INCONCEIVABLE: THE FIGHT FOR EQUALITY IN FERTILITY INSURANCE

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LGBTQ+ individuals face numerous hurdles in their pursuit of parenthood. For the benefit of both the parents and children, LGBTQ+ couples often desire biological parenthood, a more challenging prospect for same-sex partners. Assisted reproductive technology ("ART") becomes a crucial avenue for LGBTQ+ parents seeking to establish genetic ties to their children. ART procedures, however, are incredibly expensive, exacerbated by the lack of widespread fertility insurance coverage. Even when available, fertility insurance often hinges on proof of "infertility," a criterion largely defined by heteronormative standards. This definition disproportionally harms LGBTQ+ individuals because two cisgender women or two cisgender men will never be able to get pregnant from unprotected sex. Because ART services are so costly, unless they have access to insurance coverage, many LGBTQ+ individuals have no avenue to the only way for them to build biologically related families. This Note explores the inequality of fertility insurance, arguing that LGBTQ+ couples have strong claims for sex discrimination under the Equal Protection Clause and Title VII of the Civil Rights Act of 1964, especially utilizing the new precedent of Bostock's *definition of "sex." To provide LGBTQ+ individuals with equal access to fertility insurance, this Note argues that improvements must be made through federal legislation, the Affordable Care Act ("ACA"), the Employee Retirement Income Security Act ("ERISA"), and state mandates.*

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I. INTRODUCTION

Corey Briskin and Nicholas Maggipinto, a married same-sex couple, first started trying to have their own biological child around 2017.[1] To this day, they have still been unable to do so.[2] Both always knew they wanted children, with Maggipinto saying, "I frankly don't think I would feel complete without being able to have a child."[3] Briskin, a former employee of the District Attorney's office of New York City ("NYC"), believed his insurance plan would help cover the costs of in vitro fertilization ("IVF").[4] But the couple soon learned that the plan required them to prove their "infertility" under a heteronormative definition they cannot meet.[5] Without fertility insurance, the couple faces costs of up to $200,000 to have a biological child of their own.[6] The heteronormative language of Briskin's fertility insurance excludes him and Maggipinto from coverage, precluding them from overcoming steep financial hurdles in starting a family.[7] On April 12, 2022, Briskin and Maggipinto filed a class-action discrimination claim against NYC, hoping to change not only their lives but the lives of other gay male employees of NYC categorically excluded from receiving IVF benefits.[8]

1. Caroline Lewis, *Gay Brooklyn Couple Files Discrimination Complaint Against NYC Over Denial of Fertility Coverage*, GOTHAMIST (Apr. 12, 2022), https://gothamist.com/news/gay-brooklyn-couple-files-discrimination-complaint-against-nyc-over-denial-of-fertility-coverage [https://perma.cc/3A9X-HBZG].

2. *Id.*

3. Anne Branigin, *Who Can Access IVF Benefits? A Gay Couple's Complaint Seeks an Answer* (Apr. 13, 2022, 3:05 PM), https://www.washingtonpost.com/business/2022/04/13/gay-couple-ivf-benefits-discrimination-complaint [https://perma.cc/CC3Y-VN3X].

4. *Id.*

5. Lewis, *supra* note 1.

6. *Id.*

7. Branigin, *supra* note 2.

8. Peter Romer-Friedman, Robert Friedman & Joseph J. Wardenski, *Gay Couple Files Class Action Discrimination Charge Against New York City for Refusing to Give Gay Male City Workers the In Vitro Fertilization*

For many LGBTQ+ families, assisted reproductive technology ("ART") is the only avenue for parents to have genetic ties to their children.[9] ART, per the Centers for Disease Control and Prevention ("CDC"), is defined as "all fertility treatments in which either eggs or embryos are handled."[10] Many gay men have stated they are motivated to pursue ARTs because of the presence of a genetic link to their child, the concern over the psychological stress a child may experience from being adopted, and the "achievement of some sense of immortality" through biological children.[11] This is unsurprising as American society continually prioritizes biogenetic relationships, with many remarking that biological parenthood is "the most basic of human activities."[12] Indeed, some LGBTQ+ couples may be particularly interested in having biological children in an effort to promote better family relationships with those who felt their lineage was ending when the individuals came out.[13] Others may be interested in having biological children to carry on a partner's race or even simply because having a child "together" is more romantic.[14] Not only can a biological connection be important for the parents, but it can also influence the children themselves.[15] One recent study indicated that children raised by their biological parents are significantly more likely than children in other types of families to avoid poverty and prison and to graduate from college.[16] Thus, utilizing ARTs to have biological children can be crucial for both LGBTQ+ couples and their future children.[17]

In most cases, ART procedures involve "surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman."[18] ART procedures can be extremely costly for most couples, especially for anyone facing added costs due to a lack of fertility insurance.[19] Indeed, many companies don't

(IVF) Benefits the City Offers Other Workers, GUPTA WESSLER (Apr. 12, 2022), http://guptawessler.com/ivf/ [https://perma.cc/5HG9-S24Z].

9. Rose Holden Vacanti Gilroy, *The Law of Assisted Reproductive Technologies: Imposing Heteronormative Family Structures onto Queer Families*, 31 TUL. J.L. & SEXUALITY 27, 28 (2022).

10. *What Is Assisted Reproductive Technology*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/art/whatis.html (Oct. 8, 2019) [https://perma.cc/KGK4-S5DE].

11. Dana Berkowitz, *Gay Men and Surrogacy*, *in* LGBT-PARENT FAMILIES: INNOVATIONS IN RESEARCH AND IMPLICATIONS FOR PRACTICE 71, 75 (Abbie E. Goldberg & Katherine R. Allen eds., 2013).

12. Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065, 1083 n.112; Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER, L. & JUST. 18, 76 (2008).

13. *Id.* at 1085.

14. *Id*. at 1088–89.

15. *Id.* at 1088.

16. W. Bradford Wilcox, Wendy Wang & Ian Rowe, *Less Poverty, Less Prison, More College: What Two Parents Mean for Black and White Children*, IFS (June 17, 2021), https://ifstudies.org/blog/less-poverty-less-prison-more-college-what-two-parents-mean-for-black-and-white-children [https://perma.cc/KR3M-P67P].

17. *See generally id.*

18. *What Is Assisted Reproductive Technology*, *supra* note 10.

