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Leila Y. Vicinelli

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ACCESSING THE ARTS: THE USE OF REPRODUCTIVE JUSTICE IN THE FIGHT FOR LGBT+ RIGHTS

ABSTRACT

Procreation has long been an integral component within the family structure. While the ability to produce offspring was once a privilege reserved for fertile, heterosexual pairings, modern advancements in Assisted Reproduction Technology (ART) have made same-sex procreation possible. Although ART makes it possible for same-sex couples to biologically produce offspring, accessibility to treatment is often hindered by financial, legal, and social impediments. This Note will explore the current limitations on LGBT+ accessibility to ART treatments and provide much needed solutions for these challenges. In a post-*Obergefell* world, the prominence of and rights owed to same-sex households can no longer be disregarded.

INTRODUCTION

I. DISCUSSION

- A. *Infertility Treatments, Such as Assisted Reproduction Technologies, Play a Critical Role in Facilitating Family Building in the United States*
 1. *Access to ART Is Particularly Critical to Same-Sex Couples Seeking to Build a Family*
 2. *The Availability of ART in the 1990s Led to a Significant Increase in the Number of Same-Sex Couples Raising Children*
- B. *Despite the Ground-Breaking Advancements in Reproductive Healthcare Achieved Through ART, LGBT+ Accessibility to Treatment Is Limited by High Out-of-Pocket Costs, Limited Health Insurance Coverage, and Sex-Based Discrimination*
 1. *First, Infertility Mandates Must Be Established at the State and Federal Level to Ensure Private Health Insurers Cover Prohibitively Expensive ART Procedures*
 2. *Second, the Outdated, Heterocentric Definitions Within Preexisting Infertility Mandates Must Be Revised to Extend Coverage to Same-Sex Couples*
 3. *Third, Religious Liberty Laws Must Be Limited in Order to End the Protection of Discriminatory Conduct Towards Same-Sex Couples and Prevent*

Providers from Refusing Treatment to LGBT+ Individuals

- C. *Supreme Court Precedent Establishing the Fourteenth Amendment Supported Rights to Family Planning, Privacy, and Association Supports the Contention That ART Must Be Made Accessible to Same-Sex Couples*
 - 1. *In the Aftermath of Dobbs v. Jackson Women’s Health, the Future of Substantive Due Process Rights Remains Uncertain*
 - 2. *From the Ashes of Roe, the Respect for Marriage Act Reflects Bipartisan Hope for the Advancement of LGBT+ Rights*
- D. *The Modern American Family Is Determined by Choice, Not Biological and Social Imperatives*
 - 1. *The Fallacy of the Nuclear Family*
 - 2. *Long-Standing Perceptions of Homosexuality as a Rejection of the Family Unit Emerged as a Result of Discriminatory Laws and Attitudes*
 - 3. *Kinship Ties Between LGBT+ Individuals Dispelled the Myth of LGBT+ Seclusion and Altered Perceptions of the American Family*

CONCLUSION

INTRODUCTION

The Supreme Court’s legalization of same-sex marriage in the summer of 2016 delivered a monumental victory to the LGBT+ community. *Obergefell v. Hodges* not only established the right to same-sex marriage throughout the country, but also conferred a variety of critical spousal rights and benefits to all married same-sex couples. Though *Obergefell* was a key turning point in the LGBT+ rights movement, it failed to grant all the benefits enjoyed by married heterosexual couples to married same-sex couples. Critically, *Obergefell* failed to protect same-sex couples’ rights to procreation. In violation of the Fourteenth Amendment, this right remains stymied by legislative silence on infertility mandates, outdated and heteronormative diagnostic criteria, and the corrosion of anti-discrimination laws by religious liberty claims.

Unfortunately, the most promising means for same-sex procreation—Assisted Reproductive Technology (ART)—comes with an exorbitantly high price tag for individuals outside of heterosexual partnerships. Because of this, the integral right to family building that has been long attributed to marriage is barred to most same-sex

couples in the United States. In a post-*Obergefell* world, married same-sex couples must be afforded the opportunity to access the same benefits as married heterosexual couples. Addressing this imbalance requires the implementation of queer reproductive justice to expand infertility coverage and revise the obsolete legislation that perpetuates inequities and bias faced by the LGBT+ community.

I. DISCUSSION

A. Infertility Treatments, Such as Assisted Reproduction Technologies, Play a Critical Role in Facilitating Family Building in the United States

Per CDC definition, Assisted Reproductive Technology (ART) encompasses all fertility treatments that involve the handling of eggs or an embryo.¹ The most commonly used form of ART is in vitro fertilization (IVF), whereby eggs and sperm are artificially fertilized within a laboratory before being transferred to the uterus as an embryo.² Other forms of ART include intracytoplasmic sperm injection (ICSI), gamete intrafallopian transfer (GIFT), and zygote intrafallopian transfer (ZIFT).³ For all ART fertility treatments, successful pregnancy and birth outcomes depend upon a variety of circumstances, including: the patient's age, infertility diagnosis, prior births and/or miscarriages, the ART technique used, and the number of implanted embryos.⁴

Though ART first emerged in the United States during the early twentieth century, it remained highly controversial and generally unpopular until the first successful American IVF birth in 1981.⁵ At its inception, ART was deemed a “scientific affront to womanhood[,]” and a reminder that “[m]an will never be happy until he has proved that he is at least as smart as nature.”⁶ Later challengers of

1. *See What is Assisted Reproductive Technology?*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/art/whatis.html> [<https://perma.cc/D99U-ZKUB>].

2. *See id.*; *see also* Meaghan Jain & Manvinder Singh, *Assisted Reproductive Technology (ART) Techniques*, NAT'L LIBR. OF MED. (June 7, 2023), <https://www.ncbi.nlm.nih.gov/books/NBK576409/> [<https://perma.cc/LN2D-EDQC>].

3. *See Assisted Reproductive Technologies*, SOC'Y FOR ASSISTED REPROD. TECH., [https://www.sart.org/patients/a-patients-guide-to-assisted-reproductive-technology/general-information/assisted-reproductive-technologies/#:~:text=Assisted%20Reproductive%20Technology%20\(ART\)%20includes,frozen%20embryo%20transfer%20\(FET\)](https://www.sart.org/patients/a-patients-guide-to-assisted-reproductive-technology/general-information/assisted-reproductive-technologies/#:~:text=Assisted%20Reproductive%20Technology%20(ART)%20includes,frozen%20embryo%20transfer%20(FET)) [<https://perma.cc/XVF4-GNA6>].

4. *See ART Success Rates*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/art/artdata/index.html> [<https://perma.cc/CDN2-7LK2>].

5. Charis Thompson, *IVF Global Histories, USA: Between Rock and a Marketplace*, 2 REPRODUCTIVE BIOMEDICINE ONLINE 128, 128–31 (2016).

6. *Id.* at 129.

ART clung to conservative religious and political narratives to support their “moral” opposition to IVF and artificial insemination.⁷ American Catholics, Protestant evangelicals, and several Republican politicians decried the rise in popularity of ART, as they feared the depersonalization of reproduction, the destruction of unused embryos, and the technology’s potential ability to topple the rigid structures of the American nuclear family.⁸

Cautionary tales about reproductive technologies that circulated in sensationalized media stories further fueled conservatives’ distrust of ART.⁹ Accounts of ART-related custody lawsuits, clinical errors, high treatment costs, fertility drug side effects, moral implications of “designer babies,” and the risks associated with multiple births soon proliferated ART-related dialogues.¹⁰

Oponents of abortion rights who clung to their “pro-life” agenda also claimed: “[w]hether embryos are implanted in the woman and then selectively reduced or . . . [created] in a petri dish and then discarded,” IVF held the potential to “end[] a new human life”¹¹ The “pro-life” organization, Right to Life Michiana, even demanded the application of criminal penalties for doctors who discarded embryos while performing IVF treatments.¹²

In spite of its many critics, the use of ART within the United States began to swiftly rise in the late 1990s, as did the rates of successful ART pregnancies and deliveries.¹³ Because fertility clinics are required to report data to the CDC, the rapid increase of ART’s use and efficacy is plainly evident in the agency’s annually released ART Success Rate Reports.¹⁴ Between 1996 and 2018, over one million babies were born via ART in the United States.¹⁵ The CDC’s most recent Fertility Clinic Success Rates Report reveals that the use of ART in the United States has more than doubled in the past decade.¹⁶ In 2019, the 448 clinics that submitted data to the CDC reported

7. *Id.* at 131.

8. *See id.*

9. *See id.*

10. *See id.*

11. Sarah McCammon, *Duckworth: Block Supreme Court Pick Who Thinks ‘My Daughters Shouldn’t Even Exist,’* NPR (Oct. 6, 2020), <https://www.npr.org/2020/10/06/920823849/duckworth-block-supreme-court-pick-who-thinks-my-daughters-shouldn-t-even-exist> [<https://perma.cc/CEM8-YJVD>].

