

**FIRST COMES LOVE, THEN COMES
MARRIAGE, THEN COMES A BABY: THE
EXCLUSION OF GAY MEN FROM NEW JERSEY'S
FERTILITY TREATMENT MANDATE**

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Table of Contents

Introduction	97
I. Background	97
a. Methods of Family Formation.....	97
b. Gay Men and Artificial Reproductive Technology	100
c. Artificial Reproductive Technology in New Jersey	104
d. New Jersey’s Infertility Mandate Leaves Out Gay Men.....	108
II. Legal Discussion	111
a. Due Process and the Right to Reproduce	111
b. The Right to Equal Protection	120
c. The New Jersey Law Against Discrimination.....	124
III. Policy Discussion	124
a. The Current Mandate v. New Jersey LGBT Policy	127
b. How the Statute Can be Fixed.....	127
Conclusion	130

2024]

FIRST COMES LOVE

97

Introduction

Adam and Tee, like many married couples, dreamed of having children.¹ The couple, however, was infertile.² Infertility is an obstacle to having children, but not a novel one: 9.4% of American men and 11% of American women suffer from some form of infertility.³ Infertility is not always prohibitive; to help infertile couples conceive, the state where Adam and Tee live mandates insurance companies pay for certain fertility-related costs.⁴ Like so many other couples, Adam and Tee sent the costs of their fertility treatment to Blue Cross and Blue Shield (“BCBS”) for reimbursement.⁵ Unlike other couples, however, BCBS denied them. The reason for the denial? *Adam and Tee are both men.*⁶

I. Background

a. *Methods of Family Formation*

Multiple paths are available to those seeking to become parents. While most people become parents through conventional reproductive acts (e.g., sexual intercourse), others pursue less traditional pathways.⁷ Assisted reproductive technology (“ART”) is an umbrella term used to describe “all fertility treatments in which an egg or embryo is handled,”⁸ including intrauterine insemination and invitro-fertilization (“IVF”).⁹ While intrauterine insemination is cheaper than other ART forms, the procedure has a lower success rate and does not

¹ Lisa Parker & Courtney Copenhagen, *Unfair Denial or Discrimination?*, NBC 5 CHI. (Dec. 10, 2020, 11:23 PM), <https://www.nbcchicago.com/news/local/nbc-5-responds-unfair-denial-or-discrimination/2391780>.

² *Id.*

³ Anjani Chandra et al., *Infertility and Impaired Fecundity in the United States, 1982-2010: Data from the National Survey Family Growth*, 67 NAT’L HEALTH STAT.REP.1, 1 (2013).

⁴ Parker & Copenhagen, *supra* note 1.

⁵ *Id.*

⁶ *Id.*

⁷ DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 339 (West Academic, 5th ed. 2019).

⁸ Ctr. For Disease Control, *What is Assisted Reproductive Technology?* (Oct.8, 2019), <https://www.cdc.gov/art/whatis.html>.

⁹ Carolinas Fertility Inst, *What is the Difference Between IUI & IVF?* (June 14, 2019), <https://carolinasfertilityinstitute.com/whats-difference-iui-ivf>.

work for all people struggling with infertility.¹⁰ With intrauterine insemination, the fetus is genetically related to the surrogate.¹¹ With IVF, however, the entire fertilization process occurs outside the human body, typically in a laboratory.¹²

Surrogacy, bearing a child for someone else, is often used in conjunction with both intrauterine insemination and IVF.¹³ Surrogacy following intrauterine insemination is known as traditional surrogacy; in contrast, surrogacy following IVF is known as gestational surrogacy.¹⁴

In 2020, nearly 80,000 babies were born in the United States using ART, which accounts for approximately 2% of all children born in the country that year.¹⁵ There are several reasons why people choose ART, including, but not limited to, the desire to become a parent without a partner, the desire to become pregnant using the genetic material of a deceased partner, or the desire to have a biological child in a same-sex relationship. In addition, other people use ART due to some form of medical infertility.¹⁶ As such, people from various backgrounds require access to ART to become parents.

However, the total costs of ART can be prohibitive for prospective parents. For example, the cost to implant an embryo formed through IVF into a uterus is \$15,715 for a fresh cycle and \$3,812 for a frozen cycle.¹⁷ A fresh cycle refers to the implantation of a recently created embryo; in contrast, a frozen cycle refers to the implantation of an embryo that was created—up to years prior—and frozen for future use.¹⁸ Importantly, the price of implanting a frozen embryo does not include the cost of prior embryo freezing, which can total \$9,000

¹⁰ *Id.*

¹¹ *Id.*

¹² DOUGLAS E. ABRAMS ET AL., *supra* note 7, at 341.

¹³ *Id.* at 341.

¹⁴ *See id.*

¹⁵ Ctr. For Disease Control, *ART Success Rates*, <https://www.cdc.gov/art/artdata/index.html> (last reviewed May 31, 2023).

¹⁶ *See* DOUGLAS E. ABRAMS ET AL., *supra* note 7, at 340.

¹⁷ Sara Crawford et al., *Cost of Achieving Live Birth from Assisted Reproductive Technology*, 105 *FERTILITY & STERILITY* 444, 444-45 (Feb. 2016).

¹⁸ *Fresh vs. Frozen Embryo Transfer Success Rates*, PACIFIC FERTILITY CTR. OF LA (Jan. 11, 2021), <https://www.pfcla.com/blog/frozen-embryo-transfer-success-rates-ivf>.

for one cycle¹⁹ Moreover, frozen embryo storage has recently doubled at certain clinics, sometimes costing \$720 annually.²⁰ The costs do not stop there, however. Where donor gametes are needed because the prospective parents cannot use their own, prospective parents must pay for them as well. Donor sperm costs around \$1,550 per vial²¹—with two vials recommended per cycle of IVF²²—and the use of donated eggs can add anywhere from \$7,400 to \$9,400 to the cost of a cycle.²³ If surrogacy is used, there is an additional cost ranging from \$190,000 to \$230,000 or more, depending on which state the surrogacy is taking place.²⁴ Using these estimates, the cost for a single, fresh cycle of IVF using donated eggs and surrogacy costs nearly \$300,000.

However, not every IVF-created embryo will prove viable in the mother's uterus.²⁵ For a 23-year-old, 150-pound 5'9 woman who has not previously given birth with no fertility-related complications, the cumulative chance of a live birth after *three* transfers using donated eggs stands at 87%.²⁶ Therefore, prospective parents will likely have to pay for more than one cycle of IVF to increase their chances of having a live birth.²⁷ This cost analysis noticeably excludes the

¹⁹ *Cost of Egg & Embryo Freezing: What You Need to Know*, PACIFIC FERTILITY CTR. LOS ANGELES (June 29, 2022), <https://www.pfcla.com/blog/egg-freezing-costs>.

²⁰ Yeganeh Torbati, *With egg freezing increasingly common, fertility clinics hike storage fees*, WASHINGTON POST (Apr. 14, 2023 at 10:40 a.m. EDT), <https://www.washingtonpost.com/business/2023/04/12/egg-freezing-storage-prices/>.

²¹ *How Much Does It Cost?*, THE SPERM BANK OF CA, <https://www.thesperm-bankofca.org/get-started/sperm-purchase/donor-program-fees/> (last visited Sept. 23, 2023).

²² *Donor Sperm*, PACIFIC FERTILITY CTR., <https://www.pacificfertilitycenter.com/treatment-care/donor-surrogate-programs/donor-sperm> (last visited Sept. 23, 2023).

²³ *Egg Donation Cost at the Advanced Fertility Center of Chicago + Medications for a Complete Egg Donation Cycle*, ADVANCED FERTILITY CTR. OF CHI., <https://advancedfertility.com/fertility-treatment/affording-care/egg-donation-cost/> (last visited Oct. 9, 2022).

²⁴ *West Coast Surrogacy Costs & Fees*, WEST COAST SURROGACY INC., <https://www.westcoastsurrogacy.com/surrogate-program-for-intended-parents/surrogate-mother-cost> (last visited Sept. 23, 2023) (One potential cost analysis is a \$3,000 signing bonus for the surrogate, \$50,000 base fee for the surrogate not including expenses and allowances, health insurance costs for the mother, lost wages, and potential extra fees for twins, triplets, or caesarian section birth).

²⁵ See ART Success Rates, *supra* note 15.

²⁶ Ctr. For Disease Control, *My Chance of Having a Baby Using IVF*, <https://www.cdc.gov/art/ivf-success-estimator/index.html> (last viewed Oct. 9, 2022) (Navigate to the CDC's "IVF Success Estimator" and put in any weight, height, and medical history to receive an estimated chance of success with IVF after one, two, and three cycles. For this Note, a 5'9 female weighing 150 pounds who has not given birth before and has no medical complications was used as a sample to represent an average patient).

²⁷ *Id.*

traditional costs of maternal care, such as the hospital bill parents can expect to receive post-birth. 56% of Americans cannot afford a \$1,000 emergency; for working-class people, IFV costs can seem insurmountable.²⁸

ART's unique cocktail of high cost and high demand has led many states, including New Jersey, to mandate health insurance policies to cover the costs associated with ART when it is deemed necessary for a person to conceive.²⁹ In New Jersey, for example, insurance is mandated to cover: "diagnosis and diagnostic tests, medications, surgery, in vitro fertilization, embryo transfer; artificial insemination (unlimited cycles), gamete intrafallopian transfer, zygote intrafallopian transfer, intracytoplasmic sperm injection, ovulation induction, assisted hatching, and four completed egg retrievals per lifetime of the covered person."³⁰ However, New Jersey has been underinclusive in defining when ART is necessary and, more specifically, for *whom* it is necessary.

b. Gay Men and Artificial Reproductive Technology

All cisgender gay men in same-sex relationships are relationally or structurally infertile.³¹ As applied to these couples, structurally infertile means cisgender gay men must reproduce through "means other than the sexual intercourse" because "they lack the necessary structures to achieve biological parenthood on their own."³² Some gay men are additionally medically infertile, falling into a cross-over group referred to as "medico-structurally infertile."³³ In either case, these men, through no fault of their own, are infertile.