19. Shira Stein, *LGBTQ Couples' IVF Hopes Hinge on New Infertility Definition*, BLOOMBERG L. (May 17, 2022, 4:35 AM), https://news.bloomberglaw.com/health-law-and-business/lgbtq-couples-ivf-hopes-hinge-on-new-infertility-definition [https://perma.cc/2TJA-6EGR].

even provide insurance coverage for fertility treatments.[20] Those that do often require proof of "infertility," defined as "not being able to get pregnant (conceive) after one year (or longer) of unprotected sex."[21] This excludes millions of same-sex couples, like Briskin and Maggipinto, from using IVF to establish a family.[22] This continual exclusion has led to movements like the "Fertility Equality" campaign aimed at promoting new legislation that allows everyone to build a family, regardless of wealth, sexuality, gender, or biology.[23]

Based on data from the Society for Assisted Reproductive Technology, doctors performed 413,776 ART cycles during 2021, resulting in 97,128 live-born infants.[24] Among LGBTQ+ families, 65% reported looking to foster care, adoption, and ART to start a family in 2020.[25] LGBTQ+ individuals looking to start a family using ART face a variety of costs: $25–$1.5K for donor sperm, $250–$4K for intrauterine insemination ("IUI"), $13.5K–$21K+ for IVF, and $60K–$150K+ for gestational surrogacy.[26] These high costs pose a significant financial obstacle for numerous LGBTQ+ couples aspiring to start a family.[27] Without fertility insurance, many LGTBQ+ couples are effectively excluded from pursuing conception through ARTs.

NYC utilizes a self-funded insurance plan whereby NYC itself pays for its employees' medical costs.[28] This type of insurance is becoming increasingly common among larger companies, covering around 61% of workers in America who have employer-sponsored health insurance.[29] Consequently, it is increasingly essential to protect LGBTQ+ individuals' rights under such insurance plans. Self-funded plans are only regulated by federal law, primarily governed by the Employee Retirement Income Security Act ("ERISA").[30] Currently, there is no sex nondiscrimination provision in ERISA.[31] This leaves millions of same-sex couples enrolled in self-insured plans vulnerable and unprotected.[32]

20. Gabriela Weigel, Usha Ranji, Michelle Long & Alina Salganicoff, *Coverage and Use of Fertility Services in the U.S.*, KFF (Sept. 15, 2020), https://www.kff.org/womens-health-policy/issue-brief/coverage-and-use-of-fertility-services-in-the-u-s/ [https://perma.cc/73FX-L7DL].

21. Stein, *supra* note 19.

22. Lewis, *supra* note 1.

23. David Kaufman, *The Fight for Fertility Equality*, N.Y. TIMES (July 24, 2020), https://www.nytimes.com/2020/07/22/style/lgbtq-fertility-surrogacy-coverage.html [https://perma.cc/A7UF-3GVA].

24. *ART Success Rates*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/art/artdata/index.html (Sept. 25, 2023) [https://perma.cc/EMG4-SDVM].

25. *LGBTQ Family Building Survey*, FAMILY EQUAL., https://www.familyequality.org/fbs (last visited Jan. 29, 2024) [https://perma.cc/G7W6-R4LP].

26. *Building LGBTQ+ Families: The Price of Parenthood*, FAMILY EQUAL., https://www.familyequality.org/resources/building-lgbtq-families-price-parenthood/ (last visited Jan. 29, 2024) [https://perma.cc/TK73-5ZUF].

27. *See id.*

28. Lewis, *supra* note 1.

29. Weigel et al., *supra* note 20.

30. Yusra J. Hoyt, Note, *Terms of Art: Infertility Mandates and Inclusivity in the Age of* Bostock, 43 WOMEN'S RTS. L. REP. 260, 275 (2021).

31. *Id.* at 276.

32. *Id.* at 276–77.

Congress should incorporate a sex nondiscrimination provision into ERISA to protect the rights of LGBTQ+ individuals covered by self-funded insurance plans. Since this could be potentially difficult to implement due to a divisive Congress, another potential solution is for the Department of Labor ("DOL") to pass a regulation stating that ERISA will be interpreted under the new ruling of *Bostock*, finding that sex discrimination under Title VII includes discrimination based on sexual orientation.[33] Moving forward, LGBTQ+ employees excluded from fertility insurance in self-funded plans could use the *Bostock* ruling to assert claims, contending violations of their Title VII and Equal Protection rights.[34] While these solutions may not guarantee that employees covered by self-funded insurance plans have access to fertility insurance, they will ensure that those companies who provide fertility insurance provide it equally amongst their employees.

Additionally, with roughly 31 million Americans covered under the Affordable Care Act ("ACA"), the ACA could be used to address the definition of infertility used by insurance plans and better protect the rights of LGBTQ+ individuals.[35] In May 2016, the Obama administration issued regulations implementing Section 1557 of the ACA, extending nondiscrimination to health insurance standards.[36] But the Trump administration overturned this, allowing health insurers to vary benefits amongst certain groups, like LGBTQ+ people.[37] Now, the Biden administration has the opportunity to revert back to protecting LGBTQ+ individuals' rights in health insurance.[38] The Biden administration should amend the ACA to not only continue extending nondiscrimination to health insurance but also to incorporate a more inclusive definition of "infertility," following the "infertility" definition used by Illinois.[39] To further promote insurance coverage of fertility treatments, the Department of Health and Human Services ("HHS") should also include fertility treatment as an "essential health benefit," erasing

33. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1743 (2020).

34. *See infra* Part III.

35. Preeti Vankar, *Number of ACA-related Enrollments in the U.S. 2014-2021*, STATISTA (Sept. 20, 2023), https://www.statista.com/statistics/1280656/number-of-us-aca-related-enrollments/ [https://perma.cc/S4NP-GGJ5].

36. Sara Rosenbaum, *The Affordable Care Act and Civil Rights: The Challenge of Section 1557 of the Affordable Care Act*, MILBANK MEMORIAL FUND (Sept. 2016), https://www.milbank.org/quarterly/articles/affordable-care-act-civil-rights-challenge-section-1557-affordable-care-act/ [https://perma.cc/2XGC-EFPD].

37. MaryBeth Musumeci et al., *The Trump Administration's Final Rule on Section 1557 Non-Discrimination Regulations Under the ACA and Current Status*, KFF (Sept. 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/M3CL-R5LK].

38. Stein, *supra* note 19.

39. *Guide to Navigating Infertility Treatment Coverage in Illinois—2022*, HOWARD BROWN HEALTH (Feb. 11, 2022), https://howardbrown.org/navigating-infertility-treatment-coverage-illinois-2022/ [https://perma.cc/58JP-YE6W]:

> [A] disease, condition or status characterized by: (1) a failure to establish a pregnancy or to carry a pregnancy to live birth after 12 months of regular, unprotected sexual intercourse if the woman is 35 years of age or younger, or after six months if the woman is over 35 years of age . . . (2) a person's inability to reproduce either as a single individual or with a partner without medical intervention; or (3) a licensed physician's findings based on a patient's medical, sexual, and reproductive history, age, physical findings, or diagnostic testing.

state confusion related to the ACA's requirement that states cover the costs of new mandates exceeding any essential health benefits.[40] Such changes would profoundly impact the millions of LGBTQ+ individuals covered by the ACA.