12. *See id.*

13. James P. Toner, *Progress We Can Be Proud Of: U.S. Trends In Assisted Reproduction Over The First 20 Years*, 78 FERTILITY AND STERILITY 943, 944–45 (2002).

14. *See* CTR. FOR DISEASE CONTROL AND PREVENTION, *supra* note 4.

15. *See* Gretchen Livingston, *A Third Of U.S. Adults Say They Have Used Fertility Treatments Or Know Someone Who Has*, PEW RESEARCH CENTER (July 17, 2018), <https://www.pewresearch.org/fact-tank/2018/07/17/a-third-of-u-s-adults-say-they-have-used-fertility-treatments-or-know-someone-who-has> [<https://perma.cc/VP52-UEA8>].

16. *See* CTR. FOR DISEASE CONTROL AND PREVENTION, *supra* note 4.

83,946 living American babies born through ART.¹⁷ While this number reflects the relative rareness of ART in comparison to non-assisted heterosexual conception, it also confirms a surge in its usage since 1996, when a mere 20,000 ART conceived babies were born.¹⁸ Due to the rise of ART, a substantial two percent of all infants born in the United States are now conceived through ART.¹⁹

1. Access to ART Is Particularly Critical to Same-Sex Couples Seeking to Build a Family

ART is mainly used by same-sex couples, heterosexual couples experiencing infertility, or single individuals seeking family building assistance.²⁰ ART provides couples and individuals who are unable to independently build a family with a viable alternative to adoption.²¹ Around the time of IVF's early rise, adoption faced mounting scrutiny due to the perceived shortage of adoptable American children, evidence of trauma caused by transracial adoptions, and the legal complications associated with both domestic and foreign adoptions.²²

For adoption-seeking LGBT+ couples, the law presented uniquely challenging obstacles to be overcome.²³ Before *Obergefell* federally legalized same-sex marriage, many states banned same-sex adoption.²⁴ Others restricted eligibility by enacting legislation that barred joint adoptions by unmarried couples or allowed "conscience clauses" that enabled adoption agencies to consider religious and moral beliefs when making placement decisions.²⁵ The judicial enforcement of these policies permitted adoption agencies to discriminate against LGBT+ individuals and prevented same-sex couples from building their own families.²⁶

In 1997, New Jersey became the first state to allow the joint adoption of children by gay parents.²⁷ Prior to the implementation

17. *2019 Assisted Reproductive Technology: Fertility Clinic and National Summary Report*, CTR. FOR DISEASE CONTROL AND PREVENTION, 25 (2021).

18. Livingston, *supra* note 15.

19. *Id.*

20. See Gabriela Weigel, Usha Ranji, Michelle Long & Alina Salganicoff, *Coverage and Use of Fertility Services in the U.S.*, KFF (Sep. 15, 2020), <https://www.kff.org/report-section/coverage-and-use-of-fertility-services-in-the-u-s-issue-brief> [<https://perma.cc/6VX9-L7UR>].

21. See Thompson, *supra* note 5, at 130.

22. See *id.*

23. See *id.*

24. See Tanya M. Washington, *Once Born, Twice Orphaned: Children's Constitutional Case Against Same-Sex Adoption Bans*, 15 J.L. & FAM. STUD. 19, 19–20 (2013).

25. See *id.* at 22–24.

26. See *id.* at 22–23.

27. See Judith Havemann, *N.J. ALLOWS GAYS TO ADOPT JOINTLY*, WASH. POST (Dec. 18, 1997), <https://www.washingtonpost.com/archive/politics/1997/12/18/nj-allows>

of this policy, a handful of states and the District of Columbia allowed same-sex couples to pursue adoption through a time and cost intensive process wherein one parent adopted the child and the second parent petitioned for joint guardianship rights.²⁸ Though this two-step process (often referred to as “second-parent adoption”)²⁹ provided a path to parenthood for same-sex couples, it was also prohibitively expensive and too legally complex for most to successfully pursue.³⁰

Despite the fact that all fifty states currently allow LGBT+ couples to jointly adopt children, the rise of religious freedom acts threatens the future of same-sex adoption.³¹ The judiciary of the last state to overturn its same-sex adoption ban, Mississippi, reasoned that because *Obergefell* secured various marriage-related benefits (including the right to adopt) for same-sex couples, the denial of such a right was unconstitutional.³² Around the same time, however, the Mississippi senate passed the “Religious Liberty Accommodation Act,” which allows businesses to refuse service to LGBT+ individuals due to religious or moral beliefs.³³ In other states, Religious Freedom Restoration Acts (RFRA) have permitted faith-based adoption and foster agencies to refuse service to LGBT+ couples due to religious and moral objections.³⁴ Even in a post-*Obergefell* world, adoption remains either entirely out of reach or implausible for many same-sex couples.³⁵

Due to the imperfect nature of the American adoption system and its persistent bias towards same-sex couples, ART presents a much-needed alternate route for LGBT+ family building.³⁶ Furthermore, ART provides same-sex couples with the opportunity to “approximate biological procreation as nearly as possible.”³⁷ The

-gays-to-adopt-jointly/7b031fcd-1338-4dff-b548-1e54eb196f12 [https://perma.cc/6L27-DQFK].

28. *See id.*

29. Washington, *supra* note 24, at 20–21.

30. *See* Havemann, *supra* note 27.

31. *See* Mollie Reilly, *Same-Sex Couples Can Now Adopt Children In All 50 States*, HUFFINGTON POST (Mar. 31, 2016), https://www.huffpost.com/entry/mississippi-same-sex-adoption_n_56fdb1a3e4b083f5c607567f [https://perma.cc/JS9Y-HS6U].

32. *See id.*

33. *See* Sarah Fowler, *Nation Reacts to Mississippi’s ‘Religious Freedom’ Bill*, CLARION LEDGER (Mar. 31, 2016), <https://www.clarionledger.com/story/news/2016/03/31/national-reactions-religious-freedoms-bill/82463028> [https://perma.cc/Y23G-X944].

34. *See* ACLU of Michigan, *RFRA-Style Adoption Bill Signed By Governor, ACLU of Michigan Vows Legal Challenge* (June 11, 2015), <https://www.aclu.org/press-releases/rfra-style-adoption-bill-signed-governor-aclu-michigan-vows-legal-challenge> [https://perma.cc/U8NF-5SVF].

35. *See id.*

36. *See* Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065, 1068 (2016).

37. *Id.* at 1092.

development of ART subverts heterosexuality's "exclusive monopoly" over procreation and biogenetic parenthood.³⁸ While genetic familial ties are not required in the process of family building, biology has historically established the boundaries of kinship.³⁹ Many same-sex individuals opt for ART procedures due to their desire to pursue the traditional benefits attributed to the "prestige" of biogenetic parenthood such as sharing physical characteristics and blood ties with one's offspring.⁴⁰

2. The Availability of ART in the 1990s Led to a Significant Increase in the Number of Same-Sex Couples Raising Children

Once ART became readily available in the 1990s, same-sex households began expanding their families at a rapid rate.⁴¹ This phenomenon came to be known as the "gayby boom."⁴² While same-sex adoption remained costly and legally impractical for many gay or lesbian couples seeking to build a family of their own,⁴³ ART provided members of the LGBT+ community with an effective means to pursue parenthood and subvert outdated notions that LGBT+ individuals were fated to lead childless, solitary existences.⁴⁴ The success of the "gayby boom" boosted visibility for the LGBT+ community, as both mainstream celebrities (notably, Melissa Etheridge and Julie Cypher) and ordinary same-sex couples pursued options for family building.⁴⁵ The ART-spurred "gayby boom" normalized LGBT+ parenthood and redefined traditional American perceptions of family and kinship.⁴⁶ As a result, the number of LGBT+ couples raising children more than doubled between the 2000s and 2010s.⁴⁷

38. *Id.* at 1075.

39. *Id.* at 1069.

40. *See id.* at 1069–71.

41. *See* Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065, 1075 (2016).

42. *See id.*

43. *See* Dan Woog, *Adopting a Family: Court Decisions and Perseverance Opened the Doors More Than Ever in 1997 for Gays Looking to Be Parents*, THE ADVOCATE, 69 (Jan. 20, 1998).

44. *See* Johann Hari, *GAYBY BOOM; As Bruno Parades His Latest Accessory on Screen, Johann Hari Says Parenthood Is a Real Ambition for More and More Gay Couples*, THE LONDON EVENING STANDARD, 27 (June 22, 2009).