²⁸ Carmen Reinicke, *56% of Americans Can't Cover a \$1,000 Emergency Expense With Savings*, CNBC (Jan. 19, 2022), <https://www.cnbc.com/2022/01/19/56percent-of-americans-cant-cover-a-1000-emergency-expense-with-savings.html>.

²⁹ Valarie Blake, *It's an Art Not a Science: State-Mandated Insurance Coverage of Assisted Reproductive Technologies and Legal Implications for Gay and Unmarried Persons*, 12 MINN. J.L. SCI. & TECH. 651, 653, 667 (2011).

³⁰ Am. Soc'y for Reprod. Med., *New Jersey*, <https://www.reproductivefacts.org/patient-advocacy/state-and-territory-infertility-insurance-laws/new-jersey/> (last visited Sep. 22, 2023).

³¹ Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 6 WIS. L. REV. 1065, 1077 (2016).

³² Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKLEY J. GENDER L. & JUST. 18, 24 (2008).

³³ Blake, *supra* note 29, at 654.

Despite structural and potential medical infertility, a significant number of gay men want to become parents.³⁴ In a 2019 study conducted by the *Family Equality Counsel*, 63 percent of LGBTQ millennials were considering having children.³⁵ Moreover, this figure is on par with their non-LGTBQ counterparts.³⁶ As a result, gay men must choose alternate means to become parents.³⁷ Gay men do consider adoption, but if having biological children is important to them— as it is for many straight couples — they need ART.³⁸ Because the journey to parenthood for gay men often includes surrogacy, this process is now inextricably linked to LGBT equality.³⁹

The census, which historically had difficulty calculating the amount of LGBTQ people in America, estimates 22,418 same-sex couples are living in the state of New Jersey.⁴⁰ If one-third of these couples were gay men, and 40% of these couples wanted biological children, roughly 1,500 gay male New Jersey residents would require ART to conceive. While not scientific, this calculation paints a picture of the real and sizable demand for ART among gay men in New Jersey. This estimate is further supported by a showing that, in recent years, gay men in the United States have increasingly pursued the

³⁴ FAMILY EQUALITY COUNSEL, LGBTQ FAMILY BUILDING SURVEY 3 (2019).

³⁵ *Id.*

³⁶ *Id.* (showing 48 percent of LGBTQ Millennials are planning to grow their families, compared to 55 percent of non-LGBT Millennials- a gap of only 7%).

³⁷ *Id.* (showing 63 percent of LGTBQ people planning families are looking to alternative methods of family formation, such as ART).

³⁸ See, e.g., Jenny Kleeman, 'We are expected to be OK with not having children': How Gay Parenthood Through Surrogacy Became a Battleground, THE GUARDIAN (Oct. 1, 2022 4:00 PM), <https://www.theguardian.com/lifeandstyle/2022/oct/01/how-gay-parenthood-through-surrogacy-became-a-battleground#:~:text=%E2%80%9CSituation-ally%2C%20we%20are%20the%20most,trying%20to%20fight%20the%20most.%E2%80%9D>; Julie Compton, *More LGBTQ Millennials Plan to Have Kids Regardless of Income, Survey Finds*, NBC (Dec. 27, 2019, 10:55 AM), <https://www.nbcnews.com/feature/nbc-out/more-lgbtq-millennials-plan-have-kids-regardless-income-survey-finds-n1107461>.

³⁹ Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1253 (2016).

⁴⁰ J. Dale Shoemaker, *The Government Doesn't Know Much About LGBTQ People. Here's What We Know About N.J.*, NJ.COM TRUE JERSEY (Feb. 20, 2020, 9:05 A.M.), <https://www.nj.com/data/2020/02/the-government-doesnt-know-much-about-lgbtq-people-heres-what-we-know-about-nj.html>.

opportunity to have children with the assistance of surrogate mothers.⁴¹ However, it is difficult to determine exact numbers.⁴²

The process of surrogacy for gay men is “complicated by the fact they must rely on both donated gametes (in their case, eggs or ova) but also on the assistance of a surrogate to carry the fertilized embryo to term.”⁴³ ART for gay men typically involves a combination of IVF and surrogacy.⁴⁴ Because both partners in this relationship are men, an egg donor is needed for IVF.⁴⁵ Donated eggs are fertilized with one of the men’s sperm.⁴⁶ The fertilized eggs will once again require the assistance of a female, as the fertilized eggs must be implanted into a surrogate’s uterus.⁴⁷ This surrogate would attempt to carry the fetus to term.⁴⁸

Using the preceding calculations, the average cost of ART is approximately \$200,000 per child.⁴⁹ While the price remains uniform for all couples seeking to utilize ART, some couples – namely, heterosexual ones may qualify for access to health insurance loans that may offset the cost.⁵⁰ Receiving aid towards ART treatments, such as IVF cycles, egg retrievals, and embryo transfers, alleviates significant costs for qualifying couples.⁵¹ Unfortunately, gay couples are not afforded these same benefits.⁵²

State statutes determine which individuals and couples qualify for mandated insurance coverage for fertility treatment. A state may choose any requirement to determine which individuals and couples receive insurance coverage for ART. However, more than half of the

⁴¹ CARLOS A. BALL, *THE RIGHT TO BE PARENTS: LGBT FAMILIES AND THE TRANSFORMATION OF PARENTHOOD*, at 133 (2012) (ebook).

⁴² *Id.*

⁴³ *Id.* at 132.

⁴⁴ *5 Decisions for Gay Dads During IVF*, PACIFIC FERTILITY CTR. L.A. (Jul. 27, 2018), <https://www.pfcla.com/blog/gay-dad-decisions-starting-ivf-journey>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Erin Digitale, *For Gay Men, Having a Biological Child Can Be Complicated*, STAN. MED.: SCOPE (Aug. 12, 2022), <https://scopeblog.stanford.edu/2022/08/12/for-gay-men-having-a-biological-child-can-be-complicated/>.

⁵⁰ *Id.*

⁵¹ Crawford et al., *supra* note 17.

⁵² See Digitale, *supra* note 49.

fourteen mandates require a medical cause.⁵³ This medical requirement excludes coverage for couples who are infertile for other reasons.⁵⁴ As applied to gay men: “[m]ale couples, by definition, will be unable to show a medical need for a surrogate because there is no woman in the couple who could fulfill the infertility requirement.”⁵⁵ All gay men, by the essence of being gay men, are infertile.⁵⁶ Yet, not all gay men can demonstrate this infertility in the same way their straight counterparts do (i.e., medically) and are thus excluded from benefits.⁵⁷

Both structurally and medically infertile persons have the same desire to become parents.⁵⁸ A gay person finds no more peace with their infertility than a person with an ovarian disease.⁵⁹ However, some legislatures have decided that the latter’s need is somehow more real. Perhaps this is because some still consider the former a choice and the latter natural.⁶⁰

However, Jenna Casolo of Georgetown University Law Center argues that these statutes might not be written out of animosity.⁶¹ Instead: “[T]he influence of cultural conditioning with respect to homosexuality and parenting creates at least a heightened risk for discrimination where judges and politicians allow heteronormative suppositions to influence law and policy.”⁶² In other words, when these fertility mandates were written, legislators rarely kept gay men in mind. Ignorance can explain many laws that negatively impact gay men.

The era in which these statutes were written may also explain why legislators have failed to consider gay men when enacting fertility policies.⁶³ Generally: “[o]lder statutes are more likely to require proof that the intended parents have a ‘medical need’ for

⁵³ Blake, *supra* note 29, at 698.

⁵⁴ See Jenna Casolo et al., *Assisted Reproductive Technologies*, 20 GEO. J. GENDER & L. 313, 344 (2019).

⁵⁵ *Id.*

⁵⁶ Daar, *supra* note 32.

⁵⁷ Casolo, *supra* note 54.

⁵⁸ Blake, *supra* note 29, at 698-99.

⁵⁹ *See id.*

⁶⁰ *Id.* at 672.

⁶¹ Casolo, *supra* note 54, at 343.

⁶² *Id.*

⁶³ Courtney G. Joslin, (*Not*) *Just Surrogacy*, 109 CALIF. L. REV. 401, 434 (2021).

surrogacy.”⁶⁴ It is also essential to keep in mind that New Jersey’s original infertility statute was written in 2001⁶⁵ — before it was legal to marry a same-sex partner,⁶⁶ before it was illegal to be fired from your job for being gay,⁶⁷ and before openly gay men were allowed to serve in the military.⁶⁸ At the time the New Jersey statute was crafted, gay people were not recognized in many aspects of public life. As a result, the legislators likely could not imagine why a couple could not conceive naturally beyond medical disease. This is because, to them, all couples consisted of one male and one female.

Regardless of intent, gay men are still required to bear the entire financial burden of ART because of medical necessity requirements.⁶⁹ As such, the doors to biological fatherhood are often closed for most gay men, not because they are unfit parents but because of the price of IVF alone.

c. Artificial Reproductive Technology in New Jersey

At one point in time, surrogacy was illegal in New Jersey.⁷⁰ *In re Baby M.*, a case involving a surrogate who wanted to assume parental rights, went all the way up to the New Jersey Supreme Court, dominating headlines in the late 1980s.⁷¹ At the time, no state, including New Jersey, had any surrogacy legislation.⁷² The New Jersey Supreme Court issued a unanimous opinion declaring surrogacy illegal

⁶⁴ *Id.*

⁶⁵ Family Building Act, Pub. L. No. 2001, ch. 236.

⁶⁶ Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

⁶⁷ Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

⁶⁸ *Repeal of “Don’t Ask, Don’t Tell”*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/our-work/stories/repeal-of-dont-ask-dont-tell> (last visited Mar. 9, 2023).