This Note recommends protecting fertility equality by enacting new federal legislation mandating fertility insurance coverage in all insurance plans utilizing a more inclusive definition of "infertility." Additionally, it suggests making fundamental changes to the ACA and ERISA and promoting federal mandates that would protect access to fertility insurance at the state level. Part II introduces the history of LGBTQ+ rights in the United States, exploring LGBTQ+ reproductive rights as defined by courts and the Constitution. It then examines the history of fertility treatments and the creation of fertility insurance. Part III argues that the nature of current fertility insurance plans excludes LGBTQ+ individuals from ART and, thus, constitutes discrimination on the basis of "sex" under *Bostock*.[41] Based on this analysis, it then advocates for changes at the state and federal levels to protect LGBTQ+ persons' reproductive rights. Part IV recommends that Congress implement a new definition of "infertility" but also remarks on changes to the ACA, ERISA, and state mandates that would significantly improve LGBTQ+ access to ART. This Note concludes that the absence of fertility insurance for LGBTQ+ individuals deprives them of access to ARTs, constituting discrimination on the basis of sexual orientation.

II. BACKGROUND

Common definitions of "infertility" used in most fertility insurance coverage are widely regarded as a barrier to LGBTQ+ family planning.[42] This barrier, however, is only legally problematic if LGBTQ+ individuals have established reproductive rights. To better understand how existing types of fertility insurance discriminate against LGBTQ+ people, this Part will explore the current legal landscape of LGBTQ+ reproductive rights and the history of fertility treatments and fertility insurance.

A. The Legal Landscape of LGBTQ+ Rights

Under the Fourteenth and Fifth Amendments, "[n]o State shall . . . 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."[43] Throughout history, however, same-sex couples have faced prejudice, continually fighting for their rights and equality.[44] While recent Supreme Court decisions[45] and

40. Stein, *supra* note 19.

41. Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

42. Jakob Emerson, *Biden Administration Considering IVF Coverage Requirement, Fertility Definition Change*, BECKER'S PAYER ISSUES (May 17, 2022), https://www.beckerspayer.com/payer/biden-administration-considering-ivf-coverage-requirement-fertility-definition-change.html [https://perma.cc/TLM6-TXD8].

43. U.S. CONST. amend XIV, § 1; U.S. CONST. amend. V.

44. *See infra* Subsection II.A.1.

45. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015).

legislation[46] have considerably improved the rights of LGBTQ+ individuals, there is still tremendous work to be done to level the playing field—especially in the field of fertility insurance.

1. Judicial History

LGBTQ+ individuals' rights have significantly evolved over the past hundred years.[47] While the judicial history of queer[48] rights started with significant losses, such as *Baker v. Nelson*[49]and *Bowers v. Hardwick*,[50]the cultural attitude toward LGBTQ+ individuals improved after *Romer v. Evans*.[51]

In *Romer v. Evans*, the Supreme Court found a state constitutional amendment unconstitutional because it, in part, barred local anti-discrimination laws protecting gay, lesbian, and bisexual people.[52] Over the next several decades, the LGBTQ+ community continued to make ground, gaining the right to sexual privacy,[53] the right to marry,[54] and protection from employment discrimination.[55] Outside of these defined cases, however, many gray areas for the rights of LGBTQ+ individuals still exist.[56] This includes reproductive rights.[57] While *Skinner v. Oklahoma* established the fundamental right to procreation[58], the Supreme Court has not explicitly recognized the right of LGBTQ+ people to procreate through ARTs. In *Skinner*, the Supreme Court stated that "[m]arriage and procreation are fundamental to the very existence and survival of the race," with procreation being "one of the basic civil rights of man."[59] Thus, under a strict scrutiny analysis, an Oklahoma law allowing for the forced sterilization of certain criminals was held to be a violation of the Equal Protection Clause, with the Court noting the "far-reaching and devastating effects" of the law.[60] Later on, in

46. *See infra* Subsection II.A.1.

47. *Obergefell*, 576 U.S. at 660–61; *See A Timeline of Lesbian, Gay, Bisexual, and Transgender History in the United States*, GSAFE, https://www.gsafewi.org/wp-content/uploads/US-LGBT-Timeline-UPDATED.pdf (last visited Jan. 29, 2024) [https://perma.cc/78JR-2SEM] (providing timeline of LGBTQ+ legal issues in United States).

48. *What Does Queer Mean?*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/teens/sexual-orientation/what-does-queer-mean (last visited Jan. 29, 2024) [https://perma.cc/5GRQ-CMK3] ("Queer is a word that describes sexual and gender identities other than straight and cisgender. Lesbian, gay, bisexual, and transgender people may all identify with the word queer.").

49. Baker v. Nelson, 409 U.S. 810 (1972), *overruled by* Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that same-sex marriages are constitutionally prohibited by state law).

50. Bowers v. Hardwick, 478 U.S. 186, 191 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003) (holding that there is no fundamental right to engage in consensual "homosexual sodomy").

51. *See* Romer v. Evans, 517 U.S. 620, 620 (1996).

52. *Id.* at 635–36.

53. *Lawrence*, 539 U.S. 558.

54. *Obergefell*, 576 U.S. 644.

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

56. *See infra* Subsection II.A.1.

57. *See infra* Subsection II.A.1.

58. Skinner v. Oklahoma, 316 U.S. 535, 536–41 (1942).

59. *Id.* at 541.

60. *Id.*

Griswold[61] and *Eisenstadt*,[62] the Court further highlighted the right to procreation. It established a fundamental right to privacy for married couples, and then all individuals, asserting that every individual has the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[63]

In *Obergefell*, Justice Kennedy acknowledged four principles of marriage to demonstrate why marriage equality is a right that must be given to same-sex couples.[64] Among these principles, he stated that marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[65] He further stated that the Supreme Court has recognized these rights in conjunction, previously stating that "the right to 'marry, establish a home and bring up children, is a central part of the liberty protected by the Due Process Clause.'"[66] Additionally, Justice Kennedy noted that same-sex couples had already been providing loving homes to thousands of children, whether biological or adopted.[67] Thus, the Supreme Court acknowledged the inherent ties between the established right to marriage and the right to procreate.[68]

Today, only one lower court has explicitly recognized a right to reproduction through ARTs.[69] In *Lifchez v. Hartigan*, an Illinois federal court held that a state statute banning fetal experimentation was unconstitutional, in part, because the fundamental right of privacy that "includes the right to have access to contraceptives" must include "the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy."[70] While this helps promote a cultural acceptance of LGBTQ+ families, this does not resolve the issue for same-sex male couples who can *only* create their own biological children through ARTs. The Supreme Court has yet to address whether access to assisted procreation (*i.e.*, ARTs) is a fundamental right of LGBTQ+ individuals protected under the "liberty" of Due Process.[71] Therefore, LGBTQ+ couples are unable to assert a denial of their Due Process rights for lack of access to ARTs.[72] Because the Supreme Court has yet to define this right, the most compelling constitutional claim for LGBTQ+ couples' right to access ARTs for procreation rests on the Equal Protection Clause.[73]

61. Griswold v. Connecticut, 381 U.S. 479 (1965).

62. Eisenstadt v. Baird, 405 U.S. 438 (1972).

63. *Id.* at 453.