45. *See* Margo Harakas, *INCREASINGLY, SAME-SEX HOUSEHOLDS ARE OPTING FOR PARENTHOOD, WHETHER BY ADOPTION OR OTHER METHODS. THEY'RE CALLING IT . . . THE 'GAYBY BOOM'*, SUN SENTINEL, 1D (May 11, 1998).

46. *See id.*

47. *See* Natalie Angier, *The Baby Boom for Gay Parents*, N.Y. TIMES, D4(L) (Nov. 26, 2013).

B. Despite the Ground-Breaking Advancements in Reproductive Healthcare Achieved Through ART, LGBT+ Accessibility to Treatment Is Limited by High Out-of-Pocket Costs, Limited Health Insurance Coverage, and Sex-Based Discrimination

ART's innovation comes at an unfortunately high price point. Because ART out-of-pocket costs are prohibitively expensive for the vast majority of the population, most individuals depend on their health insurance plans to finance the process.⁴⁸ Even with coverage, same-sex couples are often disqualified from ART cost subsidization due to the heteronormative diagnostic criteria stipulated by most states for the prerequisite infertility diagnosis.⁴⁹ Furthermore, due to a resurgence in religious liberty claims, providers and hospitals may refuse treatment of same-sex couples based on their moral beliefs.⁵⁰ Though ART presents a particularly indispensable means of procreation for same-sex couples, the interrelated barriers of exorbitant costs and underinclusive state legislation limit its availability to only the wealthiest LGBT+ individuals.⁵¹ Accordingly, overcoming these threefold issues in order to provide same-sex couples with equal access to ART is necessary to achieve LGBT+ reproductive justice.

1. First, Infertility Mandates Must Be Established at the State and Federal Level to Ensure Private Health Insurers Cover Prohibitively Expensive ART Procedures

Most forms of ART are unaffordable without the assistance of a private health insurance plan.⁵² For those who do pay the out-of-pocket costs, intrauterine insemination (IUI) treatments typically fall between \$300 to \$1,000, while IVF begins at \$15,000 and can climb well above \$30,000.⁵³ These costs are comprised of pre-procedure

48. See Gerard Letterie, *What Is the Status of Insurance Coverage for Fertility Services in the United States by Large Insurers? A Patchwork System in Need of Repair*, 40 J. OF ASSISTED REPROD. AND GENETICS 577, at 580 (Mar. 1, 2023).

49. See Carla Centanni, *Using ART to Make a Baby: How Rhode Island's Insurance Coverage Mandate is Preventing Same-Sex Couples from Having Biological Children*, 24 ROGER WILLIAMS L. REV. 331, 341 (2019).

50. See Adam Sonfield, *Learning from Experience: Where Religious Liberty Meets Reproductive Rights*, 19 GUTTMACHER POLY REV. 1, 1 (Jan. 5, 2016), <https://www.guttmacher.org/gpr/2016/learning-experience-where-religious-liberty-meets-reproductive-rights> [<https://perma.cc/D8GQ-CVDA>].

51. See Letterie, *supra* note 48, at 579–80.

52. See Letterie, *supra* note 48, at 579–80.

53. Planned Parenthood, *What is IUI?*, <https://www.plannedparenthood.org/learn/pregnancy/fertility-treatments/what-iui> [<https://perma.cc/HF7P-AZCZ>]; see also Marissa

expenses,⁵⁴ and either the embryo creation and transfer⁵⁵ or the expenses associated with embryo cryopreservation and frozen embryo transfer.⁵⁶ Given the high cost of ART, such procedures remain largely inaccessible for those who are ineligible for appropriate infertility coverage on their health insurance plan.⁵⁷

Medicaid health insurance plans do not typically cover infertility treatments, as they are not categorized as “medically necessary.”⁵⁸ Private health insurance providers often only provide coverage for ART procedures in accordance with infertility mandates that are applied at the state level.⁵⁹ Because of this, access to affordable ART is dependent on several mitigating factors, including: wealth, employment, size of employer, health insurance plan, and geographic location.⁶⁰

A mere fifteen states require private health insurers to provide some infertility coverage for insurers through mandates.⁶¹ Unfortunately, of the fifteen states with infertility mandates, each limits coverage eligibility based on certain patient characteristics.⁶² New Jersey, for example, caps IVF coverage eligibility at 45,⁶³ and Rhode Island restricts all infertility coverage to women between the ages of 25 and 42.⁶⁴ While Hawaii is one of seven states that requires insurance providers to cover IVF treatments (and has done so since 1987), it limits coverage to only one cycle per covered individual, though IVF typically requires multiple cycles.⁶⁵

Conrad, *How Much Does IVF Cost?*, FORBES HEALTH (Aug. 14, 2023), <https://www.forbes.com/health/family/how-much-does-ivf-cost/> [<https://perma.cc/WLF7-U974>].

54. See Conrad, *supra* note 53 (Monitoring appointments, fertility assessment, injectable medications and hormones, semen analysis, and genetic testing).

55. See Conrad, *supra* note 53 (Egg retrieval, anesthesia, donor sperm, intracytoplasmic sperm injection, mock embryo transfer, and fresh embryo transfer).

56. See Conrad, *supra* note 53.

57. See Letterie, *supra* note 48, at 579–80.

58. See Centanni, *supra* note 49, at 338 (the Rhode Island infertility mandate only requires infertility coverage for individuals with private health insurance); see also Weigel et al., *supra* note 20.

59. See Centanni, *supra* note 49, at 341.

60. See Letterie, *supra* note 48, at 579–80.

61. Centanni, *supra* note 49, at 341.

62. See *id.* at 341.

63. *New Jersey State Mandate—The Family Building Act*, IRMS, <https://www.sbiivf.com/new-jersey-state-mandate/#:~:text=The%20law%20defines%20infertility%20as,carry%20a%20pregnancy%20to%20term> [<https://perma.cc/RRL3-UUL6>].

64. *Rhode Island Coverage Mandate*, ASRM, <https://www.reproductivefacts.org/resources/state-infertility-insurance-laws/states/rhode-island/#:~:text=Requirements%20or%20Limitations%20on%20Coverage,ages%20of%2025%20and%2042> [<https://perma.cc/6AF2-MUAF>].

65. See Fertility Institute of Hawaii, Inc., *Billing FAQs*, <https://www.ivfcenterhawaii.com/wp-content/uploads/2017/03/FIH-Billing-FAQ-2017.05.pdf> [<https://perma.cc/D7EV-QP59>]; see also H.B. 677, 29th Leg. (Haw. 2017).

Additionally, until a 2017 revision, Hawaii's IVF mandate only applied to procedures that involved the egg and sperm taken from a husband and wife, thereby excluding same-sex couples from coverage.⁶⁶ In a similar fashion, Maryland—known for establishing the first IVF mandate in 1985—only required infertility coverage of heterosexual, married couples until the 2010s.⁶⁷ In the United States, virtually no legislation specifies that same-sex couples qualify for infertility coverage.⁶⁸ Furthermore, while the costs of more traditional forms of ART such as IVF are often prohibitively high, the cost of surrogacy (which is often necessary for male same-sex couples pursuing ART options) is staggering and almost never covered by insurance providers.⁶⁹

*2. Second, the Outdated, Heterocentric Definitions Within
Preexisting Infertility Mandates Must Be Revised to Extend
Coverage to Same-Sex Couples*

The second major barrier to same-sex ART access arises from the outdated language and definitions of infertility used by the CDC, state legislators, and insurance providers. Due to the heterocentric language that defines infertility, even LGBT+ individuals with health insurance plans that cover ART are typically deemed ineligible for coverage.⁷⁰ The CDC defines the condition of infertility as “not being able to get pregnant (conceive) after one year (or longer) of unprotected sex.”⁷¹ This narrow definition cannot apply to same-sex relationships, wherein unprotected sex cannot result in conception and ART is required.⁷² The only acknowledgment to same-sex couples on the CDC's infertility page vaguely states that “donor eggs, sperm, or donated embryos may also be used by same-sex couples.”⁷³ Per CDC standards, a diagnosis of infertility only applies in the

66. See H.B. 677, 29th Leg. (Haw. 2017).

67. See Eli Y. Adashi & William D. Schlaff, *Against All Odds: The First State Infertility Mandate (Maryland)*, 110 FERTILITY AND STERILITY 824, 824 (Oct. 2018).

68. See *id.*

69. See Conrad, *supra* note 53; see also Beth Braverman, *How Much Surrogacy Costs and How to Pay for It*, U.S. NEWS (May 30, 2023), <https://money.usnews.com/money/personal-finance/family-finance/articles/how-much-surrogacy-costs-and-how-to-pay-for-it> [<https://perma.cc/8DB7-EYAJ>].