⁶⁹ See e.g., Digitale, *supra* note 44; Shira Stein, *Hospital Chain Blocks Fertility Coverage for Its LGBTQ Employees (I)*, BLOOMBERG L.NEWS (July 18, 2022, 5:54 AM), <https://news.bloomberglaw.com/health-law-and-business/hospital-chain-blocks-fertility-coverage-for-its-lgbt-employees>; Precious Fondren, *Gay Couple Was Denied I.V.F. Benefits. They Say That’s Discriminatory*, N.Y. TIMES (April 12, 2022), <https://www.nytimes.com/2022/04/12/nyregion/nyc-ivf-same-sex-couple.html>; Dan Avery, *Gay couples face added hurdle when trying to start a family: Insurance policies*, NBC (Dec. 17, 2020, 12:20 PM), <https://www.nbcnews.com/feature/nbc-out/gay-couples-face-added-hurdle-when-trying-start-family-insurance-n1251394>.

⁷⁰ ABRAMS ET AL., *supra* note 7, at 346.

⁷¹ *Id.*

⁷² *Id.*

2024]

FIRST COMES LOVE

105

and surrogacy contracts unenforceable when the child was already two years old.⁷³ The opinion survived twenty-nine years and two attempts by the New Jersey legislature to legalize the practice.⁷⁴ In 2009, a New Jersey trial court expanded the holding to gestational surrogacy contracts.⁷⁵ In *A.G.R v. D.R.H. & S.H.*, the court ruled that a gestational surrogate who agreed to help a gay couple conceive—one of whom was her brother—was a legal parent of the resulting twin girls.⁷⁶

Finally, with Governor Phil Murphy's election, the legislature passed The Gestational Carrier Agreement Act.⁷⁷ However, there are two nuances in this legislation.

First, only gestational surrogacy contracts are enforceable.⁷⁸ As a result, a traditional surrogacy contract, or a contract for surrogacy with the use of intrauterine insemination rather than IVF, is unenforceable under New Jersey Law.⁷⁹ Effectively, this corrals gay men into utilizing the more expensive ART-IVF.

Secondly, compensation for surrogacy arrangements is limited.⁸⁰ Under the Gestational Carrier Agreement Act, a surrogate can only be compensated for reasonable living expenses and costs, including attorney fees, other legal services, food, clothing, medical expenses, shelter, and counseling.⁸¹ As Casolo notes, this creates a potential problem for gay men as well:

[a]ny restrictions on surrogacy contracts may unintentionally disproportionately affect male same-sex couples seeking to become

⁷³ *Id.*

⁷⁴ Joanna L. Grossman, *End of an Era: New Jersey Legalizes Surrogacy, 29 Years After Baby M*, JUSTIA (Jun. 5, 2018), <https://verdict.justia.com/2018/06/05/end-of-an-era-new-jersey-legalizes-surrogacy-29-years-after-baby-m>.

⁷⁵ No. FD-09-001838-07, 2009 N.J. Super. LEXIS 3250, at 12 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009) (finding that as a matter of public policy, under *Baby M*, voidable surrogacy contracts include gestational surrogacy agreements).

⁷⁶ *Id.* at 1-3, 12-13.

⁷⁷ Grossman, *supra* note 74.

⁷⁸ Rumbold & Seidelman, LLP, *New Jersey Surrogacy Laws 101*, <https://adoptionlawny.com/reproduction-law/local-surrogacy-info/new-jersey-surrogacy-laws/> (last visited Sept. 24, 2023).

⁷⁹ *Id.*

⁸⁰ N.J. STAT. ANN. § 9:17-65 (West 2018).

⁸¹ Rumbold & Seidelman, LLP, *How Much do Surrogates Get Paid in NY and NJ?*, <https://adoptionlawny.com/reproduction-law/become-a-surrogate/surrogate-compensation/> (last visited Sept. 24, 2023).

parents. Because LGBT men cannot reproduce on their own, they must have the cooperation and support of a woman to act as their surrogate. Laws banning or limiting compensation reduce the bargaining power of LGBT couples when negotiating a potential surrogate.⁸²

For gay men, when contracting with a surrogate is almost always essential to their dreams of biological fatherhood, restricting the amount of compensation feels as though the legislature is treating surrogacy as a luxury rather than a necessity.

Concerning ART, in between the *Baby M* case and the legalization of surrogacy, New Jersey passed a statute mandating that insurance companies cover the cost of ART for infertile citizens: The Family Building Act.⁸³ However, a new problem arose with how legislators defined infertility:

For the purposes of this section, “infertility” means the disease or condition that results in the abnormal function of the reproductive system such that a person is not able to impregnate another person; conceive after two years of unprotected intercourse if the female partner is under 35 years of age, or one year of unprotected intercourse if the female partner is 35 years of age or older or one of the partners is considered medically sterile; or carry a pregnancy to live birth.⁸⁴

On August 1, 2016, Marianne Krupa and her wife Erin, along with two other women, challenged this statute for discrimination based on sexual orientation and for restricting their fundamental right to procreation.⁸⁵ Erin Krupa began fertility treatment with her doctor in 2013 but encountered what any woman trying to get pregnant fears: uterine cysts and Stage 3 endometriosis.⁸⁶ This meant Erin Krupa was “medico-structurally infertile.” In other words, she was both situationally infertile as a lesbian woman and medically infertile due to cysts and endometriosis.⁸⁷

⁸² Casolo, *supra* note 54.

⁸³ Family Building Act, Pub.L.No. 2001, ch. 236.

⁸⁴ *Id.*

⁸⁵ *Krupa v. N.J. State Health Benefits Comm’n*, No. 2:16-cv-4637-SDW-LDW, 2018 U.S. Dist. LEXIS 10571, at 15, n.11 (D.N.J. Jan. 23, 2018).

⁸⁶ *Id.* at 5.

⁸⁷ Blake, *supra* note 29, at 653-654.

To make matters worse, the couple's insurance company, Horizon Blue Cross Blue Shield, relied on New Jersey's original infertility statute, the 2001 Infertility Mandate, and denied their request for coverage.⁸⁸ Horizon stated that Krupa must prove her infertility by "having unprotected intercourse with a man for two years."⁸⁹ As noted by the couple's lawyer, "[t]hese women are already going through what can be a difficult experience, and they have the added stress of affording it financially and the added insult of being treated like a second-class citizen."⁹⁰

The *Krupa* court granted the Defendant's Motion to Dismiss for lack of jurisdiction and ripeness.⁹¹ The named Defendants included the former Attorney General for the State of New Jersey, the former Commissioner of the New Jersey Department of Banking and Insurance, the former Director of the New Jersey Division of Pension and Benefits, and members of the state's commissions or committees including, the New Jersey State Health Benefits Plan Design Committee and the School Employees Health Benefits Plan Design Committee.⁹² The court ruled that (1) the 11th Amendment barred the parties from being sued in their official capacity and (2) qualified immunity barred them from being sued in their individual capacities.⁹³ Yet, the New Jersey State Legislature continued the conversation on infertility.⁹⁴ In 2017, Governor Chris Christie signed an amended statute, further expanding the statutory definition of infertility.⁹⁵ Under the new statute, Marianne Krupa and her wife would be covered.⁹⁶

⁸⁸ *Krupa*, U.S. Dist. LEXIS 10571, at 4-5.

⁸⁹ *Id.* at 7 (quotes omitted).

⁹⁰ Megan Jula, *4 Lesbians Sue Over New Jersey Rules on Fertility Treatment*, N.Y. TIMES (Aug. 8, 2016), <https://www.nytimes.com/2016/08/09/nyregion/lesbian-couple-sues-over-new-jersey-rules-for-fertility-treatment.html>.

⁹¹ *Krupa*, U.S. Dist. LEXIS 10571, at 8, 14-15..

⁹² *Id.* at 2.

⁹³ *Id.* at 14.

⁹⁴ N.J. STAT. ANN. § 17:48-6x (West 2017).

⁹⁵ *Id.*

⁹⁶ *Krupa v. N.J. State Health Benefits Comm'n*, No. 2:16-cv-4637-SDW-LDW, 2018 U.S. Dist. LEXIS 10571 (D.N.J. Jan. 23, 2018).

d. New Jersey's Infertility Mandate Leaves Out Gay Men

After the passage of the 2017 amendment, some quickly declared it a victory for all.⁹⁷ However, while the amendment is a victory for medically infertile women looking to have a biological child, it omits language about structurally infertile gay men. In fact, the statute adds gender-specific language regarding men seeking infertility coverage. Instead of defining infertility as a “person who is unable to impregnate another person,” it now defines infertility as a male who is unable to impregnate a female.”⁹⁸

The updated statute still requires that infertility be the cause of a “disease or condition that results in the abnormal function of the reproductive system.”⁹⁹ This likely excludes structural infertility as an eligible form of infertility.¹⁰⁰ As a result, most gay men will not qualify under the amended statute.

The potentially excluded class of medico-structurally infertile gay men remains.¹⁰¹ Medically infertile gay men will have additional trouble proving they are infertile, as their typical sex acts do not provide a ground for fertility. As such, a gay man or couple will likely have to undergo medical testing to prove medical infertility. Still, the statute’s ambiguous wording makes it uncertain if such laboratory test results would even be enough to qualify.¹⁰²

The mandate still hinges entirely on how the word “unable” is defined.¹⁰³ Today, there is nothing to stop an insurance company from interpreting the statute literally, as Horizon Blue Cross Blue Shield did in *Krupa*.¹⁰⁴ Even if gay men experience infertility in the same

⁹⁷ Joan Quigley, *New law covers some infertility treatments for LGBT couples*, THE JERSEY JL (May 22, 2017), https://www.nj.com/opinion/2017/05/new_law_provides_insurance_coverage_for_infertilit.html.

⁹⁸ *Compare* Family Building Act, Pub.L.No. 2001, ch. 236., with N.J. STAT. ANN. § 17:48-6x (West 2017).

⁹⁹ *Krupa*, 2018 U.S. Dist. LEXIS 10571, at 3.

¹⁰⁰ Blake, *supra* note 29, at 667, 671 n.97 (“The statute in New Jersey is equally problematic. It requires that the infertility be caused by a disease or condition, without defining what a condition is”); N.J. STAT. ANN. § 17:48-6x (West 2008).

¹⁰¹ *Id.* at 674, tbl.2.

¹⁰² *Id.* at 671-73.

