitro* fertilization, but only the protection of any embryos conceived with such assistance. The regulations adopted by Costa Rica’s elected officials in Executive Decree 24029-S of February 3, 1995, more than fulfill that duty. Those regulations absolutely prohibit the destruction of embryos, requiring that every embryo conceived be transferred to the maternal womb so it will have the opportunity to develop into a child. This protection for unborn life, once conceived, meets the requirements that even an absolute duty would impose.

Although Costa Rica acknowledges that Executive Decree 24029-S forbids the destruction of embryonic life, it maintains that medically assisted reproduction violates the right to life, because of the predictability of embryonic deaths involved in such methods.⁸⁶ Costa Rica’s statement that with *in vitro* fertilization, death is “predictable as a result of human manipulation” is misleading. *In vitro* fertilization brings about conception, but this “human manipulation” does not harm the embryos thus conceived; the loss of early embryonic life that takes place following *in vitro* fertility therapy is inherent in all forms of human reproduction.⁸⁷

⁸⁶ See Ana Victoria Sanchez Villalobos Admissibility Statement, *supra* note 66, at para. 30:

The State maintains that, even though Executive Decree 24029-S required that all fertilized audios [sic] must be implanted in the maternal uterus, and it prohibited their elimination or preservation, the mere manipulation of embryos so that only one will survive means the death of other embryos. Moreover, it argues, even if deaths occur within the maternal uterus as a result of natural causes it is unacceptable that death should be predictable as a result of human manipulation. The State adds that the problem is not limited to the number of human lives lost, but has to do primarily with the predictability of those deaths.

(The word “audios” should read “ovules.” See the Spanish version of the admissibility petition, available at <http://www.cidh.oas.org/annualrep/2004sp/CostaRica.12361.htm>)

⁸⁷ CONSENSO LATINOAMERICANO EN ASPECTOS ÉTICO-LEGALES RELATIVOS A LAS TÉCNICAS DE REPRODUCCIÓN ASISTIDA, 10 (1995), available at <http://www.unifertes.com/etica.pdf> [hereinafter CONSENSO LATINOAMERICANO] (describing the process of natural selection in coital conception; of those embryos identified at 24 to 36 hours after fertilization, only 30 percent will naturally develop to the point where they can implant in the womb; of these established pregnancies, another 17 to 20 percent will end in spontaneous abortion, predominantly due to

Whether conceived *in vitro* or *in utero*, the majority of human embryos fail, due to a variety of natural causes, to develop into children.⁸⁸ The natural loss of embryonic life involved in all human reproduction cannot constitute a violation of Article 4.⁸⁹

Indeed, Costa Rica has not disputed that *in vitro* conception and *in utero* conception involve equivalent levels of risk to embryonic life.⁹⁰ The Costa Rican court, however, has invoked the embryonic right to life to prohibit only medically-assisted conception. This differential treatment protects the right to found a family for couples who can conceive without assistance but denies the same right to couples with reproductive disabilities.

The State's duty to protect unborn human life under Article 4 is the same whether that life was conceived *in utero* or *in vitro*. Treating the two methods of conception differently, without justification, violates not only the rights of every person to found a family and to enjoy the highest standard of health but also the right under Article 1 to be free of discrimination.

chromosomal defects incompatible with life):

Es importante señalar que el proceso reproductivo, que se da en forma espontánea en nuestra especie, es extremadamente selectivo. Dicha selección opera en forma implacable desde los más tempranos estados de desarrollo. Así, de cien concepti en estados de cuatro células (24 a 36 horas desde la fecundación) no más de 30 llegan espontáneamente al estado de blastocisto, momento en que tienen la potencialidad de anidarse en el útero de la mujer. Más aún, de aquellos embriones que llegan a manifestarse como clínicamente evidentes, (tres semanas desde la fecundación) otro 17 a 20% se perderá como aborto clínico. De estos más del 70% muere como expresión de errores cromosómicos incompatibles con la vida y generados durante la fecundación.

⁸⁸ These causes include failure of the early pre-implantation embryo to divide and grow, as well as spontaneous abortion post-implantation. *Id.* The rate of spontaneous abortion is not believed to be affected by *in vitro* conception. See Richard Paulsen, *Pregnancy outcome after assisted reproductive technology*, UPTODATE, April 25, 2005 (copy on file with the Lowenstein Clinic) (“The spontaneous abortion rate after IVF is the same as for the general population of the United States when fresh embryos are used and adjustments are made for age and multiple gestation . . .”).

⁸⁹ Interpreting Article 4 to require a ban on *in vitro* fertility therapy leads to a result that profoundly contradicts the right to life; in order to protect life, the court has made it impossible for that life to be conceived. A concern that not all embryos will survive – a risk that equally characterizes *in utero* conception – has become a justification for depriving some couples of the chance to create new life.