70. See Shira Stein, *LGBTQ Couples' IVF Hopes Hinge on New Infertility Definition*, BL (May 17, 2022), <https://news.bloomberglaw.com/health-law-and-business/lgbtq-couples-ivf-hopes-hinge-on-new-infertility-definition> [<https://perma.cc/TGW3-B2UT>].

71. *Infertility: Frequently Asked Questions*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/reproductivehealth/Infertility/index.htm> [<https://perma.cc/DP5D-6EYJ>].

72. See *id.*

73. See *id.*

context of heterosexual intercourse.⁷⁴ Within this framework, which is relied upon by most insurers, the oft-required “proof of infertility” cannot be established within a same-sex partnership.⁷⁵

The truly decisive language, however, lies within the state legislation that determines eligibility for coverage pursuant to established infertility mandates.⁷⁶ New Jersey’s Family Building Act (passed in 2001), for example, explicitly requires proof of infertility for ART coverage.⁷⁷ The act defines infertility as a condition of dysfunction of the reproductive system, wherein a female under 35 years old fails to conceive after two years of unprotected sexual intercourse (sexual intercourse being defined by that act as “sexual union between a male and a female”), a female aged 35 years or older is unable to conceive after one year of sexual intercourse, or a male is unable to impregnate a female.⁷⁸ Because New Jersey defines infertility as the failure to conceive after repeated, unprotected, heterosexual intercourse between a man and a woman, the benefits of the mandate remain out of reach for same-sex couples that intend to build a family.⁷⁹

In 2016, New Jersey’s infertility mandate (the “New Jersey Family Building Act”⁸⁰) came into contention when a married lesbian couple, Marianne and Erin Krupa, pursued legal action after they were denied coverage for medically necessary fertility treatments.⁸¹ To the surprise of both the Krupas and their doctor, the healthcare provider, Horizon Blue Cross Blue Shield, denied coverage of fertility treatment because the women could not meet the mandate-required

74. *See id.* The World Health Organization (WHO) similarly defines infertility as “a disease of the male or female reproductive system defined by the failure to achieve a pregnancy after 12 months or more of regular unprotected sexual intercourse.” Though, like the CDC, the WHO fails to include same-sex couples within the listed definition for infertility, the organization asserts that because “[e]very human being has a right to the enjoyment of the highest attainable standard of physical and mental health . . . couples have the right to decide the number, timing, and spacing of their children [and] [i]nfertility can negate the realization of these essential human rights.” Accordingly, the WHO notes that dealing with the issues of infertility and disparities in access to fertility treatments is “an important part of realizing the rights of individuals and couples to found a family,” particularly for same-sex couples who require assistive reproductive technologies.

75. *See* Stein, *supra* note 70.

76. *See* Stein, *supra* note 70.

77. N.J.A.C. 11:4-54, 9 (2001), https://www.state.nj.us/dobi/acrobat/pn02_260.pdf [<https://perma.cc/93VK-WK75>].

78. *See id.* at 11.

79. *See id.* at 9.

80. *See New Jersey IVF Coverage Mandate*, REPRODUCTIVE SCIENCE CENTER OF NEW JERSEY, <https://fertilitynj.com/patients/new-jersey-ivf-coverage-mandate> [<https://perma.cc/VM2M-VF3Q>].

81. *See* 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> [<https://perma.cc/T6W4-JQD8>].

infertility criteria of proving “two years of unprotected sexual intercourse” with no resultant pregnancy.⁸² Though new Jersey maintained that the mandate applies indiscriminately and irrespective of sexual orientation, the Krupas attested that the language of the mandate unconstitutionally prevents LGBT+ individuals from accessing healthcare procedures that are necessary for family building.⁸³

At the time of the lawsuit, two bills were proposed to update the infertility definitions to contain “determination of infertility by a physician.”⁸⁴ These proposed expansions of coverage have yet to emerge from committee, though they would provide a means for same-sex couples to finally fit the state’s mandate requirements.⁸⁵ The medical director of the Reproductive Science Center of New Jersey, Dr. William Ziegler, admits that “[he doubts] there was a lot of thought given to the implications of what this would cause and how many New Jerseyans it would exclude . . . [i]t’s a double standard. It discriminates against same-sex couples because they don’t have the biological equipment to have a baby the way a heterosexual couple does.”⁸⁶

Two more women joined the Krupas in their discrimination lawsuit against the commissioner of the New Jersey Department of Banking and Insurance.⁸⁷ These women were not seeking to compile damages, but to trigger lasting policy change that would benefit all LGBT+ couples who desire to pursue affordable infertility treatment in the state of New Jersey.⁸⁸ Erin Krupa told the *New York Times*: “If this is what good can come out of it . . . I guess I would do it all again to improve treatment for other women.”⁸⁹

Unfortunately, *Krupa v. Badolato* was dismissed by the District Court and the Krupas failed to appeal the case.⁹⁰ The court determined that (1) the Eleventh Amendment barred the Krupas’ case, (2) Defendants had not been on notice that their conduct violated established law, (3) Plaintiffs failed to sufficiently plead allegations of wrongdoing as related to each individual Defendant, and (4) the

82. *Id.*

83. *See id.*

84. *Id.*

85. *See id.*

86. *See* Megan Julia, *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> [<https://perma.cc/T6W4-JQD8>].

87. *See id.* (Notably, this lawsuit directly targeted the state and its antiquated mandate as opposed to the insurance company itself.)

88. *See id.*

89. *Id.*

90. *See* *Krupa v. Badolato*, No. 2:2016cv04637—Document 72, slip op. at 2 (D.N.J. 2018).

claims of a state Constitutional violation were also barred by the Eleventh Amendment.⁹¹

In January 2022, New Jersey Governor Phil Murphy signed the Freedom of Reproductive Choice Act into law, which enshrines existing case law via statute and protects the right to abortion within the state.⁹² While this act grappled with several legislative issues centered around reproduction, it did not address the inequities of the antiquated New Jersey infertility mandate.⁹³ Once again, New Jersey lawmakers turned a blind eye to the discrimination and burdens faced by same-sex couples seeking to begin a family without incurring a major financial burden.⁹⁴

New Jersey is not an outlier, however, as several states still cling to mandates that make it practically impossible for same-sex couples to attain infertility coverage.⁹⁵ Arkansas, Texas, and Hawaii exclude same-sex couples by requiring the use of the patient's egg and their spouse's sperm.⁹⁶ Due to the legislative boundaries that gatekeep mandated infertility coverage through outdated, heteronormative definitions, it is often infeasible for same-sex couples to attain fertility treatment coverage.⁹⁷

Fifteen states currently maintain infertility mandates.⁹⁸ In states with "comprehensive" IVF coverage, ART rates significantly outnumber the national average.⁹⁹ This pattern suggests that the enforcement of state infertility mandates successfully increases ART accessibility, and therefore, usage.¹⁰⁰ Furthermore, data from three states that have maintained infertility mandates for over thirty years (Massachusetts, Connecticut, and Rhode Island) indicate that requiring coverage does not notably increase overall insurance premium costs.¹⁰¹ Accordingly, the establishment of infertility mandates

91. *See id.* at 11.

92. *See* Daniel Han & Matt Friedman, *New Jersey Democrats Moving Toward Putting Abortion on the 2023 Ballot*, POLITICO (Nov. 11, 2022), <https://www.politico.com/news/2022/11/15/new-jersey-democrats-abortion-ballot-2023-00066956> [<https://perma.cc/G7WE-G249>].

93. *See id.*

94. *See id.*

95. *See* Stein, *supra* note 70.

96. *See id.*

97. P.A. 102-0170, Ill. Gen. Assembly (Jan. 1, 2022); *see also* Stein, *supra* note 70.

98. *See* Weigel et al., *supra* note 20.

99. *See* Benjamin J. Peipert, Melissa N. Montoya, Bronwyn S. Bedrick, David B. Seifer & Tarun Jain, *Impact of In Vitro Fertilization State Mandates for Third Party Insurance Coverage in the United States: A Review and Critical Assessment*, REPRODUCTIVE BIOLOGY AND ENDOCRINOLOGY (2022).

100. *See id.*

101. *See* Stein, *supra* note 70 (Less than a 1% increase in health insurance premium costs resulted from the mandate.).

through state legislation is a proven and cost-effective means through which ART can be made more accessible.¹⁰²

To advance LGBT+ reproductive justice, however, these mandates must contain inclusive language and diagnostic criteria. An Illinois act that passed in January 2022 provides an effective model for such legislation. The Illinois mandate defines infertility as “[a] person’s inability to reproduce either as a single individual or with a partner without medical intervention; or a licensed physician’s findings based on a patient’s medical, sexual, and reproductive history, age, physical findings, or diagnostic testing.”¹⁰³ Fertility mandates within other states, such as California and Maryland, have also updated their language to extend coverage to same-sex couples.¹⁰⁴ Maryland, once the most restrictive state regarding infertility coverage, updated the language of its infertility mandate to explicitly include LGBT+ individuals.¹⁰⁵

Although the development of inclusive state mandates is currently the most effective means of making ART more accessible, the establishment of a federal infertility mandate would trigger swift and widespread change throughout the nation. While state infertility mandates have been criticized for being arbitrary, unbalanced, and “without teeth,”¹⁰⁶ a federal mandate that extends infertility coverage to all insured same-sex couples within the United States would be an effective step towards achieving reproductive justice.