¹⁰³ *See Krupa*, 2018 U.S. Dist. LEXIS 10571, at 3-6; Julia, *supra* note 90.

¹⁰⁴ *Id.* at 6-7.

2024]

FIRST COMES LOVE

109

way as their straight counterparts (i.e., medically), they still can be denied coverage.¹⁰⁵

Because of the text's ambiguity, Attorney Deb Guston, writing for the LGBTQ+ Bar, believes the amendment "arguably" extends coverage to gay men.¹⁰⁶ Despite Attorney Guston's optimism, however, history says otherwise.¹⁰⁷ In 2020, Chicago-based gay couple Adam Motz and Tee Lam were denied IVF coverage by Horizon Blue Cross Blue Shield.¹⁰⁸ At the time, Illinois had a statute much like New Jersey's.¹⁰⁹ The statute read:

For purposes of this Section, "infertility" means a disease, condition, or status characterized by the inability to conceive after one year of unprotected sexual intercourse, the inability to conceive after one year of attempts to produce conception, the inability to conceive after an individual is diagnosed with a condition affecting fertility, or the inability to sustain a successful pregnancy.¹¹⁰

One can see how this wording allows insurance companies to deny gay men the same coverage afforded to heterosexual couples.¹¹¹ Illinois State Representative Margaret Croke, noting the discriminatory impact of the statute, stated, "[f]or decades, our state insurance law discriminated against countless looking to welcome a child into their family, putting parenthood financially out of reach for same-sex couples, single women, and others."¹¹² Thankfully, Illinois has since amended its statute to resolve such discrepancies.¹¹³ As a result, Chicago-based couple Adam Motz and Tee Lee are now the proud

¹⁰⁵ Blake, *supra* note 29, at 682-83.

¹⁰⁶ Deb Guston, *New Jersey Delivers Gestational Carrier Agreement Law and LGBT Amendments to Artificial Insemination Law*, THE LGBTQ+ BAR (June 15, 2018), <https://lgbtqbar.org/bar-news/new-jersey-delivers-gestational-carrier-agreement-law-and-lgbt-friendly-amendments-to-artificial-insemination-law/>.

¹⁰⁷ *Id.*

¹⁰⁸ Parker & Copenhagen, *supra* note 1.

¹⁰⁹ 215 ILL. COMP. STAT. 5/356m (1997).

¹¹⁰ *Id.*

¹¹¹ 215 ILL. COMP. STAT. 5/356m (1997); Parker & Copenhagen, *supra* note 1; *See generally* Bebe J. Anderson, Esq., *Lesbians, Gays, and People Living with HIV: Facing and Fighting Barriers to Assisted Reproduction*, 15 CARDOZO J.L. & GENDER 451, 460-64 (2009).

¹¹² 215 ILL. COMP. STAT. 5/356m (1997); Parker & Copenhagen, *supra* note 1; *See generally* Bebe J. Anderson, Esq., *Lesbians, Gays, and People Living with HIV: Facing and Fighting Barriers to Assisted Reproduction*, 15 CARDOZO J.L. & GENDER 451, 460-64 (2009).

¹¹³ Press Release, Governor J.B. Pritzker, Ill. Governor Pritzker Signs Package of Legis. Advancing LGBTQ+ Rights (July 27, 2021) (published online).

parents of twins.¹¹⁴ However, while this is a heartwarming story for Illinoisians, it is important to remember that New Jersey continues to use language in its infertility coverage mandate that Illinois found discriminatory.¹¹⁵

Furthermore, this problem is not limited to Illinois or New Jersey. In New York, a gay couple was denied ART coverage by their insurance company in 2022 because the company defined infertility “as the inability to conceive after ‘12 months of unprotected intercourse’ or intrauterine insemination.”¹¹⁶

In the event a gay man or couple in New Jersey is denied coverage for fertility treatment by their insurance, it would be exceedingly difficult to challenge that decision in their individual capacity. Arguing over the meaning of the word “unable” is complex. Additionally, as true in *Kupra*, identifying a proper defendant may be difficult.¹¹⁷ In *Krupa*, the Court determined that the Attorney General for the State of New Jersey, the former Commissioner of the New Jersey Department of Banking and Insurance, the former Director of the New Jersey Division of Pension and Benefits, and members of the state’s commissions or committees, including the New Jersey State Health Benefits Plan Design Committee and the School Employees Health Benefits Plan Design Committee, all could not be defendants in the case.¹¹⁸

IVF and court cases are typically lengthy, especially those involving insurance companies. By the time a couple goes to court, they may miss their child-rearing window. For reference, the Krupas began their fertility journey in 2013 and did not step foot in court until 2016.¹¹⁹ Adam Motz and Tee Lam fought for two years to be

¹¹⁴ Lisa Parker, *Gay Parents Ask: Unfair Denial or Discrimination by Major Health Insurer?* NBC 5 CHI. (Updated on Oct. 26, 2022 10:36 PM), <https://www.nbcchicago.com/consumer/gay-parents-ask-unfair-denial-or-discrimination-by-major-health-insurer/2978437/>.

¹¹⁵ § 17:48-6x.

¹¹⁶ Precious Fondren, *Gay Couple Was Denied I.V.F. Benefits. They Say That’s Discriminatory.*, N.Y. TIMES (Apr. 12, 2022), <http://www.nytimes.com/2022/04/12/nyregion/nyc-ivf-same-sex-couple.html>; See Anderson, *supra* note 112 (discussing gay men being denied ART).

¹¹⁷ *Krupa v. N.J. State Health Benefits Comm’n*, No. 2:16-cv-4637-SDW-LDW, 2018 U.S. Dist. LEXIS 10571, at 14 (D.N.J. Jan. 23, 2018).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 6-7.

2024]

FIRST COMES LOVE

111

reimbursed \$11,000, even with the Illinois Department of Human Rights taking on their case.¹²⁰

Potential plaintiffs would also have to shoulder the significant financial cost of taking a multinational insurance company to court. The cost alone could dissuade a couple from ever challenging the statute.

However, if a gay man or couple were able to take an insurance policy's medical requirement to court, they would have ample arguments. As it stands, the New Jersey fertility mandate can be challenged on due process and equal protection grounds. Furthermore, the statute is also vulnerable to a challenge under the New Jersey Law Against Discrimination.

II. Legal Discussion

a. Due Process and the Right to Reproduce

The right to due process is implicit in Article I, part I of New Jersey's Constitution.¹²¹ This section reads, "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."¹²²

The New Jersey Supreme Court calls Article I, paragraph I "a general recognition of those absolute rights of the citizen which were a part of the common law."¹²³ This court has found among these absolute rights are a right to housing,¹²⁴ public education,¹²⁵ death with dignity,¹²⁶ search and seizure protections,¹²⁷ and free speech. Once a

¹²⁰ Parker, *supra* note 114.

¹²¹ ROBERT F. WILLIAMS & RONALD K. CHEN, THE NEW JERSEY STATE CONSTITUTION (OXFORD COMMENTARIES ON THE STATE CONSTITUTIONS OF THE UNITED STATES) 61 (3d ed. 2023).

¹²² N.J. CONST. art. 1, § I, ¶ 1.

¹²³ King v. S. Jersey Nat'l Bank, 330 A.2d 1, 10 (N.J. 1974) (quoting Ransom v. Black, 24 A. 489, 490 (N.J.L.1892)).

¹²⁴ Southern Burlington Co. NAACP v. Mt. Laurel, 336 A.2d 713, 725 (N.J. 1975).

¹²⁵ Robinson v. Cahill, 303 A.2d 273, 277, 294-95 (N.J. 1973); Abbott v. Burke, 573 A.2d 359, 403, 413 (N.J.1990).

¹²⁶ In re Quinlan, 355 A.2d 647, 51-52 (N.J. 1976).

¹²⁷ State v. Hunt, 450 A.2d 952, 954-56 (N.J. 1982).

right is identified as absolute under Article I, it is protected from government intrusion by substantive due process.¹²⁸

The fundamental rights granted by the New Jersey Constitution are not in line with those protected by its federal counterpart.¹²⁹ The federal constitution grants citizens negative rights, freeing them from particular government actions.¹³⁰ However, the states can go beyond this floor and grant their citizens positive rights, considered the right to an active, welfarist state.¹³¹ For example, each state recognizes a positive right to childhood education in its respective constitutions.¹³²

New Jersey has a particularly progressive constitution in terms of fundamental rights.¹³³ Statutes that may not violate due process as promised by the federal constitution were found to violate the New Jersey Constitution.¹³⁴ The New Jersey Constitution illustrates “the social, political, and economic ideals of the present day in a broader way than ever before in American constitutional history.”¹³⁵ The New Jersey Constitution may protect the broadest swath of fundamental rights—one of which may be the right to reproduce.

Determining if a fundamental right exists is a two-step inquiry.¹³⁶ First, the asserted fundamental liberty interest must be clearly identified.¹³⁷ Second, once the asserted fundamental right is defined, the court evaluates whether that claimed liberty interest is “objectively ‘deeply rooted in this Nation’s history and tradition’” and “implicit

¹²⁸ *Id.* at 61.

¹²⁹ See generally EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS 210-11 (2013).

¹³⁰ *Id.* at 1-4; see also *Deshaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 194-96 (1989).

¹³¹ ZACKIN, *supra* note 129, at 2; see e.g., *Oregon v. Kennedy*, 456 U.S. 667, 680-81 (1982) (Brennan, J., concurring); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980); *Id.* at 91-92 (Marshall, J., concurring); *Oregon v. Haas*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967); see generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491, 495, 499, 501, 503 (1977).

¹³² ZACKIN, *supra* note 129, at 13.

¹³³ See *Right to Choose v. Byrne*, 450 A.2d 925, 931-32 (N.J. 1982).

¹³⁴ *Id.* at 933 (invalidating a New Jersey version of the Hyde amendment which was upheld in a federal due process challenge in *Harris v. McRae*).

¹³⁵ *Id.* at 941 (quoting Milmed, *The New Jersey Constitution of 1947* in N.J.S.A. CONST., Arts. I-III 91 at 110 (1971)).