⁹⁰ See Ana Victoria Sanchez Villalobos Admissibility Statement, *supra* note 66, at paras. 29-42.

V. COSTA RICA’S BAN ON *IN VITRO* FERTILITY THERAPY FAILED TO FULFILL THE STATE’S OBLIGATION TO BALANCE THE HUMAN RIGHTS AT STAKE.

Where human rights are in apparent conflict, States must carefully balance them to ensure that no individuals’ rights are unnecessarily or unfairly denied. Article 29 of the American Convention specifies, “No provision of this Convention shall be interpreted as . . . permitting any State Party . . . to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention.” This requirement is consistent with the internationally recognized principle that “all human rights and fundamental freedoms are universal, indivisible, interdependent and interrelated and should be promoted and implemented in a fair and equitable manner, without prejudice to the implementation of each of these rights and freedoms.”⁹¹

The World Health Organization has found that “the burden falls on those employing state authority, whether through legislation, executive action, or judicial action, to ensure conformity of their action with the human rights, concerning reproductive and sexual health and other interests, of those they intend to be affected by their action, and those they can reasonably anticipate being so affected.”⁹² Discharge of a State’s duty to fulfill human rights may require it to “balance competing human rights or to find a basis of maximum accommodation of the human rights of individuals that may be in conflict with each other.”⁹³

The decision of the Costa Rican high court to ban *in vitro* fertility therapy failed either to “balance competing rights” or demonstrate an attempt to “find a basis of maximum

⁹¹ *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, G.A. Res. 53/144, U.N. GAOR, 53rd Sess., at 3, U.N. Doc. A/RES/53/144 (1999), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.53.144.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.53.144.En?OpenDocument) [hereinafter *UNGA Declaration*]. The American Convention also states, “The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.” American Convention, *supra* note 36, art. 32.

⁹² WORLD HEALTH ORGANIZATION, *CONSIDERATIONS FOR FORMULATING REPRODUCTIVE HEALTH LAWS* 52 (2d ed. 2000).

⁹³ *Id.* at 53.

accommodation” of potentially conflicting rights. The high court based its decision solely on its interpretation of the State’s duty to protect unborn life; it failed to acknowledge, let alone give appropriate weight to, infertile couples’ right to found a family under Article 17 of the American Convention.⁹⁴ By failing to also consider the rights of couples with reproductive disabilities, the high court neglected its duty to promote and implement *all* human rights.

Costa Rica has an obligation to balance and give effect to the competing rights at issue “in a fair and equitable manner without prejudice to the implementation of each of these rights and freedoms.”⁹⁵ The regional consensus on permitting *in vitro* fertility therapy demonstrates that other American States have been able to accommodate the rights of infertile couples seeking to found a family and the State interest in protecting embryonic life. Banning *in vitro* fertility therapy imposes a heavy and discriminatory burden on the rights of individuals with reproductive disabilities. The denial of these rights is not justified by the Article 4 duty to protect developing life; this duty is not absolute and can be fulfilled without prohibiting *in vitro* fertilization. Any regulation of *in vitro* fertility therapy must accommodate the competing rights of couples to found a family and to pursue the highest possible standard of health.

⁹⁴ Although the high court’s published opinion mentions the “right to family” once, it is described only as a right belonging to children potentially conceived through *in vitro* fertilization and not as a right belonging to couples wishing to conceive through this method. Sala Constitucional de la Corte Suprema de Justicia de Costa Rica, *supra* note 1, at para. 4:

En cuanto a la posibilidad de que se realice la fecundación artificial heteróloga, la Procuraduría señala que existe un derecho fundamental a la familia, según se deriva del artículo 51 de la Carta Fundamental, 23 del Pacto Internacional de Derechos Civiles y Políticos, 17 de la Convención Americana sobre Derechos Humanos y 7, 8, 9 y 18 de la Convención sobre los Derechos del Niño. Relacionando ese derecho con la fecundación In Vitro, podríamos decir que todo niño tiene el derecho a nacer en el seno de una familia, así como a ser criado y educado por sus padres, por lo que la técnica debe desarrollarse tomando en cuenta este aspecto.

⁹⁵ *UNGA Declaration*, *supra* note 91, at 3.

CONCLUSION

Costa Rica's ban on *in vitro* fertility therapy deprives individuals with reproductive disabilities of their rights under the American Convention to found a family and to enjoy the highest standard of health. This denial of rights is not justified by the State's interest in protecting human life. Therefore, *amicus curiae* Allard K. Lowenstein International Human Rights Clinic at Yale Law School respectfully submits that Costa Rica's prohibition of *in vitro* fertility therapy violates its duties under the American Convention.