In 2019, Senator Cory Booker of New Jersey introduced the “Access to Infertility Treatment and Care Act,” and called for the amendment of part A of title XXVII within the Public Health Service Act, by including a section that would require all health insurance plans with obstetric coverage to also provide coverage for infertility treatments, including ART procedures.¹⁰⁷ The act allows for an infertility diagnosis outside of heterosexual relationships by defining infertility as “a disease, characterized by the failure to establish a clinical pregnancy . . . due to a person’s incapacity for reproduction either as an individual or with his or her partner, which may be determined . . . based on medical, sexual, and reproductive history.”¹⁰⁸

102. See Peipert et al., *supra* note 99.

103. See Stein, *supra* note 70.

104. See Kimberly Leonard, *Who Has the Right to Build a Family?*, U.S. NEWS & WORLD REPORT (Aug. 15, 2016), <https://www.usnews.com/news/articles/2016-08-15/same-sex-infertility-case-exposes-lack-of-access-to-reproductive-treatment> [<https://perma.cc/89AU-EWQJ>].

105. See *id.*

106. See *id.*

107. See *id.*

108. S. 2352, 117th Cong. § 3(b)(2) (2021).

Furthermore, the act specifically states that infertility impacts individuals of all sexual orientations.¹⁰⁹

3. Third, Religious Liberty Laws Must Be Limited in Order to End the Protection of Discriminatory Conduct Towards Same-Sex Couples and Prevent Providers from Refusing Treatment to LGBT+ Individuals

In addition to the expansion and enforcement of infertility mandates, protections must be upheld to inhibit the third major barrier to ART accessibility for same-sex couples: discriminatory conduct towards LGBT+ individuals. Section 1557 of the Affordable Care Act (ACA) prohibited sex-based discrimination, which, under the Obama administration, included protections against discrimination based on sexual orientation.¹¹⁰ In 2020, however, the Trump administration narrowed Section 1557 and removed all sexual-orientation protections.¹¹¹ During the summer of 2022, the Department of Health and Human Services (HHS) proposed several revisions to the current Section 1557 of the ACA in order to revise the alterations made by the Trump administration.¹¹² The HHS proposal intended to extend Section 1557's sex-based protections to cover sexual orientation and gender identity-related discrimination.¹¹³ Furthermore, HHS requested Section 1557 be updated pursuant to *Bostock v. Clayton County*, wherein sexual orientation-based discrimination by an employer was deemed to be a violation of Title VII of the Civil Rights Act.¹¹⁴ An explicit prohibition of sexual orientation-based discrimination within the ACA's Section 1557 would effectively improve LGBT+ access to necessary healthcare.¹¹⁵

109. *See id.*

110. *See* MaryBeth Musumeci, *The Trump Administration's Final Rule on Section 1557 Non-Discrimination Regulations Under the ACA and Current Status*, KFF (Sep. 18, 2020), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/the-trump-administrations-final-rule-on-section-1557-non-discrimination-regulations-under-the-aca-and-current-status> [https://perma.cc/Q9NY-HHSA].

111. *See id.*

112. *See* Katie Keith, *HHS Proposes Revised ACA Anti-Discrimination Rule*, HEALTH AFFAIRS (July 27, 2022), <https://www.healthaffairs.org/content/forefront/hhs-proposes-revised-aca-anti-discrimination-rule> [https://perma.cc/3YG4-3T34].

113. *See id.*

114. *See* 590 U.S. 644, 653–55, 683 (2020).

115. *See* Delphine Luneau, *Human Rights Campaign Applauds Biden Administration's Proposal to Strengthen Nondiscrimination Protections Under Affordable Care Act*, HUMAN RIGHTS CAMPAIGN (July 25, 2022), <https://www.hrc.org/press-releases/human-rights-campaign-applauds-biden-administrations-proposal-to-strengthen-nondiscrimination-protections-under-affordable-care-act> [https://perma.cc/AJJ5-2P45].

Despite these efforts, the HHS' attempts at revising Section 1557 to include sexual orientation protections have been unsuccessful. At the tail end of 2022, a Trump appointed district court judge in Texas held that the definition of "sex" must be interpreted narrowly as "biological sex" within the context of Section 1557.¹¹⁶ The judge also held that *Bostock* must be interpreted narrowly and cannot be applied to Section 1557.¹¹⁷ Accordingly, the ACA still does not prohibit sexual orientation–based discrimination by healthcare providers.¹¹⁸ Though patients can still file lawsuits based on sexual orientation based discriminatory acts, the HHS cannot investigate claims filed by patients who have suffered such discrimination at the hands of their healthcare providers.¹¹⁹

Increasingly, conservatives invoke the shield of religious liberty protections in order to justify discriminatory conduct towards LGBT+ individuals.¹²⁰ Though the free exercise of religion is a fundamental right enshrined within the First Amendment of the U.S. Constitution, conservatives have misused legislation such as the Religious Freedom Restoration Act (RFRA) to defend their discriminatory conduct and justify failures to follow promulgated healthcare mandates by claiming moral or conscience exceptions.¹²¹ By signing RFRA into law in 1993, President Bill Clinton established that the protection of the right to free exercise of religion must be protected against government action unless the government establishes that their conduct (1) furthers a compelling government interest (2) through the least restrictive means.¹²²

Those who advocate for the application of RFRA within the healthcare marketplace argue that certain mandates substantially burden their religious values and are not narrowly tailored enough to serve as the least restrictive means for furthering the government's interest in market access.¹²³ This position entirely disregards

116. See Allie Reed, *Biden's LGBT Health Shield Plan Muddled by Trump-Appointed Judge*, BL (Dec. 12, 2022), <https://news.bloomberglaw.com/health-law-and-business/bidens-lgbt-health-shield-plan-muddled-by-trump-appointed-judge> [<https://perma.cc/X2H2-YAEK>]; see also *Neese v. Becerra*, 640 F. Supp. 3d 668, 684 (2022).

117. See *Neese*, 640 F. Supp. 3d at 675–76.

118. See Reed, *supra* note 116.

119. See *id.*

120. See Adam Sonfield, *Learning from Experience: Where Religious Liberty Meets Reproductive Rights*, 19 GUTTMACHER POL'Y REV. 1, 1 (Jan. 5, 2016), <https://www.guttmacher.org/gpr/2016/learning-experience-where-religious-liberty-meets-reproductive-rights> [<https://perma.cc/D8GQ-CVDA>].

121. See Adam Sonfield, *In Bad Faith: How Conservatives Are Weaponizing "Religious Liberty" to Allow Institutions to Discriminate*, 21 GUTTMACHER POL'Y REV. 23, 23, <https://www.guttmacher.org/gpr/2018/05/bad-faith-how-conservatives-are-weaponizing-religious-liberty-allow-institutions> [<https://perma.cc/P7P6-E6VL>].

122. See H.R. 1308, 103rd Cong. (1993).

123. See Sonfield, *supra* note 121.

the government's interest in preserving sex-based equality.¹²⁴ The D.C. Circuit Court, for example, rejected sex equality as a legitimate government interest and reasoned that because the contraceptive mandate at issue was not the least restrictive means to further government market interests, the measure amounted to an unjustifiable "subsidization of a woman's procreative practices."¹²⁵ Similarly, the Tenth Circuit held that a religiously exempted employer's failure to provide contraception did not burden female employees because such employees were not barred from accessing the market and purchasing contraceptives with their own money.¹²⁶ If applied to infertility mandates, this reasoning would preclude many LGBT+ individuals from accessing ART treatments, which have overwhelmingly high out-of-pocket costs.