¹³⁶ *Lewis v. Harris*, 908 A.2d 196, 207 (N.J. 2006).

¹³⁷ See *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

in the concept of ordered liberty.”¹³⁸ Defining the asserted right plays a significant role in the subsequent history and tradition analysis.¹³⁹ Generally, narrowing the asserted interest makes it less likely to be found within the state’s history and tradition. For example, in *Lewis v. Harris*, the Supreme Court of New Jersey framed the asserted fundamental right as the right to *same-sex* marriage, not marriage.¹⁴⁰ The court acknowledged that had the right been defined as marriage more generally, it would have easily been found fundamental within New Jerseyans’ tradition and collective consciousness.¹⁴¹

However, the court may favor a broader definition of the asserted right. *Lewis* was overturned by *Obergefell* precisely because of its narrow construction, with *Obergefell* defining the right as a broader right to marriage.¹⁴² Furthermore, this broad definition is supported by other case law. In *Lawrence v. Texas*, the right was not framed narrowly as the right to gay sex but as a broader right to intimate association.¹⁴³ In *Loving v. Virginia*, the right was framed as a broader right to marriage, not a right to interracial marriage specifically.¹⁴⁴

One factor that may tip the court towards a narrow construction is a reluctance to recognize new rights. In the overturned case of *Lewis v. Harris*, the majority stated that courts must “‘exercise the utmost care’ before finding new rights” through substantive due process analysis, “‘lest the liberty protected . . . be subtly transformed into the policy preferences of the Members of [the] Court.’”¹⁴⁵ The second step in determining if a fundamental liberty exists is determining if the liberty interest is rooted in the “‘traditions and [collective] conscience of our people . . . to be ranked fundamental.’”¹⁴⁶ In

¹³⁸ *Id.* at 720-21 (first quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); then quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)). *See also* *King v. S. Jersey Nat’l Bank*, 330 A.2d 1, 10 (N.J. 1974).

¹³⁹ *Lewis*, 908 A.2d at 207.

¹⁴⁰ *Id.* at 208.

¹⁴¹ *Id.*

¹⁴² *Compare* *Obergefell v. Hodges*, 576 U.S. 644, 670-71 (2015), *with* *Lewis*, 908 A.2d at 208.

¹⁴³ *Compare* *Lawrence v. Texas*, 539 U.S. 558, 567, 574 (2003), *with* *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (defining the asserted right more broadly).

¹⁴⁴ *See* *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

¹⁴⁵ *Lewis*, 908 A.2d at 210-11.

¹⁴⁶ *Id.* at 270.

conducting this analysis, the court looks at the state and nation's judicial, legislative, and social history.¹⁴⁷

New Jersey courts have long recognized a liberty interest in reproduction.¹⁴⁸ In *Griswold v. Connecticut*, the Supreme Court invalidated the state's ban on the use of contraceptives for married couples.¹⁴⁹ In *Eisenstadt v. Baird*, this holding was extended to unmarried individuals.¹⁵⁰ Justice Brennan stressed that "if the right to privacy means anything," single individuals should be free from government interference in the decision to bear a child.¹⁵¹

This liberty interest extends beyond the choice to use contraception. In *Right to Choose v. Bryne*, the Supreme Court of New Jersey found that the state could not restrict a woman's right to have an abortion by limiting the procedure's availability through state Medicaid regulations.¹⁵² The court reasoned that such restrictions "[impinge] upon the right of a woman to control her body and destiny, . . . [which] encompasses one of the most intimate decisions in human experience, the choice to terminate a pregnancy or bear a child."¹⁵³ The liberty interest is to reproduce if wanted, not just to choose an abortion.¹⁵⁴

A large body of New Jersey law supports the right to choose. In *Gleitman v. Cosgrove*, a woman who contracted rubella during her pregnancy was found to have a right to choose whether to give birth to a defective child or undergo an abortion.¹⁵⁵ In *Berman v. Allen*, the Court held that a woman had a cause of action for deprivation of the right to decide whether to bear a child with Down's Syndrome.¹⁵⁶ In *Schroeder v. Perkel*, a mother who gave birth to a child with cystic fibrosis was found to have a right to choose whether to have another child who may suffer the same genetic defect.¹⁵⁷ Finally, in *Doe v.*

¹⁴⁷ *Id.* at 206-13, 215, 222-23.

¹⁴⁸ See *Right to Choose v. Byrne*, 450 A.2d 925, 928, 934 (N.J. 1987).

¹⁴⁹ See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

¹⁵⁰ See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

¹⁵¹ *Id.* at 453-54.

¹⁵² *Right to Choose*, 530 A.2d at 937.

¹⁵³ *Id.* at 934.

¹⁵⁴ *Id.*

¹⁵⁵ *Gleitman v. Cosgrove*, 227 A.2d 689, 691, 693-94 (N.J. 1967).

¹⁵⁶ *Berman v. Allan*, 404 A.2d 8, 14-15 (N.J. 1979).

¹⁵⁷ *Schroeder v. Perkel*, 432 A.2d 834, 842 (N.J. 1981).

Bridgeton Hospital Ass'n, Inc., the court held that a private non-profit hospital could not use moral concepts to limit elective abortions.¹⁵⁸ All these cases highlight a tradition of reproductive choice in New Jersey jurisprudence.

Furthermore, the court's recognition of a liberty interest in reproduction extends beyond abortion.¹⁵⁹ In *Smith v. Board of Examiners*, the New Jersey Supreme Court struck down a statute that allowed for the forced sterilization of certain classes of people.¹⁶⁰ The court reasoned that "our system of government" does not allow for "the forceable suppression of . . . constitutional rights" of any individual.¹⁶¹ Even amongst classes of people the state found inadvisable to reproduce, including criminals, people with epilepsy, "idiots," and "other defectives," the court held that the right to reproduce is fundamental.¹⁶² In a federal case addressing the same issue of sterilization, Justice Douglas noted the right to reproduce was "basic to the perpetuation of a race."¹⁶³ These cases are also important because they do not involve plaintiffs already carrying a child.¹⁶⁴ Rather, the courts recognized the liberty interest even in persons who are not currently in the process of reproducing, may never reproduce, and may not even be able to reproduce.¹⁶⁵

New Jersey has a legislative tradition of placing great value on reproduction, priding itself on "historically provid[ing] stronger protections for reproductive rights and autonomy than are provided by other states and the federal government."¹⁶⁶ Subsection (h) of the New Jersey Freedom of Reproductive Choice Act provides:

It is both reasonable and necessary for the State to enable, facilitate, support, and safeguard the provision of high-quality, comprehensive reproductive and sexual health care...and the ability of such individuals to access affordable and timely reproductive health care services and to engage in autonomous reproductive decision-making,

¹⁵⁸ *Doe v. Bridgeton Hosp. Ass'n, Inc.*, 366 A.2d 641, 647 (N.J. 1976).

¹⁵⁹ *Smith v. Bd. of Exam'rs of Feeble-Minded*, 88 A. 963, 967 (N.J.L. 1913).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 965.

¹⁶² *Id.* at 967.

¹⁶³ *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).

¹⁶⁴ *Id.* at 537; *see also Smith*, 88 A. 963 at 963-65.

¹⁶⁵ *Skinner*, 316 U.S. at 536-37; *see also Smith*, 88 A. 963 at 963-65.

¹⁶⁶ Freedom of Reproductive Choice Act, N.J. Stat. Ann. §§ 10:7-1 (West 2022).

in consultation with health care professionals of their choosing, without fear of prosecution, discrimination, or unnecessary barriers to care.¹⁶⁷

While this act was passed in response to the national abortion debate, this statute recognizes reproduction as a liberty interest beyond abortion.¹⁶⁸ The statute says the state must provide reproductive services, which can include ART.¹⁶⁹ It also highlights that everyone in the state is entitled to reproductive assistance, including gay men.¹⁷⁰

The 2017 infertility amendment also provides evidence of the state's tradition of treating reproduction as a right.¹⁷¹ The mandate proves that New Jersey has a powerful liberty interest in reproduction and will mandate coverage for treatments for infertile citizens.¹⁷²

Both the New Jersey legislature and governor acted to support people who choose to have children. The New Jersey *Family Leave Act* entitles New Jerseyans to twelve weeks of job-protected leave when they have a child.¹⁷³ In 2023, Governor Murphy suggested doubling the state's long-held child tax credit.¹⁷⁴ These initiatives demonstrate the state's long history of supporting citizens' reproduction through programs and subsidization. Importantly, these benefits are also neutral to a citizen's gender or sexual orientation.

Lastly, in looking at the "conscious" of New Jerseyans, the centrality of reproduction to the average person is clear. A 2019 study conducted by the *Family Equality Council* showed that 48 percent of LGBTQ Millennials are planning to grow their families, compared to 55 percent of non-LGBT Millennials- a gap of only 7%.¹⁷⁵

In sum, the right to reproduce is fundamental. Furthermore, the scope of this right may extend to ART, as access to parts of the reproduction liberty right (e.g., contraception, abortion, right to not be

¹⁶⁷ Freedom of Reproductive Choice Act, N.J. STAT. ANN. §§ 10:7-1 (West 2022)).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Family Building Act, Pub.L.No. 2001, ch. 236

¹⁷² *Id.*

¹⁷³ Family Leave Act, N.J. STAT. ANN. § 34:11B-4 (West 2022).

¹⁷⁴ Brent Johnson, *N.J. to Renew Property Tax Relief, Double Child Tax Credit Under Murphy's Budget Plan*, NJ.COM, <https://www.nj.com/politics/2023/02/nj-to-renew-property-tax-relief-double-child-tax-credit-under-murphys-budget-plan.html> (Mar. 02, 2023, 1:35AM).