64. Obergefell v. Hodges, 576 U.S. 644, 665–66 (2015) ("The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.").

65. *Id.* at 667 (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) and Meyer v. Nebraska, 262 U.S. 390 (1923)).

66. *Id*. at 668 (citing Zablocki v. Redhail, 434 U.S. 374 (1978)).

67. *Id.*

68. *Id.* at 667–69.

69. 735 F. Supp. 1361, 1377 (N.D. Ill. 1990).

70. *Id.*

71. U.S. CONST. amend. V.

72. *Id.*

73. U.S. CONST. amend XIV, § 1.

2. Equal Protection Clause

Equal Protection is provided in the Fourteenth Amendment and Fifth Amendment.[74] The Fourteenth Amendment includes the Equal Protection Clause, which protects individuals at the state and local levels.[75] The Fifth Amendment includes Equal Protection in its Due Process Clause through reverse incorporation[76] and protects individuals at the federal level.[77] In an Equal Protection claim, the issue is whether the governmental discrimination between different classes is justified by an adequate purpose.[78] The type of discrimination determines the level of scrutiny the court will apply in deciding whether the government's actions were closely related to their stated objectives.[79] There are three main questions in analyzing governmental action under the Equal Protection Clause: (1) what is the classification? (2) what is the appropriate level of scrutiny? and (3) does the governmental action survive the appropriate level of scrutiny?[80]

Under the current "classification" analysis, classification by the government will be deemed "suspect" and subject to a higher level of scrutiny if the classification is based on race, national origin, ethnicity, resident alienage, gender, or illegitimacy.[81] In other words, if a classification by the government targets a group that is a "discrete and insular" minority, the classification will face a stricter review by the courts, whereby the government must prove that the classification is "necessary to further a compelling interest."[82] Previous cases have held that gender-based classifications are subject to intermediate scrutiny, violating the Equal Protection Clause unless the government can show that the classification is "substantially related to an important interest."[83]

No Supreme Court precedent indicates that classification based on sexual orientation is included under the classification of "gender" in the Equal Protection Clause.[84] But the recent decision in *Bostock v. Clayton County* may influence future decisions.[85] In *Bostock*, the Supreme Court held that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[86] The Court's finding that "sex" necessarily includes sexual orientation and gender identity could mean that

74. *Equal Protection*, CORNELL L. SCH. (Nov. 2022), https://www.law.cornell.edu/wex/equal_protection [https://perma.cc/DCJ6-WYU2].

75. *Id.*

76. *Id.*

77. *Id.*

78. Russell W. Galloway Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 123 (1989).

79. *Id.* at 124.

80. *Id.* at 124–26.

81. *Id.* at 122.

82. *Id.* at 125; United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

83. Galloway Jr., *supra* note 78, at 125; Craig v. Boren, 429 U.S. 190, 197 (1976).

84. *A Q&A with Professor Eskridge on Landmark SCOTUS Decision on LGBTQ Rights*, YALE L. SCH. (June 16, 2020), https://law.yale.edu/yls-today/news/qa-professor-eskridge-landmark-scotus-decision-lgbtq-rights [https://perma.cc/8ZPB-SW7G].

85. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020).

86. *Id*.

"gender" may include sexual orientation as well.[87] Indeed, following the decision in *Bostock*, a federal judge in Idaho applied heightened scrutiny to an Idaho law that banned transgender women and girls from sports teams, citing the Supreme Court's statements in *Bostock*.[88] Thus, if the Equal Protection Clause is found to include sexual orientation under the umbrella of "gender," LGBTQ+ individuals may be able to assert constitutional claims against fertility insurance plans.

Currently, the Fourteenth Amendment protects LGBTQ+ individuals' rights to marriage, procreation, and childbearing.[89] But, these individuals face additional hurdles to procreation and childbearing, like structural infertility and associated economic costs.[90] While ART procedures should seemingly allow many couples to have biological children, the costs of the procedures are a major obstacle. To fully understand this obstacle, it is crucial to evaluate various ART procedures and their associated costs, analyzing how they influence LGBTQ+ couples' ability to start a family.

B. History of Fertility Treatment

Today, LGBTQ+ couples have a variety of infertility treatment options available to them.[91] While infertility itself was initially thought to be an act of God, scientists began exploring artificial insemination in the late 1850s.[92] This was the start of what has now become known as assisted reproductive technologies—ARTs.[93] For many years after, scientists continued to learn more about fertility in general, identifying how specific hormones and menstrual cycles play a role in reproduction.[94]

One of the most significant breakthroughs in fertility treatment occurred in 1978 when British physicians achieved the first successful birth from IVF.[95] IVF is a form of ART where a man's sperm and a woman's eggs are combined outside the body in a laboratory dish and then transferred to the woman's uterus to develop further.[96] While success rates for IVF remained low, progress continued:

87. Sharita Gruberg, *Beyond Bostock: The Future of LGBTQ Civil Rights*, CTR. FOR AM. PROGRESS (Aug. 26, 2020), https://www.americanprogress.org/article/beyond-bostock-future-lgbtq-civil-rights/ [https://perma.cc/M5VF-NNSA].

88. *See* Memorandum Decision and Order at 60, Hecox v. Little (D. Idaho Aug. 17, 2020) (No. 1:20-cv-00184-DCN).

89. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Romer v. Evans, 517 U.S. 620, 635 (1996).

90. *See* Melissa B. Jacoby, *The Debt Financing of Parenthood*, 72 LAW & CONTEMP. PROBS. 147, 149 (2009) ("But assisted reproduction is also important to those with 'structural infertility'—that is, those who want to be parents but do not want to engage in heterosexual intercourse.").

91. *The Evolution of Fertility Treatments and Development of IVF*, S. CAL. REPROD. CTR. (Nov. 29, 2016), https://blog.scrcivf.com/ivf-the-history-and-evolution-of-fertility-treatments [https://perma.cc/E5JT-JNE3].

92. *Id.*

93. *Id.*

94. *Id.*; *see* Dr. John Buster, *Fertility Treatment's Storied History and Promising Future*, WOMEN & INFANTS (Apr. 4, 2022), https://fertility.womenandinfants.org/blog/fertility-treatment-history-future [https://perma.cc/M48N-N3R3].