In the past few decades, the Supreme Court has generally upheld RFRA claims and approved religious or moral based exemptions from HHS mandates. In *Wheaton College v. Burwell*, the Supreme Court exempted a Christian-affiliated liberal arts college from an HHS contraception mandate due to the school's religious beliefs.¹²⁷ Similarly, in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania* the court exempted a catholic order of nuns from accommodating HHS contraception mandates and provided for alternative methods of procuring free birth control.¹²⁸ *Burwell v. Hobby Lobby Stores, Inc.* legitimized religion-based HHS mandate exemptions for private organizations, which prompted Justice Ginsberg's dissenting opinion wherein she admitted her "fear [that the Court] has ventured into a minefield by its immoderate reading of RFRA."¹²⁹ Most recently, *Masterpiece Cake Shop* established the legitimacy of a baker's right to refuse service to gay individuals based upon his religious and moral opposition to same-sex marriage.¹³⁰

As made evident by most rulings in the recent surplus of religious liberty cases, even if LGBT+ inclusive infertility mandates were established, access will likely be hindered by the enforcement of religious or moral exemptions. To combat this issue, a Virginia congressman, Representative Robert Scott, introduced a bill entitled the "Do No Harm Act," which aims to amend RFRA and bar it from

124. See Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R. & C.L. L. REV. 129, 137 (2015).

125. See *id.* at 138.

126. See *id.*

127. See 573 U.S. 958, 958–59 (2014).

128. See 140 S. Ct. 2367, 2372–73, 2375–76 (2020).

129. See 573 U.S. 682, 771–72 (2014).

130. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. 617, 638 (2018).

providing protections against discriminatory conduct.¹³¹ If passed, such an act would curb exploitation of the free exercise clause within reproductive healthcare and improve LGBT+ access to ART treatments.¹³² Attempted federal legislative action, such as the “Do No Harm Act,” provides a hopeful framework for improving LGBT+ access to ART treatment by limiting RFRA’s reach.

C. Supreme Court Precedent Establishing the Fourteenth Amendment Supported Rights to Family Planning, Privacy, and Association Supports the Contention That ART Must Be Made Accessible to Same-Sex Couples

Binding Supreme Court interpretations of the U.S. Constitution reveal that all persons within the United States maintain the right to privacy and procreation within marriage. Specifically, these rulings rely on the Fourteenth Amendment’s substantive due process clause, providing that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,¹³³

and the equal protections clause, which asserts that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹³⁴

Because *Obergefell v. Hodges* federally legalized same-sex marriage, married same-sex couples must be afforded the same liberties and legal protections that are granted to married heterosexual couples in accordance with their Fourteenth Amendment rights.¹³⁵ Consequently, married same-sex couples need to be provided equal access to ART treatments.

In many ways, the path to marriage equality sheds light on possible legislative and judicial routes to achieve reproductive equality

131. See H.R. 1378, 117th Cong. (2021).

132. See *id.*

133. U.S. CONST. amend. XIV § 1.

134. *Id.*

135. See 576 U.S. 644, 675–76 (2015).

and justice. Despite there being virtually no legal routes for same-sex couples to pursue marital status in the 20th century, some couples seized upon the loopholes that existed because of legislation's silence on the legitimacy of same-sex unions.¹³⁶ This loophole soon closed when several states responded to the civil rights push to legalize same-sex marriage by amending legislation to define marriage as an act that can only occur between a man and a woman.¹³⁷ In 1996, President Bill Clinton signed H.R.3396, the Defense of Marriage Act (DOMA), into law.¹³⁸ This action amended Chapter 1 of title 1 of U.S.C. by restricting the definition of "marriage" to "only a legal union between one man and one woman as husband and wife, and the word 'spouse' [to refer] only to a person of the opposite sex who is a husband or a wife."¹³⁹

In *United States v. Windsor*, the Supreme Court struck down DOMA, condemning it as a violation of the Fifth and Fourteenth Amendment rights of equal protection.¹⁴⁰ The Court found that because DOMA denied same-sex couples the rights that result from federally recognized marriage, it perpetuated the disadvantages and stigmas faced by same-sex couples.¹⁴¹ *Windsor* was the first of two major legal battles that advanced the perception of the American "family" model. Next—a mere three years later—*Obergefell v. Hodges* federally legalized same-sex marriage and officially extended the legal protections and advantages of marriage to same-sex unions.¹⁴² By (1) improving accessibility to same-sex marriage through federal protections and (2) revising the language of heterocentric, non-inclusive legislation, *Obergefell* federally legitimized same-sex marriage.¹⁴³

Furthermore, by affirming same-sex marriage, the Supreme Court simultaneously granted married LGBT+ individuals access to spousal rights and benefits that had previously been relegated to husbands and wives.¹⁴⁴ In *Obergefell*, Justice Kennedy critically notes: "a third basis for protecting the right to marry is that it

136. See Erik Eckholm, *The Same-Sex Couple Who Got a Marriage License in 1971*, N.Y. TIMES (May 16, 2015), <https://www.nytimes.com/2015/05/17/us/the-same-sex-couple-who-got-a-marriage-license-in-1971.html> [https://perma.cc/QVX4-WCVE].

137. See Richard Wolf, *Timeline: Same-Sex Marriage Through the Years*, USA TODAY (Apr. 22, 2015), <https://www.usatoday.com/story/news/nation/2015/04/22/gay-marriage-timeline/70497376> [https://perma.cc/C878-R83Z].

138. See Defense of Marriage Act of 1996, H.R. 3396, 104th Cong. § 1, <https://www.congress.gov/bill/104th-congress/house-bill/3396/text> [https://perma.cc/6VH9-RCMW].

139. See *id.* § 3.

140. See 570 U.S. 744, 770 (2013).

141. See *id.*

142. See 576 U.S. 644, 675 (2015).

143. See *id.* at 670–72.

144. See *id.* at 675.

safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”¹⁴⁵ The fundamental right to procreation within marriage first emerged in *Skinner v. Oklahoma*, wherein the Court held that forced sterilization violated the equal protection clause of the Fourteenth Amendment.¹⁴⁶ In a post-*Obergefell* world, the inherited right to procreation may be effectively implemented through accessible ART treatments for same-sex couples.

1. In the Aftermath of Dobbs v. Jackson Women’s Health, the Future of Substantive Due Process Rights Remains Uncertain

When *Dobbs v. Jackson Women’s Health* overruled *Roe v. Wade* in June, 2022, the Supreme Court overturned half a century’s worth of precedent surrounding abortion rights.¹⁴⁷ The Supreme Court reasoned that *Roe* was “egregiously wrong from the start” and that it is “time to heed the Constitution and return the issue of abortion to the people’s elected representatives.”¹⁴⁸ The Court contended that the right to abortion was “critically different from any other right that this court has held to fall within the Fourteenth Amendment’s protection of ‘liberty’” and that because the Constitution fails to mention the right to abortion, the protections provided in *Roe* and *Casey* were not “deeply rooted in this nation’s history and tradition . . . [nor] implicit in the concept of ordered liberty.”¹⁴⁹

Absent federal abortion protections, states with trigger bans (including Mississippi, Arkansas, Oklahoma, Missouri, and South Dakota) were able to immediately bar access to abortions in the aftermath of *Dobbs*.¹⁵⁰ In addition to these trigger laws, *Dobbs* also led to a surge in the advancement of abortion-restricting bills.¹⁵¹ Over 100 of these proposed bills were introduced between January and August in 2022.¹⁵² The *Dobbs* decision signaled the current Supreme Court’s reluctance to protect the rights of individuals who

145. *See id.* at 646.

146. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

147. 597 U.S. 215, 359–60 (2022) (Breyer, J., dissenting).

148. *Id.* at 231–32.

149. *Id.* at 231.

150. Larissa Jimenez, *60 Days After Dobbs: State Legal Developments on Abortion*, BRENNAN CENTER FOR JUSTICE (Aug. 24, 2022), <https://www.brennancenter.org/our-work/research-reports/60-days-after-dobbs-state-legal-developments-abortion#:~:text=Several%20states%20were%20ready%20for,circumstances%2C%20though%20some%20exceptions%20remain> [https://perma.cc/93M4-2VRY].

151. *Id.*

152. *See id.*

have been historically disenfranchised.¹⁵³ In one swift blow, the five justice conservative majority utterly disregarded the concept of *stare decisis* and upended decades of established American legal precedent by implementing an exceedingly narrow interpretation of a fundamental right.¹⁵⁴

In *Dobbs*'s dissent, liberal Justices Breyer, Kagan, and Sotomayor ominously noted that “no one should be confident that this majority is done with its work,”¹⁵⁵ as the constitutional right to abortion is critically linked “to other settled freedoms involving bodily integrity, familial relationships, and procreation.”¹⁵⁶ Specific cases that have been rendered vulnerable by the reasoning in *Dobbs*, include *Griswold v. Connecticut*, *Lawrence v. Texas*, and *Obergefell v. Hodges*.¹⁵⁷ Following *Dobbs*, the futures of several constitutionally protected fundamental rights (including bodily autonomy, privacy, association, marriage, and family planning) remain uncertain.¹⁵⁸

In the court's majority opinion, Justice Alito claimed “[o]ur decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”¹⁵⁹ Justice Clarence Thomas, however, directly refuted this assertion in his concurrent opinion.¹⁶⁰ Thomas claimed that “‘substantive due process’ is an oxymoron that ‘lack[s] any basis in the Constitution,’” and cannot ensure protections from government encroachment upon fundamental rights.¹⁶¹ Thomas insists the court does not go far enough in *Dobbs* and should instead extend its reasoning beyond *Roe* to overturn the substantive due process rights granted in *Griswold*, *Lawrence*, and *Obergefell*.¹⁶²

153. *See id.*

154. John F. Kowal, *Is Marriage Equality Next Target for SCOTUS Conservative Supermajority?*, BRENNAN CENTER FOR JUSTICE (June 14, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/marriage-equality-next-target-scotus-conservative-supermajority> [<https://perma.cc/8JYK-TBLF>]; *see also* Erik Larson & Emma Kinery, *Same-Sex Marriage, Contraception at Risk After Roe Ruling*, BLOOMBERG LAW (June 24, 2022), <https://news.bloomberglaw.com/us-law-week/supreme-court-justices-disagree-on-scope-of-dobbs-ruling> [<https://perma.cc/QD2T-35QR>].