¹⁷⁵ FAMILY EQUALITY COUNSEL, LGBTQ FAMILY BUILDING SURVEY 3 (last accessed Dec. 1, 2023) <https://www.familyequality.org/resources/lgbtq-family-building-survey/>.

forcibly sterilized) have been consistently constitutionally upheld.¹⁷⁶ If such a right may exist under the federal constitution, it has an even stronger chance of existing under the more progressive New Jersey Constitution.¹⁷⁷

However, the scope of this right still depends on how narrowly or broadly the courts define it. If interpreted broadly, New Jersey would be burdened with justifying any restrictions on using ART— mainly, the medical requirement.¹⁷⁸ In contrast, some case law and legislative history become dissimilar if the right is defined narrowly. Some scholars argue there will be no fundamental right to ART because contraception and abortion concern bodily integrity through the removal of something from one’s body, while ART involves requesting that something be done to one’s body.¹⁷⁹ This distinction between “freedom from unwanted bodily invasions and freedom to obtain bodily invasions” separates ART from other rights granted under the fundamental right of procreation.¹⁸⁰ If the courts distinguished the right in this way, cases like *Eisenstadt* and *Right to Choose* would not be persuasive. Yet, this analysis does not consider that states like New Jersey offer positive rights— the right that “something be done to one’s body.”¹⁸¹

Still, even if a challenger can prove an affirmative right to reproduce within the New Jersey Constitution, such rights are not entirely protected from state restriction.¹⁸² Rather, the rights are entitled to substantive due process, requiring the state to justify any restrictions under New Jersey’s constitutional equal protection doctrine.¹⁸³ Similar to the federal doctrine, the New Jersey balancing doctrine considers (1) the nature of the right asserted, (2) the extent to which the state intrudes on the right, and (3) the public need for such intrusion.¹⁸⁴

¹⁷⁶ Blake, *supra* note 29, at 682–681 (quoting Rhadika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1463 (2008)).

¹⁷⁷ See generally Brennan, *supra* note 131, at 131.

¹⁷⁸ See Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 677 (1985).

¹⁷⁹ Blake, *supra* note 29, at 681.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² See WILLIAMS & CHEN, *supra* note 121, at 58.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 58.

For example, the right to marry, deemed fundamental by the federal and New Jersey Supreme Court, is still subject to “public intrusions” such as age restrictions, a licensing fee, and securing a legal document.¹⁸⁵ In theory, New Jersey’s medical requirement could be justified. However, the legislature should justify why medically derived infertility deserves institutional preferential protection over structural infertility.¹⁸⁶

The aforementioned restrictions on marriage are allowed, in part, because they represent minuscule intrusions.¹⁸⁷ By contrast, the restriction on gay men’s right to reproduce results in far more than a twenty-eight-dollar burden via fee.¹⁸⁸ Rather, the burden is in the tens of thousands of dollars.¹⁸⁹ As such, more justification needs to be provided for limiting the insurance mandate to the medically infertile.

Existing marriage restrictions were upheld because they serve the important government interest of making sure people who get married are fully capable of understanding their decisions.¹⁹⁰ Comparatively, cost is the only justification for restricting the infertility mandate. With an expansion of the mandate, New Jersey would be forced to raise insurance premiums to compensate for added costs. This justification against expanding the mandate is weakened by the precedent set in *Right to Choose*, where the increase in Medicaid expenses was not enough to justify the state’s restriction on the right of women to receive an abortion.¹⁹¹

Furthermore, the expansion would only expand *who* is covered by the mandate, not *what* the mandate covers. Even though gay men experience additional costs related to ART, such as surrogacy and gamete collection, insurance would still only cover the same core

¹⁸⁵ ABRAMS ET AL., *supra* note 7, at 156-57.

¹⁸⁶ Blake, *supra* note 29, at 699-700.

¹⁸⁷ See *Zablocki v. Redhail*, 434 U.S. 374, 383, 386-87 (1978) (distinguishing between statutes that “interfere directly and substantially” with the choice to marry—which require heightened constitutional scrutiny—and “reasonable regulations that do not significantly interfere” with free choice—which do not require such scrutiny).

¹⁸⁸ State of New Jersey Dep’t of Health, *Vital Statistics*, <https://www.nj.gov/health/vital/order-vital/fees/> (last visited Mar. 11, 2023).

¹⁸⁹ Sara Crawford et al., *Costs of Achieving Live Birth from Assisted Reproductive Technology: A Comparison of Sequential Single and Double Embryo Transfer Approaches*, 105, *FERTILITY & STERILITY* 444, 445 (2016).

¹⁹⁰ See generally ABRAMS ET AL., *supra* note 7.

¹⁹¹ See *Right to Choose, etc. v. Byrne*, 450 A.2d 925, 937 (N.J. 1982).

2024]

FIRST COMES LOVE

119

procedures: diagnosis and diagnostic tests, medications, surgery, in vitro fertilization, embryo transfer, artificial insemination (unlimited cycles), gamete intrafallopian transfer, zygote intrafallopian transfer, intracytoplasmic sperm injection, ovulation induction, assisted hatching, and four completed egg retrievals per lifetime of the covered person.¹⁹² Thus, covering gay men under the mandate would cost no more and no less than covering any other person.

One need only look at Maine to calculate how much the expansion may cost. Maine did not have an infertility mandate and debated starting one in 2022.¹⁹³ The state calculated that, to cover the estimated ten percent of its infertile citizens (137,000 people), insurance premiums in the state would increase by about \$5 to \$6 a month.¹⁹⁴ Using this as a proportion, even if New Jersey extended its mandate to cover all 22,418 same-sex couples,¹⁹⁵ this change would only raise premiums by sixty-five cents a month. Furthermore, this cost could be even less as New Jersey would share costs among a much larger population— 9.26 million to Maine’s 1.38 million.¹⁹⁶ Additionally, even if the mandate were extended to cover all 22,418 same-sex couples in the state, not all couples would use ART to have children. If Maine did not find a \$5 to \$6 premium increase prohibitory, New Jersey should not find a sixty-five-cent increase to be a bar to expanding access.

Furthermore, New Jersey has recently expanded its mandate twice without worrying about costs. In 2017, the legislature extended the mandate to cover medically infertile lesbians and single women.¹⁹⁷ In 2020, the legislature widened the mandate to cover

¹⁹² Am. Soc’y for Reprod. Med., *New Jersey, State and Territory Infertility Insurance Laws*, <https://www.reproductivefacts.org/resources/state-infertility-insurance-laws/states/new-jersey/> (last visited Mar. 7, 2023).

¹⁹³ Penelope Overton, *State Lawmakers Approve Bill to Force Insurance Companies to Cover Fertility Treatments*, PRESS HERALD, <https://www.pressherald.com/2022/04/18/state-lawmakers-approve-bill-to-force-insurance-companies-to-cover-fertility-treatments/> (Apr. 19, 2022).

¹⁹⁴ *Id.*

¹⁹⁵ J. DALE SHOEMAKER, *The Government Doesn’t Know Much About LGBTQ People. Here’s What We Know About N.J.*, NJ (Feb. 20, 2020, 9:05 A.M.), <https://www.nj.com/data/2020/02/the-government-doesnt-know-much-about-lgbtq-people-heres-what-we-know-about-nj.html>.

¹⁹⁶ *Compare* New Jersey, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/NJ> (last visited Mar. 11, 2023) *with* Maine, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/ME> (last visited Mar. 11, 2023).

¹⁹⁷ N.J. STAT § 17:48-8x.

New Jersians who are rendered infertile by specific medical treatments, specifically chemotherapy.¹⁹⁸ If the state expanded the mandate in the past to new groups without costs being prohibitive, it should be able to do so again.

It is clear from caselaw, legislative history, and public consciousness that reproduction is a fundamental right. It is unclear if the court will interpret the right broadly enough to include gay men and ART. If the court favors a broad interpretation of this right, limitations on the right imposed by the infertility mandate's medical requirement cannot be justified by negligible cost savings.

b. The Right to Equal Protection

Generally, the right to equal protection prevents the government from statutorily discriminating against certain groups without facing heightened scrutiny.¹⁹⁹ The United States Constitution contains a very explicit equal protection clause in the Fourteenth Amendment, stating that “[n]o State shall. . .deny to any person within its jurisdiction the equal protection of the laws.”²⁰⁰ Most state constitutions, however, are less explicit about citizens’ right to equal protection, including New Jersey.²⁰¹ However, this does not mean New Jersians are not afforded equal protection under the law. The New Jersey Supreme Court has ruled:

A concept of equal protection is implicit in Art. I, par. 1 of the 1947 New Jersey Constitution which declares and protects the natural and unalienable rights of enjoying life and liberty, of acquiring and possessing property, and of pursuing and obtaining safety and happiness.²⁰²

Just as the New Jersey Constitution is not synchronized with the United States Constitution regarding fundamental rights, the same is

¹⁹⁸ Reproductive Science Center of New Jersey *Fertility Preservation Insurance Coverage Becomes NJ Law* (Jan. 15, 2020), [https://fertilitynj.com/news/fertility-preservation-law/..](https://fertilitynj.com/news/fertility-preservation-law/)

¹⁹⁹ WILLIAMS & CHEN, *supra* note 121, at 56-57.

²⁰⁰ U.S. CONST. amend. XIV, § 2.

²⁰¹ *See generally* ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 209 (2009).

²⁰² *McKenney v. Bryne*, 82 N.J. 304, 316 (1980).

2024]

FIRST COMES LOVE

121

true regarding equal protection.²⁰³ In *Peper v. Princeton University Board of Trustees*, the New Jersey Supreme Court noted that the protections offered by the state constitution could be more robust than those provided by the federal constitution: “While the N.J. Const. . . . has no specific equal protection clause analogous to that in the Fourteenth Amendment, our State Constitutions have been construed to provide analogous or superior protections to our citizens.”²⁰⁴

Accounting for this difference is that, in New Jersey, equal protection is analyzed under a more flexible approach.²⁰⁵ New Jersey courts adopted a balancing test that weighs the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction.²⁰⁶ This scheme bucks the strict status-based approach adopted by the United States Supreme Court.²⁰⁷ Under the federal approach, the court determines the plaintiff’s suspect classification and the level of scrutiny traditionally assigned to that group.²⁰⁸ Then, this level of scrutiny is applied to the legislation in question.²⁰⁹ There is also a question of whether the right involved is fundamental.²¹⁰

Critics of the federal strict status-based analysis claim the high courts’ jurisprudence has “evolved into a relatively limited view of enforcement based on the nature of the classification, that is, race, gender, and so forth.”²¹¹ This criticism especially rings true regarding the high courts’ equal protection analysis for LGBTQ+ petitioners. The Court is reluctant to expand the list of groups deserving intermediate or strict scrutiny and has deftly avoided addressing the scrutiny

²⁰³ WILLIAMS & CHEN, *supra* note 121, at 57 (referencing *Planned Parenthood of N.Y.C v. State*).