95. Buster, *supra* note 94.

96. AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, ASSISTED REPRODUCTIVE TECHNOLOGY: A GUIDE FOR PATIENTS 4 (2018).

the first American IVF clinic opened in 1980, and the use of donor eggs became public in 1987.[97] In 1983, scientists at the Harbor-UCLA Medical Center achieved the first successful egg donation pregnancy.[98] This had a significant impact on ARTs because it allowed women who were unable to produce their own eggs to still carry and give birth to children.[99] Furthermore, this IVF through egg donation had increased success rates, approaching 60 to 70%.[100]

While approximately 99% of ART cycles are IVF, various other forms of ART are available.[101] One option is gamete intrafallopian transfer ("GIFT"), which occurs when the egg and sperm are transferred to the woman's fallopian tubes, instead of her uterus, and fertilization takes place in the woman's fallopian tubes; this potentially serves as an option for couples who do not want the eggs fertilized outside the body.[102] Another potential procedure is zygote intrafallopian transfer ("ZIFT"), where fertilization still occurs in the lab, but the fertilized egg is transferred to the fallopian tubes rather than the uterus.[103] A less-invasive and less-expensive option is intrauterine insemination ("IUI"), where a man's sperm is placed into a woman's uterus using a long, narrow tube.[104] Depending on the type of relationship, some LGBTQ+ couples may need sperm donors, egg donors, and/or a surrogate.[105] These procedures play a crucial role in allowing LGBTQ+ individuals to be genetically related to their children. But the necessary costs associated with these treatments,[106] combined with the lack of insurance options, expose LGBTQ+ couples to insurmountable difficulties in obtaining biological parenthood.

In addition to the already high costs, the post-*Dobbs*[107] universe has introduced even more difficulties for couples seeking to utilize IVF treatment. *Dobbs v. Jackson Women's Health Organization* held that there is no constitutional right to an abortion.[108] As a result, the constitutional ground protecting abortion access across the nation has been removed, and states may now regulate abortion as they see fit.[109] While *Dobbs*[110] doesn't explicitly restrict access to ARTs, the details

97. Buster, *supra* note 94; *The Evolution of Fertility Treatments and Development of IVF*, *supra* note 91.

98. Buster, *supra* note 94.

99. *Id.*

100. *Id.*

101. *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 (last visited Jan. 29, 2024) [https://perma.cc/VH5J-FJNG].

102. *Id.*

103. *Id.*

104. *LGBTQ Fertility Treatments*, URA, https://www.uranj.com/blog/lgbtq-fertility-treatments-options-common-questions (last visited Jan. 29, 2024) [https://perma.cc/UBC9-72N8].

105. *Id.*

106. *See supra* Part I.

107. *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

108. *Id.* at 302 ("The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.").

109. *See generally* Yvonne Lindgren, Dobbs v. Jackson Women's Health *and the Post*-Roe *Landscape*, 35 J. AM. ACAD. MATRIM. LAWS. 235, 236 (2022).

110. 597 U.S. 215 (2022).

of each state's new laws could impact ART procedures.[111] Judith Daar, a law professor at Northern Kentucky University, noted that the Supreme Court's reference to "unborn human beings" in *Dobbs*[112] may have implications for IVF.[113] Daar states that "[i]f the legislature does view the unborn human life at its earliest moments as something worthy of protection over other interests, including the interest of patients and forming their families, then laws could move forward that are restrictive to in vitro fertilization."[114] Since the decision in *Dobbs*, twenty-four states have either banned abortion or are estimated to do so soon, according to the Guttmacher Institute.[115]

Many states implemented "trigger" laws set to take effect if *Roe v. Wade*[116] was ever overturned.[117] Fortunately, an analysis performed by the American Society for Reproductive Medicine determined that out of the thirteen initial trigger laws, only Utah's could be interpreted to impact ARTs.[118] This is largely because even though many of the "trigger" laws define an "unborn child" as beginning at fertilization, they mainly define "abortion" as an action on an unborn child of a pregnant woman.[119] Consequently, these laws do not appear to apply to an embryo not inside a woman, a scenario typical in IVF.[120]

Since *Dobbs*, one of the primary concepts affecting ARTs is personhood law.[121] The idea of personhood law arose in the 1960s and 1970s when abortion opponents pushed to define life as beginning at the point of fertilization.[122] While the idea at the time was to ban all abortions, fetal personhood laws have a much larger impact, affecting women's access to a wide range of reproductive healthcare.[123] If an embryo is deemed a person, a mother or healthcare provider could easily be prosecuted for violating a number of legal rights and protections

111. *State Abortion Laws Potential Implications for Reproductive Medicine*, AM. SOC'Y FOR REPROD. MED. (Oct. 10, 2022), https://www.asrm.org/news-and-publications/asrms-response-to-the-dobbs-v-jackson-ruling/dobbs/state-law-summaries/ [https://perma.cc/GBL8-GH2H].

112. 597 U.S. at 257 ("Abortion destroys what those decisions call 'potential life' and what the law at issue in this case regards as the life of an 'unborn human being.'").

113. Michelle J. Polo, *Infertility Patients Fear Abortion Bans Could Affect Access to IVF Treatment*, NPR (July 21, 2022, 5:04 AM), https://www.npr.org/sections/health-shots/2022/07/21/1112127457/infertility-patients-fear-abortion-bans-could-affect-access-to-ivf-treatment [https://perma.cc/6BSR-RCFP].

114. *Id.*

115. Elizabeth Nash & Isabel Guarnieri, *Six Months Post-Roe, 24 US States Have Banned Abortion or Are Likely to Do So: A Roundup*, GUTTMACHER INST. (Jan. 10, 2023), https://www.guttmacher.org/2023/01/six-months-post-roe-24-us-states-have-banned-abortion-or-are-likely-do-so-roundup [https://perma.cc/54PW-RQUR]; 597 U.S. at 300–01.

116. *See generally* 410 U.S. 113 (1973).

117. *State Abortion Laws Potential Implications for Reproductive Medicine*, *supra* note 111.

118. *See id.*

119. *See id.*

120. AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, *supra* note 96, at 4.

121. *See* Lindgren, *supra* note 109, at 280.

122. Pooja Salhotra, *Does a Fetus Count in the Carpool Lane? Texas' Abortion Law Creates New Questions About Legal Personhood*, TEX. TRIB. (Sept. 13, 2022, 5:00 AM), https://www.texastribune.org/2022/09/13/texas-personhood-laws-abortion-law/ [https://perma.cc/6TCM-CALW].