155. Quint Forgey & Josh Gerstein, *Justice Thomas: SCOTUS ‘Should Reconsider’ Contraception, Same-Sex Marriage Rulings*, POLITICO (June 24, 2022) (quoting *Dobbs v. Jackson Women’s Health*, 597 U.S. 215, 362 (2022) (Breyer, J., dissenting)), <https://www.politico.com/news/2022/06/24/thomas-constitutional-rights-00042256> [<https://perma.cc/X8RR-2WY4>].

156. *See id.* (quoting *Dobbs*, 597 U.S. at 362 (Breyer, J., dissenting)).

157. *See id.*

158. *See id.*

159. *See Dobbs*, 597 U.S. at 290.

160. *See id.* at 332 (Thomas, J., concurring).

161. *See id.* at 331 (Thomas, J., concurring).

162. *Id.* at 332–33 (Thomas, J., concurring).

Citing his own unpublished concurrent opinions as legal precedent, he asserts, “we have a duty to ‘correct the error’” of all “demonstrably erroneous” substantive due process arguments.¹⁶³ Through this concurrent opinion, Justice Clarence Thomas fires a warning shot to all who depend upon substantive due process rights.¹⁶⁴ Notably, Thomas’ concurrence puts women, LGBT+ individuals, their partners, and their dependents on notice for the battles to come.¹⁶⁵

2. From the Ashes of Roe, the Respect for Marriage Act Reflects Bipartisan Hope for the Advancement of LGBT+ Rights

Faced with fears that *Obergefell* may be the next substantive due process related right to be overturned by the Court, legislators have begun fighting to preserve the right of same-sex marriage through other means.¹⁶⁶ The Respect for Marriage Act (RMA) is a bill that aims to codify federal marriage equality by (1) ensuring the federal rights, benefits, and obligations of marriage; (2) repealing the Defense of Marriage Act (DOMA); and (3) affirming that public acts, records, and proceedings must be recognized by all states.¹⁶⁷ Thanks to the RMA, although the Constitution gives states authority to determine marriage laws, Congress may now “buttress” parts of *Obergefell* and *Windsor* that they fear may be soon rendered obsolete by the Court.¹⁶⁸

When presented to the Senate, the RMA received overwhelming bipartisan support.¹⁶⁹ On November 16, 2022, the U.S. Senate voted to invoke cloture on the RMA.¹⁷⁰ The RMA bill gathered the support of every Senate Democrat and twelve Senate Republicans and passed by an impressive 62–37 majority, bipartisan vote.¹⁷¹ The RMA

163. *Id.* at 332–33 (Thomas, J., concurring).

164. See Forgey & Gerstein, *supra* note 155.

165. See Forgey & Gerstein, *supra* note 155.

166. Delphine Luneau, *RESPECT FOR MARRIAGE ACT: What It Does, How It Interacts With the Obergefell Ruling, and Why They’re Both Essential to Protecting Marriage Equality*, HUMAN RIGHTS CAMPAIGN (Nov. 16, 2022), <https://www.hrc.org/press-releases/respect-for-marriage-act-what-it-does-how-it-interacts-with-the-obergefell-ruling-and-why-theyre-both-essential-to-protecting-marriage-equality> [https://perma.cc/X9WV-2CRF].

167. See *id.*

168. See *id.*

169. Henri Berg-Brosseau, *U.S. Senate Invokes Cloture for Bipartisan Respect for Marriage Act 62–37, with every Democrat and 12 Republican Votes; Vote Moves to Senate Floor*, HUMAN RIGHTS CAMPAIGN (Nov. 16, 2022), <https://www.hrc.org/press-releases/u-s-senate-invokes-cloture-for-bipartisan-respect-for-marriage-act-62-37-with-every-democrat-and-12-republican-votes-vote-moves-to-senate-floor> [https://perma.cc/F59N-U7WE].

170. *Id.*

171. *Id.*

passed the House by 267–157, where its bipartisan pull won over 47 Republican votes.¹⁷² On the overwhelming support for RMA, the Human Rights Campaign’s (HRC) incoming President, Kelley Robinson, commented:

The devastating United States Supreme Court decision to overturn *Roe v. Wade* was a clear reminder that we are just one Supreme Court decision away from losing too many of our hard fought for rights . . . there is an urgent, dire need to ensure, once and for all, that the days of debate around marriage equality are over . . . 568,000 same-sex, married couples across America rely upon the decisions in *Windsor v. United States* and *Obergefell v. Hodges* . . . [the RMA] is an essential piece of legislation that affirms that every marriage, and every family, is valid and beautiful.¹⁷³

As bipartisan support for same-sex marriage is evident at the congressional level, legislative avenues have proven to be a promising means through which infertility mandates may be extended to cover same-sex couples. Particularly at a time when the future of *Obergefell* hangs in the balance, the rights afforded by substantive due process to bodily autonomy, marriage, and forming a family cannot be relied upon to protect LGBT+ individuals or their families. Instead, defensive legislation must be proactively established to safeguard critical rights.

D. The Modern American Family Is Determined by Choice, Not Biological and Social Imperatives

The prototype of the American family has been repeatedly overhauled and redefined. The nuclear family model, which reigned as the gold standard of American domesticity during the latter half of the twentieth century, no longer appeals to large segments of the population. Driven in part by the Feminist wave of the 1960s and 1970s, the accessibility of new forms of contraception, the rise of women in the workforce, and the implementation of no-fault divorce laws, modern women are no longer relegated to the entrapments of domestic servitude. Over the past few decades, the diversification of immigrant communities within the United States has also led to a rise in multigenerational households. Furthermore, the advancement of LGBT+ rights in conjunction with scientific advancements that allow same-sex couples to form families on their own terms have also fundamentally altered the landscape of the American family.

172. *Id.*

173. *Id.*

1. *The Fallacy of the Nuclear Family*

Though the idealized “nuclear family” archetype still lingers within the American consciousness, this concept is a fallacy largely based on an ill-remembered past.¹⁷⁴ Despite the midcentury consensus that “[a] family is a mated pair raising its offspring in a home of its own. A family without a home, a husband, a wife, or a child is not complete,”¹⁷⁵ pre-twentieth century American family units were typically larger and often composed of extended family members.¹⁷⁶ Sometimes referred to as “corporate families” (wherein the members organized around shared responsibilities in a family business), these groups provided family members with greater support networks and modes of socialization.¹⁷⁷ In contrast, nuclear families contain “no shock absorbers” for potential marital conflicts, schisms, and their fallout.¹⁷⁸

In fact, the 1950s were a far cry from the “golden age of American families” that nostalgia-blinded supporters of the nuclear family allege it was.¹⁷⁹ Instead, the nuclear family of the 1950s ought to be viewed for what it truly was: an experiment,¹⁸⁰ whose framework buckled in the following decade once young men’s wages began to decline, post-war government welfare programs drew to a halt, and the feminist movement achieved major successes.¹⁸¹ It is critical to highlight that the problem with this model does not reside within the basic premise of a stable family unit, but with the oppressive power imbalances between its members.¹⁸²

2. *Long-Standing Perceptions of Homosexuality as a Rejection of the Family Unit Emerged as a Result of Discriminatory Laws and Attitudes*

Throughout the 20th century, gay and lesbian individuals were seen as both defectors from and a threat to the continuation of the

174. See David Brooks, *The Nuclear Family Was a Mistake*, THE ATLANTIC (Mar. 2020), <https://www.theatlantic.com/magazine/archive/2020/03/the-nuclear-family-was-a-mistake/605536> [https://perma.cc/B9NW-895Q].