²⁰⁴ *Peper*, 389 A.2d at 477.

²⁰⁵ See David M. Strauss, *The End or Just the Beginning for Gay Rights under the New Jersey Constitution? The New Jersey Domestic Partnership Act, Lewis v. Harris, and The Future of Gay Rights in New Jersey*, 36 RUTGERS L.J. 289, 318 (2004).

²⁰⁶ *Id.* at 322-23.

²⁰⁷ *Id.* at 320-21.

²⁰⁸ *Id.* at 292.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 320-21.

²¹¹ WILLIAMS & CHEN, *supra* note 121, at 57.

level LGBTQ+ persons are entitled to in all seminal gay rights cases: *Lawrence v. Texas*, *Romer v. Evans*, and *Obergefell v. Hodges*.²¹²

Federal courts struggled to analyze whether a plaintiff belongs to a suspect class and whether the right impacted is fundamental. This differs from New Jersey's balancing test, which focuses on ensuring that its laws provide equal protection, regardless of whether that person is part of a suspect class or the right is fundamental.

New Jersey's infertility statute likely violates its equal protection clause because its language applies to nearly all individuals except for gay men. When a statute is challenged on the basis that it impacts similarly situated constituents differently, the court weighs (1) the nature of the right at stake, (2) the extent to which the challenged statutory scheme restricts that right, and (3) the public need for the statutory restriction to determine if the distinction is a permissible one.²¹³ The statute's differential treatment is only permissible if, when placed on a seesaw opposite the right(s) at stake and the level of burden, the need for the distinction is heavier.²¹⁴

First, the rights at stake in New Jersey's infertility mandate are central. In the equal protection analysis in *Lewis v. Harris*, the court deemed insurance mandate significant benefits.²¹⁵ Similar insurance mandates are in question here. Additionally, in *Planned Parenthood v. Farmer's* equal protection analysis, reproductive choice was deemed fundamental.²¹⁶ Here, the same reproductive choice is implicated. The more critical the nature of the rights at stake, the harder it is to justify its restriction.²¹⁷ In *Lewis* and *Planned Parenthood*, the nature of the rights allowed only minimal restriction and required great public need.²¹⁸ Because the same rights are identified here, the state will have difficulty justifying only granting these rights to specific groups.

Second, the challenged statutory scheme restricts the rights of gay men to equal benefits and control over their reproductive decisions to

²¹² See *Lawrence v. Texas*, 539 U.S. 558, 574 (2003); see *Romer v. Evans*, 517 U.S. 620, 634 (1996); see *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).

²¹³ *Lewis v. Harris*, 908 A.2d 196, 203 (N.J. 2006).

²¹⁴ *Id.*

²¹⁵ *Id.* at 202.

²¹⁶ See *Planned Parenthood v. Farmer*, 762 A.2d 620, 621 (N. J. 2000).

²¹⁷ *Id.* at 633.

²¹⁸ *Id.* at 622; *Lewis*, 908 A.2d at 212-13.

an unjustifiable extent. In *Planned Parenthood*, the court found administrative burdens, such as having to navigate the judicial system for a waiver, constituted an unjustifiable burden.²¹⁹ Similarly, the statute at hand may require gay men seeking ART to navigate the healthcare field without the backing of insurance.²²⁰ Moreover, in *Lewis*, the court found that distinctions creating financial burdens (e.g., the inability to get health insurance for a domestic partner or access certain tax benefits) are similarly hard to justify.²²¹ Here, the economic disadvantage is thousands of dollars in uncovered medical costs.²²²

Lastly, there is no legitimate government purpose for the distinction. As Rao states:

A law that prohibits ARTs under some circumstances, but not others, must at the very least be based on some legitimate government interest in order to be constitutional . . . a law limiting ARTs to married persons or to heterosexual persons should fail because it would treat the very same act—the use of a particular technology—differently based upon the marital status or sexual preference of the persons involved, with no real basis for the distinction other than societal disapproval or prejudice.²²³

The New Jersey infertility mandate is precisely what Rao describes as a law that should fail under an equal protection challenge.

In *Right to Choose*, the court found that the statutory scheme can still be invalid even when a state interest is as compelling as the right to protect potential life.²²⁴ By contrast, the state’s interest here is nowhere near as compelling. In fact, in *Lewis*, the court found that restricting marriage benefits to opposite-sex couples went against the expressed interest of the New Jersey legislature in providing full civil rights to homosexuals.²²⁵ The court reasoned: “There is no rational basis for, on one hand, giving gays and lesbians full civil rights in their status as individuals, and, on the other, giving them an

²¹⁹ See *Planned Parenthood*, 762 A.2d at 630.

²²⁰ N.J. STAT. ANN. § 17:48-6x (West 2017) (stating male infertility is only covered by the mandate if the male is “unable to impregnate a female”).

²²¹ *Lewis*, 908 A.2d at 202.

²²² Crawford et al., *supra* note 17, at 445.

²²³ Rao, *supra* note 176, at 1475-76.

²²⁴ *Right to Choose v. Byrne*, 450 A.2d 925, 937 (N.J. 1982).

²²⁵ *Lewis*, 908 A.2d at 217.

incomplete set of rights when they follow the inclination of their sexual orientation and enter into committed same-sex relationships.”²²⁶ Here, the logic remains the same. There is no rational basis for giving gay men equal rights to love and marry but not doing so when they follow the inclination of love and marriage to expand their family.

Likely, the only justification the state can offer is cost. However, any increased costs resulting from expanding the mandate do not provide sufficient public need to save the statute’s constitutionality. Due to the liberties at stake, the right to reproductive choice and equal insurance coverage are profound. Accordingly, the insurmountable costs and logistical hurdles the medical requirement imposes on gay men cannot be sustained by negligible cost savings.

c. The New Jersey Law Against Discrimination

If the insurance mandate is not found to violate the equal protection guarantee of the New Jersey Constitution, the statute may still violate the New Jersey Law Against Discrimination.

New Jersey claims its Law Against Discrimination (“LAD”) is one of the most comprehensive anti-discrimination laws in the country.²²⁷ The LAD prohibits discrimination and bias-based harassment against protected classes in employment, housing, and places of public accommodation.²²⁸ As summarized by the state’s Supreme Court: “[T]he overarching goal of the [LAD] is nothing less than the eradication of the cancer of discrimination.”²²⁹ In 1992, the New Jersey legislature amended the LAD to include “affectional or sexual orientation” as a protected class.²³⁰ As a result, the LAD’s mission was expanded to eradicate discrimination against gays and lesbians. This legislation is enforced by the New Jersey Division of Civil Rights on behalf of Complainants who file petitions against Respondents.²³¹

²²⁶ *Id.*

²²⁷ *About the NJ Law Against Discrimination*, N.J. DIVI. ON CIV. RTS., <https://www.njoag.gov/about/divisions-and-offices/division-on-civil-rights-home/know-the-law/> (last visited Mar. 12, 2023).

²²⁸ *Id.*

²²⁹ *Lewis*, 908 A.2d at 214 (quoting *Fuchilla v. Layman*, 109 N.J. 319 (N.J. 1988)).

²³⁰ *Id.* at 213.

²³¹ *About the NJ Law Against Discrimination*, *supra* note 227.

First, in making a case for discrimination via disparate treatment, a complainant must make out a prima facie case.²³² The complainant must show: (1) they belong to a LAD-protected class; (2) the respondent is a place of public accommodation as defined by the LAD; (3) the respondent denied access or service to the complainant or subjected complainant to less-favorable terms and conditions of access or service than those not in the protected class; and (4) their membership in the protected class was a substantial motivating factor for the differential treatment.²³³ After the complainant meets their burden, the investigation inquires whether the respondent has a legitimate, nondiscriminatory reason for the differential treatment.²³⁴ If a respondent produces such a reason, the burden then shifts back to the complainant to prove it is merely pretextual.²³⁵

Any gay New Jersey man denied insurance coverage for ART can be a proper complainant in this case. Furthermore, government buildings and agencies are public accommodations.²³⁶ The state agency tasked with enforcing the mandate is an appropriate respondent. Under the LAD, a place of public accommodation cannot subject a complainant to terms and conditions of access or service less favorable than those not in the protected class.²³⁷ Here, New Jersey is doing just that by mandating insurance cover infertility for medically infertile straight couples but not for structurally infertile gay ones. To prevail, the complainant is not required to prove that his membership in the protected class is the only motivation for the adverse treatment.²³⁸

At the time the mandate was drafted, gay men were not allowed to marry.²³⁹ Furthermore, when the statute was amended in 2017, it was amended by a governor who vetoed a bill that would legalize gay marriage and a bill that would relax surrogacy restrictions that

²³² *Richman v. A Country Place Condo. Ass'n*, No. A-2685-18T2, 2020 N.J. Super. Unpub. LEXIS 2254, at 10-11 (N.J. Super. Nov. 23, 2020).

²³³ *Id.*

²³⁴ *Henry v. New Jersey Dept. of Human Services*, 204 N.J. 320, 331 (N.J. 2010).

²³⁵ *Id.*

²³⁶ *Public Accommodation Case Elements*, N.J. DIVI. ON CIV. RTS, <https://www.njoag.gov/about/divisions-and-offices/division-on-civil-rights-home/public-accommodation-discrimination/> (last visited Mar. 12, 2023).

²³⁷ N.J.S.A 10:5-4(f).