123. Maya Manian, *Lessons from Personhood's Defeat: Abortion Restrictions and Side Effects on Women's Health*, 74 OHIO ST. L.J. 75, 77 (2013).

granted to the embryo.[124] In relation to ARTs, more specifically IVF, previously standard procedures, like testing or discarding the embryo, may be considered illegal.[125]

The Supreme Court declined to weigh in on fetal personhood in *Dobbs*, with Justice Alito stating that "[o]ur opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth."[126] Currently, while many conservative states have been pushing for fetal personhood laws, only Georgia and Arizona have passed them, and Arizona's is enjoined by the courts.[127] Notably, Georgia's fetal personhood law characterizes an "unborn child" as being "a member of the species Homo sapiens at any stage of development who is carried in the womb;" thus, many medical experts and legislators agree that this law will not impact ARTs where embryos are created outside the "womb".[128] Other states, like New York (the home of Briskin and Maggipinto[129]), have enacted pro-abortion laws since *Dobbs*,[130] protecting both patients and providers utilizing abortions.[131]

C. History & Current State of Fertility Insurance Plans

While the first successful IVF birth occurred in 1978,[132] insurance companies largely considered ARTs experimental for decades due to a variety of social, economic, and political reasons.[133] As a result, insurance companies veered away from offering insurance coverage for infertility treatments.[134] In 2017, pushed by lobbying from supporters of reproductive medicine, the American Medical Association defined infertility as a disease, hoping to encourage states to require infertility coverage by insurance plans.[135]

As of September 2023, according to the National Infertility Association, twenty-one states have passed fertility insurance coverage laws.[136] Of these states, fifteen have laws requiring insurance companies to cover infertility

124. Polo, *supra* note 113; Salhotra, *supra* note 122.

125. Polo, *supra* note 113.

126. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 262 (2022).

127. Salhotra, *supra* note 122; *see State Abortion Laws Potential Implications for Reproductive Medicine*, *supra* note 111.

128. Rachel Garbus, *Georgia's "Fetal Personhood" Statute is Uncharted Territory*, ATLANTA (Aug. 23, 2022), https://www.atlantamagazine.com/news-culture-articles/georgias-fetal-personhood-statute-is-uncharted-territory/ [https://perma.cc/9GZL-4AFS].

129. Lewis, *supra* note 1.

130. *See generally* 597 U.S. 215.

131. S. 9039A, 2022 Leg., 2021-2022 Sess. (N.Y. 2022).

132. Buster, *supra* note 94; *The Evolution of Fertility Treatments and Development of IVF*, *supra* note 91.

133. Elissa Strauss, *40 Years Later, Why is IVF Still Not Covered by Insurance? Economics, Ignorance and Sexism*, CNN (July 25, 2018, 12:48 PM), https://www.cnn.com/2018/07/25/health/ivf-insurance-parenting-strauss/index.html [https://perma.cc/59MD-KW2J].

134. *Id.*

135. *Id.*

136. *See generally Insurance Coverage by State*, RESOLVE, https://resolve.org/learn/financial-resources-for-family-building/insurance-coverage/insurance-coverage-by-state/ (last visited Jan. 29, 2024) [https://perma.cc/3XDY-Z3VN].

treatments.[137] Conversely, two states have laws that only require insurance companies to at least offer coverage for infertility treatment.[138] Even amongst states with such requirements or offerings, considerable variation exists in terms of coverage. Insurance companies are more likely to cover certain types of less-expensive fertility services, like general diagnostic services, than more-expensive treatments, like multiple rounds of IVF.[139] Currently, fourteen states include IVF coverage in their insurance plans.[140] Even in those states requiring coverage, however, many have heteronormative definitions of "infertility" included in their patient requirements that inherently exclude LGBTQ+ individuals.[141] This is largely because many insurers based their coverage definition of infertility on the heteronormative definition used by the CDC.[142] In addition, many state laws only apply to certain insurers, certain treatments, and only for a certain amount of costs.[143] Thus, out of the small percentage of states who do provide fertility insurance coverage, LGBTQ+ couples still often remain excluded from the benefits. Per a 2019 report by Avalere Health, a healthcare consulting firm, only seven states covered fertility treatments for LGBTQ+ individuals.[144]

One of the major deterrents preventing states from implementing fertility insurance coverage mandates is the fear of defrayal costs created by the ACA.[145] Under the ACA, states must defray the costs of any new mandates that exceed the list of essential health benefits outlined in the ACA.[146] Thus, states are worried that passing new mandates requiring fertility treatment coverage would constitute a new mandate exceeding essential health benefits, thereby obliging them to cover the associated additional costs.[147] Some states have argued that their new fertility treatments are just an extension of essential maternity care, while others have resorted to making mandates only effective for large-group insurance policies, which are unaffected by the ACA defrayal rule.[148]

State mandates can only affect workplaces utilizing fully insured private health plans.[149] They do not apply to self-funded plans, which cover a significant percentage of the population.[150] Out of these plans, larger employers and those offering higher wages are more likely to include fertility services in their

137. *Id.*

138. *See State Laws Related to Insurance Coverage for Infertility Treatment*, NCSL (Mar. 12, 2021), https://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx [https://perma.cc/32W4-AH5A].

139. Strauss, *supra* note 133; Weigel et al., *supra* note 20.

140. *See generally Insurance Coverage by State*, *supra* note 136.

141. *Id.*

142. *See generally* Stein, *supra* note 19; *Frequently Asked Questions*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/reproductivehealth/infertility/index.htm (last visited Jan. 29, 2024) [https://perma.cc/69VC-ZFZ9] ("[I]nfertility is defined as not being able to get pregnant (conceive) after one year (or longer) of unprotected sex.").

143. Weigel et al., *supra* note 20.

144. Stein, *supra* note 19.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Strauss, *supra* note 133.

150. Weigel et al., *supra* note 20.

insurance coverage than smaller employers.[151] According to a 2020 Mercer National Survey of Employer-Sponsored Health plans, 61% of employers with 500 or more employees covered some type of infertility care, with a majority of companies still not covering drug therapy, IVF, or egg freezing.[152] Since these plans fall under federal law, typically ERISA, changes to ERISA's discrimination provisions could have a huge impact on advancing LGBTQ+ individuals' equal access to fertility treatments.[153]

III. ANALYSIS

"Infertility" requirements for fertility insurance coverage are common in countless health insurance policies.[154] Many of these definitions of infertility are based on heteronormative concepts related to an inability to conceive.[155] With roughly 7.1% of Americans self-identifying as "lesbian, gay, bisexual, transgender or something other than heterosexual," millions of LGBTQ+ individuals are affected by these policies.[156] Take, for example, the case of Briskin and Maggipinto: NYC's health insurance plan limits IVF coverage to employees or their spouses who are "infertile," defining infertility as an inability to have a child through male-female sexual intercourse or intrauterine insemination.[157]

As far as federal insurance policies, the ACA defines "infertility" as "not being able to get pregnant (conceive) after one year (or longer) of unprotected sex."[158] Under this definition, many LGBTQ+ couples are unable to qualify for insurance coverage for fertility treatments because two cisgender women or two cisgender men will *never* be able to get pregnant from unprotected sex.[159] Thus, they will never qualify as a couple who has been unsuccessful in getting pregnant even after attempting to do so through unprotected sex.[160] While the Obama administration held that Section 1557, the nondiscrimination provision of the ACA, extended to health insurance,[161] the Trump administration overturned this interpretation, reducing Section 1557's reach and allowing health insurers to vary benefits amongst certain groups like LGBTQ+ people.[162] Under the Trump administration's change, insurers only need to comply with Section 1557 for the

151. *Id.*

152. MERCER, NATIONAL SURVEY OF EMPLOYER-SPONSORED HEALTH PLANS 49 (2021).

153. Hoyt, *supra* note 30, at 275.

154. *See generally* Stein, *supra* note 19.