175. DAVID M. SCHNEIDER, *AMERICAN KINSHIP*, 50 (2d ed., Univ. of Chi. Press 1980) (1968).

176. Brooks, *supra* note 174.

177. Brooks, *supra* note 174.

178. Brooks, *supra* note 174.

179. STEPHANIE COONTZ, *THE WAY WE REALLY ARE*, 45 (New York, BasicBooks 1997).

180. *Id.* at 36.

181. Brooks, *supra* note 174.

182. Brooks, *supra* note 174.

traditional family unit.¹⁸³ In *Families We Choose: Lesbians, Gays, Kinship*, Kath Weston asserts that this perceived “departure from kinship” resulted from (1) the inevitable exile of homosexual individuals from their familial relations once their identities became known and (2) the conception that homosexuals did not have children, in part due to the (a) biological and (b) legal impediments that prevented same-sex couples from forming their own families (which would, in the traditional American sense, be composed of two married individuals and their offspring).¹⁸⁴

In the ’70s and ’80s, IVF and other ARTs were novel approaches to infertility and were not readily accessible to the public.¹⁸⁵ Accordingly, because gay individuals did not typically participate in heterosexual intercourse, the ability to procreate remained out of reach. Opponents to the gay rights movement emphasized this reality to portray homosexuality as inherently antithetical to the family unit.¹⁸⁶

It is important to remember that same-sex marriage was not legitimized at any state level until the 2003 decision of *Goodridge v. Department of Health*, which made Massachusetts the first state to legalize same-sex marriage,¹⁸⁷ and that intimate acts between individuals of the same sex were not federally decriminalized until *Lawrence v. Texas* that same year.¹⁸⁸ Merely twenty years ago, intimate acts between members of the same sex could be criminalized in certain states. Efforts to secure LGBT+ rights appeared to many as a fringe movement, while LGBT+ reproductive justice was practically unheard of outside of gay or lesbian circles. The wide array of legal limitations that were imposed up until the early 2000s fortified the narrative that members of the LGBT+ community were doomed to lead lives of ostracization and isolation.¹⁸⁹

183. See KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP*, 22 (2d ed., Columbia University Press 1991).

184. See *id.*

185. See Sandra Blakeslee, *INFERTILE WOMAN HAS BABY THROUGH EMBRYO TRANSFER*, N.Y. TIMES (Feb. 4, 1984), <https://www.nytimes.com/1984/02/04/us/infertile-woman-has-baby-through-embryo-transfer.html> [<https://perma.cc/9RD3-FNFC>] (the first public IVF ever).

186. See WESTON, *supra* note 183, at 22–23 (“To assert that straight people ‘naturally’ have access to family, while gay people are destined to move toward a future of solitude and loneliness, is not only to tie kinship closely to procreation, but also to treat gay men and lesbians as members of a nonprocreative species set apart from the rest of humanity (cf. Foucault 1978).”).

187. See Pew Research Center, *Same-Sex Marriage, State by State* (Jun. 26, 2015), <https://www.pewresearch.org/religion/2015/06/26/same-sex-marriage-state-by-state-1> [<https://perma.cc/8KQC-7YTY>] (referencing Massachusetts as the first state to legalize homosexual marriage); see also *Goodridge v. Dept. of Pub. Health*, 978 N.E.2d 941, 948 (Mass. 2003).

188. See *Lawrence v. Texas*, 539 U.S. 558, 560 (2003).

189. See Nina Jackson Levin, Shanna K. Kattari, Emily K. Piellusch & Erica Watson, “*We Just Take Care of Each Other*”: *Navigating ‘Chosen Family’ in the Context of Health*,

3. *Kinship Ties Between LGBT+ Individuals Dispelled the Myth of LGBT+ Seclusion and Altered Perceptions of the American Family*

Anthropologist Kath Weston's seminal study of the queer community and her resulting concept of the "chosen family" emerges from her experience in San Francisco during the late 1980s.¹⁹⁰ During this time, the AIDS crisis exacerbated preexisting stigmas against homosexuality and deepened the perceived divide between queerness and the family unit.¹⁹¹ Weston observed how "chosen families" served as critical support systems for queer individuals who began to face heightened isolation and marginalization during this tenuous period.¹⁹² Belonging within San Francisco's LGBT+ communities was not merely a tool of survival for queer individuals, but a means of revolutionizing the definition of kinship and expanding the perception of the American family.

Weston emphasized that "chosen families do not directly oppose genealogical modes of reckoning kinship. Instead, they undercut procreation's status as a master term imagined to provide the template for all possible kinship relations."¹⁹³ According to Weston, procreation and family building may establish kinship within the LGBT+ community, though these were not the binding feature of such households.¹⁹⁴ Alternatively, Weston presents same-sex procreation as an intentional, chosen act, as opposed to one of mishap or coercion, which—biologically speaking—may be the case within heterosexual partnerships.¹⁹⁵ Due to both social attitudes and certain biological truths, queer families exist as inherently *chosen* units as opposed to coincidental.¹⁹⁶

For both homosexual and heterosexual partnerships, the concept of the "chosen family" has been made possible by judicial and

Illness, and the Mutual Provision of Care Amongst Queer and Transgender Young Adults, 17 INT. J. ENVIRON. RES. PUBLIC HEALTH 7346, 7347 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7579626/#B14-ijerph-17-07346> [<https://perma.cc/T5P8-Q2H2>].

190. *See id.*

191. *See id.*

192. *See id.*

193. *See* WESTON, *supra* note 183, at 213.

194. *See* WESTON, *supra* note 183, at 210 ("Some gay men and lesbians in the Bay Area had chosen to create families and some had not, some had become parents and some had not, but almost all associated their sexual identities with a release from any sort of procreative imperative. In this sense the radical potential of a discourse on gay families is not limited to contesting the species difference of homosexuality").

195. *See* WESTON, *supra* note 183, at 211.

196. *See* WESTON, *supra* note 183, at 211.

legislative decisions, which have redefined what it means to be an American family over the past few decades. Those who oppose the promotion of LGBT+ access to ARTs still cling to the myth of the Nuclear Family structure and claim that children ought to be raised in households comprised of one mother and one father.¹⁹⁷ The misconception that children require heterosexual parents has been repeatedly disproven.¹⁹⁸ One international study, which compared the outcomes of children of same-sex parents to those of heterosexual parents revealed that the children of LGBT+ couples often outperform their peers.¹⁹⁹ The study also indicated that the LGBT+ parents typically maintain healthier relationships with their children.²⁰⁰ In the United States, there are currently a whopping 1.2 million same-sex couple households.²⁰¹ Though same-sex couples are more likely to adopt than heterosexual couples, only 15% of same-sex couples (compared to 40% of heterosexual couples) are raising children within their households.²⁰² This discrepancy may be partially linked to the inaccessibility of affordable ART procedures for same-sex couples. Because same-sex households make up a notable portion of U.S. population, equal opportunities for family building must be employed as a form of reproductive justice.

CONCLUSION

ART has permanently revolutionized the capabilities of biogenetic human reproduction. For many same-sex couples with dreams of family building, ART is the most effective method available to procreate, though it often remains out of reach. While *Obergefell* ensured the right to marriage for same-sex couples, equality between gay and straight married couples cannot be achieved until both groups are afforded equal opportunities to procreate. Accordingly, costly

197. See Robert Hart, *Kids Raised By Same-Sex Parents Fare Same As—Or Better Than—Kids Of Straight Couples, Research Finds*, FORBES (Mar. 6, 2023), <https://www.forbes.com/sites/roberthart/2023/03/06/kids-raised-by-same-sex-parents-fare-same-as-or-better-than-kids-of-straight-couples-research-finds/?sh=7f0ad2ef7738> [<https://perma.cc/AR5B-WUA2>].

198. See Lauren Sforza, *Children of Same-Sex Parents See Outcomes as Good or Better Than Heterosexual Couples: Study*, THE HILL (Mar. 3, 2023), <https://thehill.com/policy/healthcare/3887753-children-of-same-sex-parents-see-outcomes-as-good-or-better-than-heterosexual-couples-study> [<https://perma.cc/S687-PL92>]; see also Hart, *supra* note 197.

199. See Sforza, *supra* note 198.

200. See Sforza, *supra* note 198.

201. See Hart, *supra* note 197.

202. See Hart, *supra* note 197.

ART procedures must be made accessible through the enactment of inclusive state and federal mandates and by limiting RFRA's reach within the healthcare field. The implementation of queer reproductive justice is necessary to secure the rights of same-sex couples and a critical step in the fight for LGBT+ equality.

LEILA Y. VICINELLI*

* Leila Y. Vicinelli is a 2024 JD candidate at William & Mary Law School. She obtained her Bachelor of Arts in History from Dartmouth College in 2018. The author would like to thank her family for their steadfast support of her academic pursuits. She would also like to thank the *Journal of Race, Gender, and Social Justice's* staff for their help and support in the drafting process of this Note.