²³⁸ *Id.*

²³⁹ *Obergefell v. Hodges*, 576 U.S. 644, 662 (2015) (legalizing gay marriage in 2015, overturning the New Jersey Supreme Court in *Lewis v. Harris*).

disproportionately impact gay couples.²⁴⁰ Although circumstantial, the evidence suggests that at least part of the reason for not broadening the definition of the infertility mandate was to exclude gay couples.

Once a complainant makes a prima facie showing of disparate treatment, the burden shifts to the government to supply a non-discriminatory explanation. The government may point to the fact that medically infertile lesbian couples are covered by the mandate to prove non-discriminatory intent.²⁴¹ It may be argued that the disparate treatment is not discriminatory on sexual orientation grounds but rather medical ones. Furthermore, the state may offer that including gay men in the mandate will increase costs, and the burden will shift back to the complainant to prove the pretext.

The government's reasons can be challenged as a pretext as it disregards the nature of how insurance coverage for ART works. Insurance does not pay for surrogacy contracts.²⁴² Insurance also does not pay for raw genetic material.²⁴³ The only thing insurance pays for is the ART procedure itself—and this cost remains the same for gay, lesbian, and straight couples who do not possess a working uterus.²⁴⁴ Furthermore, as stated earlier, the statute already protects straight couples, lesbian couples, and single women.²⁴⁵ By comparison, the number of gay couples is small, especially when considering that not all gay couples seek to have children.²⁴⁶ Furthermore, of the gay couples who do choose to have children, some will choose alternate routes such as adoption. For this reason, extending the mandate to cover a relatively small subset of patients will not have a significant financial impact on insurance providers. The lack of a legitimate

²⁴⁰ *Chris Christie: Opposes Nationwide Marriage Equality, Transgender Rights*, HUM. RTS. CAMPAIGN, [HTTPS://WEB.ARCHIVE.ORG/WEB/20201231195822/HTTPS://WWW.HRC.ORG/RESOURCES/2016REPUBLICANFACTS-CHRIS-CHRISTIE](https://web.archive.org/web/20201231195822/https://www.hrc.org/resources/2016republicanfacts-chris-christie), (last visited Mar. 12 2023).

²⁴¹ *Krupa v. N.J. State Health Benefits Comm'n*, No. 2:16-cv-4637-SDW-LDW, 2018 U.S. Dist. LEXIS 10571, at 4-6 (D.N.J. Jan. 23, 2018).

²⁴² *Am. Soc'y for Reprod. Med.*, *supra* note 30.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Family Equality Council, *supra* note 175. .

2024]

FIRST COMES LOVE

127

reason also provides *per se* evidence that the only real reason for the medical requirement was “societal disapproval” or “prejudice.”²⁴⁷

In short, a complainant, under the LAD, may be able to win a disparate treatment claim against the state over its fertility treatment mandate. Furthermore, a complainant would not be the first to achieve such a feat: the California and Illinois equivalent of the Division on Civil Rights successfully challenged similar medical infertility requirements as discriminatory.²⁴⁸

III. Policy Discussion

a. The Current Mandate v. New Jersey LGBT Policy

After signing New Jersey’s original fertility mandate, Governor DiFrancesco released a statement emphasizing his experiences as a father of three.²⁴⁹ In his statement, he described “the joys of looking into [his] newborn child’s eyes for the first time.”²⁵⁰ He expressed the hope that the: “[N]ew law will offer those [New Jersey] couples a better chance of having a baby. A better chance of realizing a dream many of us take for granted—the dream of becoming a parent.”²⁵¹

New Jersey’s fertility mandate, gleaned by the then-governor’s intent behind the law, focuses on the social importance of having a child. This importance is neutral to sexual orientation.²⁵² Gay men want to be fathers.²⁵³ Gay men are fathers.²⁵⁴ New Jersey has long recognized this: the state has not only recognized the right of gay parents to raise their children but also places foster children in gay-parent homes through the Department of Children and Families.²⁵⁵

Over the last three decades, New Jersey has protected gay men from discrimination related to sexual orientation through judicial

²⁴⁷ Rao, *supra* note 176, at 1476-77.

²⁴⁸ Blake, *supra* note 29, at 667; § 17:48-6x.

²⁴⁹ Blake, *supra* note 29, at 676 (quoting Governor DiFrancesco).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at 677.

²⁵³ Family Equality Council, *supra* note 175.

²⁵⁴ *Id.*

²⁵⁵ Lewis v. Harris, 908 A.2d 196, 206 (N.J. 2006).

decisions and legislative enactments.²⁵⁶ In 1974, a New Jersey court held that a divorced, gay father could not be restricted from parental visitation due to sexual orientation.²⁵⁷ New Jersey was the first in the nation to recognize the right of an individual to adopt their same-sex partner's biological child.²⁵⁸ The state's courts also allowed an individual to take their same-sex partner's last name legally.²⁵⁹ With the amendment to the New Jersey Law Against Discrimination, the Garden State became the fifth in the nation to prohibit discrimination on account of sexual or affectional orientation.²⁶⁰ New Jersey also protects gay men in statutes involving hate crimes, local public contracts, and public school contracts.²⁶¹ The state also formed the New Jersey Human Relations Council to reduce bias and require school districts to adopt anti-bullying and intimidation policies that protect gay kids.²⁶²

Expanding New Jersey's infertility mandate to cover gay men is a crucial step in finishing what the state has already started. New Jersey has embraced same-sex family formation through initiatives like marriage equality. The state must now embrace accommodating methods that allow gay men to reproduce. To afford such an incredible value to only straight people is contrary to New Jersey values. As such, the statute should be changed.

b. How the Statue Can be Fixed

New Jersey can look to other states for ideas in drafting a more inclusive infertility mandate. For example, the main issue with New Jersey's current statute is the rigid medical requirement. However, comparable states determined that the medical requirement need not be eliminated entirely. Instead, it can be modified so that it is just one way in which an individual or couple can qualify.

²⁵⁶ *Id.* at 213.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 214.

²⁶² *Id.*

Illinois, which amended its infertility mandate after finding it discriminatory to LGBTQ+ people, provides an example of supplementing a medical option with other ways of proving infertility.²⁶³ Under the statute, one can still prove infertility through “disease” and “unprotected intercourse.”²⁶⁴ However, for individuals who cannot express their infertility in this way, the statute provides other options.²⁶⁵ For example, an individual or couple can alternatively have a “condition” or “status” that renders them infertile.²⁶⁶ This “condition” or “status” can be characterized by “a person’s inability to reproduce either as a single individual or with a partner without medical intervention.”²⁶⁷ The statute’s gender-neutral language now allows *anyone* unable to reproduce, either with a chosen partner or themselves, to qualify.²⁶⁸

Colorado’s Building Families Act uses language similar to that of the Illinois statute.²⁶⁹ Furthermore, California, Oregon, and Washington introduced new mandates with the same rhetoric.²⁷⁰ Mainly, all define infertility as “a person’s inability to reproduce either as a single individual or with a partner without medical intervention.”²⁷¹ This shows how influential policymakers nationwide have found this new definition to be and suggests that adopting it would bring New Jersey into uniformity with other states.

California has a critical addition to its proposed mandate. The California statute stipulates: “Consistent with Section 1365.5, coverage for the treatment of infertility shall be provided without discrimination on the basis of age, ancestry, color, disability, domestic partner status, gender, gender expression, gender identity, genetic information, marital status, national origin, race, religion, sex, or sexual orientation.”²⁷²

²⁶³ H.B. 3709, 102nd Gen. Assembly (Ill. 2021).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ Colo. Rev. Stat. 10-16-104(23) (2020).

²⁷⁰ S.B. 729, 2023 Leg., (Cal. 2023); S.B.1530, 2022 Leg., 81st Sess. (Or. 2022); S.B.5204, 2023 Leg., 68th Sess., (Wash. 2023).

²⁷¹ *Id.*

²⁷² S.B. 729, 2023 Leg., (Cal. 2023).

This language is important because, while the infertility definition adopted seems to include people seeking coverage regardless of their protective class, it leaves no debate about the legislature's intent. As such, no reading of the statute could allow an insurance company to discriminate against gay men.

Conclusion

Ultimately, ART has become increasingly important to gay men, specifically those who are structurally infertile by being in a male-male relationship. The New Jersey government mandates that insurance companies assist in covering certain costs related to ART. However, New Jersey's mandate only allows those experiencing medical infertility to qualify for coverage, not those with structural infertility.

This "medical requirement" likely runs afoul of New Jersey law. First, the right to reproduce is fundamental in New Jersey case law, legislative history, and the consciousness of New Jerseyans. If this right is construed broadly, it will include the right to ART. As a result, any restriction on ART, such as the medical requirement, will be subject to strict scrutiny. Furthermore, there is no public need for the medical requirement, so it will likely fail in court. The only legitimate justification the state can offer is cost - but this cost becomes mere cents once broken down.

More likely, the medical requirement violates the right to equal protection. In other words, substantial liberty interests, such as reproduction and insurance benefits, are offered to infertile heterosexual couples and not infertile gay couples. This distinction costs gay men tens of thousands of additional dollars. Furthermore, it exposes them to other logistical hurdles in their ART journey. Also, because the public does not need the medical requirement, these burdens on significant liberty interests could fail under an equal protection challenge.

Lastly, the mandate likely violates the New Jersey LAD. This statute prevents places of public accommodation from discriminating in terms of their services. Here, the government, a place of public accommodation, is offering insurance mandates to straight couples but not gay ones. Furthermore, because of the legislature's makeup and the time it was passed and amended, the likely reason for this

2024]

FIRST COMES LOVE

131

disparate treatment is not increased insurance premiums but social disapproval.

From a policy perspective, the infertility mandate also contradicts New Jersey's goal of eradicating discrimination against gay men. The good news, however, is that the mandate can easily be fixed to comply with New Jersey's public policy goals. Other states, such as Illinois, amended their mandate to allow structurally infertile people, as well as medically infertile people, to qualify for benefits. California has also proposed statutory language that prevents insurance companies from discriminating in ART coverage based on sexual or affectional orientation. By taking cues from these states, as well as others, New Jersey can follow what other progressive states are doing to protect gay men.