155. *See generally Insurance Coverage by State*, *supra* note 136; *Frequently Asked Questions*, *supra* note 142.

156. Jeffrey M. Jones, *LGBT Identification in U.S. Ticks Up to 7.1%*, GALLUP (Feb. 17, 2022), https://news.gallup.com/poll/389792/lgbt-identification-ticks-up.aspx [https://perma.cc/4688-HLQ4].

157. Romer-Friedman, Friedman & Wardenski, *supra* note 8.

158. *Frequently Asked Questions*, *supra* note 142.

159. *See generally* Stein, *supra* note 19.

160. *Id.*

161. *See* Rosenbaum, *supra* note 36.

162. Timothy S. Jost, *Trump Administration Amends ACA Antidiscrimination Rule, Cutting Transgender and Other Civil Rights Protections, but Supreme Court Decision Calls Amendments into Question*, COMMONWEALTH FUND (June 15, 2020), https://www.commonwealthfund.org/blog/2020/trump-administration-amends-aca-antidiscrimination-rule-cutting-transgender-and-other [https://perma.cc/8CY8-R5WS].

parts of their business that receive federal funds.[163] In issuing this change, the Trump administration stated that the changes were needed to "'address legal concerns', relieve costs and regulatory burden, and reduce confusion," relying in part on the decision in *Franciscan Alliance*, where a Texas district court found that the Obama administration's amendments to Section 1557 violated various federal acts.[164]

But the Supreme Court's decision in *Bostock*, holding that Title VII prohibits employment discrimination against LGBTQ+ people, may affect interpretations of the nondiscrimination provision of the ACA.[165] Indeed, while the Trump administration's changes to the ACA were set to take effect on August 18, 2020, the decision in *Bostock* spurred two federal courts into issuing nationwide preliminary injunctions stopping the administration from enforcing parts of the rule.[166] While the decision does not directly affect the ACA discrimination provision, the ACA's "sex" provision is based on Title IX, which closely mirrors the language of Title VII.[167] Thus, this decision could significantly impact millions of LGBTQ+ Americans covered under the ACA. Since *Bostock*, several cases have analyzed the Section 1557 rule.[168] For instance, one court found that a plaintiff had asserted a valid claim for discrimination in violation of the ACA when she contended that her insurance plan discriminated against her on the basis of her transgender son's sex.[169] Another court found that a transgender man had a valid claim under Section 1557 of the ACA when he sued a hospital for being denied a hysterectomy due to a hospital directive that gender dysphoria was not a valid reason for the surgery.[170] These cases are likely just the start of litigation concerning interpretations of Section 1557.

According to recent studies, an estimated 1.8% of infants in the U.S. are conceived annually using ARTs.[171] ART is "an important tool for leveling the procreative playing field for lesbian, gay, bisexual, and transgender individuals ("LGBT") who seek to procreate in familial units that do not have the potential for coital reproduction."[172] Because ART services are so costly, unless they have access to insurance coverage, many LGBTQ+ individuals have no avenue to the *only way* for them to build biologically-related families.[173] Access to insurance

163. *Id.*

164. Musumeci et al., *supra* note 37; Jost, *supra* note 162.

165. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020).

166. Musumeci et al., *supra* note 36; Jost, *supra* note 162.

167. Katie Keith, *Supreme Court Finds LGBT People Are Protected from Employment Discrimination: Implications for the ACA*, HEALTHAFFAIRS (June 16, 2020), https://www.healthaffairs.org/do/10.1377/forefront.20200615.475537/full/ [https://perma.cc/ENC4-UCH2].

168. *See generally* Scott v. St. Louis Univ. Hosp., 600 F. Supp. 3d 956 (E.D. Mo. 2022); Bos. All. of Gay, Lesbian, Bisexual & Transgender Youth v. U.S. Dep't of Health & Hum. Servs., 557 F. Supp. 3d 224 (D. Mass. 2021); Hammons v. Univ. of Md. Med. Sys. Corp., 551 F. Supp. 3d 567 (D. Md. 2021); Texas v. EEOC, 633 F. Supp. 3d 824 (N.D. Tex. 2022).

169. *Scott*, 600 F. Supp. 3d at 965.

170. *Hammons*, 551 F. Supp. 3d at 592.

171. Weigel et al., *supra* note 20.

172. Kimberly M. Mutcherson, *Procreative Pluralism*, 30 BERKELEY J. GENDER, L. & JUST. 22, 41 (2015).

173. *See generally id.* at 42.

is essential for couples seeking biological parenthood.[174] One study found that in states mandating insurance coverage for IVF, the rate of utilization was 277% higher compared to areas without coverage.[175] Therefore, improving access to fertility insurance coverage for ARTs can promote fertility equality and eliminate financial barriers that LGBTQ+ couples face in building their families.[176]

A. Sex Discrimination under Bostock

1. Title VII

Title VII was initially enacted by Congress in 1964 to address problems related to employment discrimination, ensuring that an employee's "sex" was not relevant to decisions in the workplace.[177] Since its creation, courts struggled to clarify the scope of "sex" discrimination under Title VII.[178] Throughout the late 1900s, the Supreme Court continued to draw lines establishing the boundaries of "sex" discrimination in the workplace.[179] More recently, cases emerged among circuit courts in which lawyers attempted to fit their clients' sexual orientation or transgender status within the previously established lines prescribed by the Supreme Court.[180] Eventually, lawyers stopped trying to fit their cases into old boxes and instead began arguing that discrimination on the basis of one's sexual orientation or gender identity simply constituted "sex" discrimination.[181] While many circuit cases were successful, some still held that sexual orientation

174. *Id.* at 73.

175. Tarun Jain, Bernard L. Harlow & Mark D. Hornstein, *Insurance Coverage and Outcomes of In Vitro Fertilization*, 347 NEW ENG. J. MED. 661, 664–65 (2002).

176. Barton H. Hamilton & Brian McManus, *The Effects of Insurance Mandates on Choices and Outcomes in Infertility Treatment Markets*, 21 HEALTH ECON. 994, 1009 (2012).

177. Alexa Bradley, Bostock v. Clayton County*: An Unexpected Victory*, MARQ. U. L. SCH. FAC. BLOG (July 17, 2020), https://law.marquette.edu/facultyblog/2020/07/bostock-v-clayton-county-an-unexpected-victory/ [https://perma.cc/WUF8-K4NS].

178. *Id.*

179. *See generally* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (establishing the "sex-plus" theory of sex discrimination under Title VII where an employer classifies an employee based on sex plus another characteristic); City of L.A., Dep't of Water & Power v. Manhart, 435 U.S. 702, 707–08 (1978) (holding that an employer violates Title VII when it uses generalizations about a group, like women, to treat employees differently); Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989) (holding that sex-stereotyping constitutes sex discrimination in violation of Title VII); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998) (holding that same-sex sexual harassment violates Title VII).

180. *See generally* Smith v. City of Salem, 378 F.3d 566, 574–75 (6th Cir. 2004) (holding that Title VII prohibits discrimination against transgender individuals based on gender stereotyping); Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011) (same); EEOC v. Scott Med. Health Ctr., P.C., 217 F. Supp. 3d 834, 839–40 (W.D. Pa. 2016) (holding that discrimination based on sexual orientation is sex stereotyping under Title VII); Winstead v. Lafayette Cnty. Bd. of Cnty. Comm'rs, 197 F. Supp. 3d 1334, 1347 (N.D. Fla. 2016) (same).

181. *See generally* Hively v. Ivy Tech. Cmty. Coll. of Indiana, 853 F.3d 339, 350–51 (7th Cir. 2017) (agreeing with the EEOC that Title VII's prohibition on sex discriminationn includes discrimination based on sexual orientation); Zarda v. Altitude Express, Inc., 883 F.3d 100, 119 (2d Cir. 2018) (holding that sex discrimination under Title VII includes discrimination based on sexual orientation); EEOC v. R.G. & G.R. Harris Funeral Homes Inc., 884 F.3d 560, 579 (6th Cir. 2018) (holding that Title VII's prohibition on sex discrimination encompasses discrimination based on an employee's gender identity).

and gender identity were not protected under Title VII.[182] The growing circuit split pushed the Supreme Court to consider the issue once and for all—consolidating *Bostock*,[183] *R.G. & G.R. Harris Funeral Homes*,[184] and *Zarda*.[185]

Bostock dictates a new precedent for discrimination on the basis of sex. In the three cases consolidated in *Bostock*, three long-time employees were each fired from their jobs shortly after they revealed they were homosexual or transgender, seemingly for no reason other than their gender identity and sexual orientation.[186] On June 15, 2020, in a 6-3 decision, the Supreme Court held that everyone in the United States who works at or applies for a job with an employer that has at least fifteen employees is protected under federal law against employment discrimination based on sexual orientation or gender identity.[187] Under *Bostock*, discriminating against an individual for being homosexual is the same as discriminating against an individual "based on sex."[188]

The Court focused on defining sex under Title VII, arguing that an employer's actions cannot be taken "because of . . . sex."[189] Its analysis concentrated on what "because of" means, concluding it serves as a but-for causation test of the employer's actions—but for the employee's sex, would the employer have done what it did?[190] The Supreme Court in *Bostock* highlighted how "discriminat[ing] on these grounds [sexual orientation, gender identity] requires an employer to intentionally treat individual employees differently because of their sex."[191] Thus, "homosexuality and transgender status are *inextricably bound* up with sex."[192] While the majority opinion did not define sexual orientation and gender identity, Justice Alito's dissent spells out these terms: "sexual orientation" is "[t]he direction of a person's sexual interest . . . toward people of the opposite sex, the same sex, or both sexes" and "gender identity" concerns "any individual who identifies with and adopts the gender role of a member of the other biological sex."[193] Both definitions appear to strongly rely on an individual's sex.

Before *Bostock*, the Equal Employment Opportunity Commission ("EEOC") had already taken the position that Title VII protects gay and transgender individuals, but that guidance had not received the Court's blessing.[194] This historic decision highlights changing views of sex discrimination,

182. Bostock v. Clayton Cnty., 723 F. App'x 964, 965 (11th Cir. 2018).
183. *See generally id.*
184. 884 F.3d at 560.
185. 883 F.3d at 100.
186. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).
187. *Id.* at 1754.
188. *Id.* at 1741.
189. *Id.* at 1739.
190. *Id.* at 1740.
191. *Id.* at 1742.
192. *Id.* (emphasis added).
193. *Id.* at 1758 nn.8–9.
194. *Impact of the Landmark Supreme Court Decision Prohibiting Discrimination on The Basis of Sexual Orientation or Transgender Status*, SUSANIN WIDMAN & BRENNAN, PC, http://www.swbcounsellors.

whereby Title VII prohibits employment discrimination against lesbian, gay, bisexual, and transgender people.[195] *Bostock* provides an avenue within federal law for individuals to assert discrimination claims based on sexual orientation and gender identity in any court in the United States.[196] Thus, definitions of "infertility" that effectively exclude LGBTQ+ couples from biological parenthood contradict the recent Supreme Court directive protecting against discrimination on the basis of sexual orientation.[197]

While most federal and state fertility insurance policies do not explicitly exclude LGBTQ+ couples, the language used for "infertility" prerequisites effectively excludes those seeking insurance. As previously stated, most insurance policies follow a variation of the outdated heteronormative language in the CDC's definition of infertility.[198] Combine this with the high costs associated with ARTs,[199] and LGBTQ+ couples are often excluded from biological parenthood itself.

The heteronormative definitions of infertility used by most fertility insurance plans constitute discrimination, as seen through both a disparate treatment analysis and a disparate impact analysis.[200]

a. Disparate Treatment

On their face, these common definitions of infertility discriminate against LGBTQ+ individuals under the theory known as disparate treatment. Disparate treatment occurs when a member of a protected class receives less favorable treatment than a similarly situated individual.[201] Under Title VII, the protected classes are "race, color, religion, sex, and national origin."[202] Disparate treatment is about an employer's intentional action to discriminate against a protected class.[203] One of the most complex tasks for any plaintiff bringing a disparate treatment claim is proving intent.[204] Intent, however, can be inferred from differences in treatment if the plaintiff can establish that "1. [t]he individual is a member of a protected class[,] 2. [t]he employer knows of the individual's protected

com/impact-of-the-landmark-supreme-court-decision-prohibiting-discrimination-on-the-basis-of-sexual-orientation-or-transgender-status (last visited Jan. 29, 2024) [https://perma.cc/C8FH-RLJD].

195. *See generally Bostock*, 140 S. Ct. 1731.

196. *Impact of the Landmark Supreme Court Decision Prohibiting Discrimination on the Basis of Sexual Orientation or Transgender Status*, *supra* note 194.

197. *See generally Bostock*, 140 S. Ct. 1731.

198. *Frequently Asked Questions*, *supra* note 142.

199. *Id.*

200. Devin Dwyer & Patty See, *LGBTQ Couples Push for 'Fertility Equality' in Family-Building Benefits*, ABC NEWS (June 27, 2023, 4:22 AM), https://abcnews.go.com/US/lgbtq-couples-push-fertility-equality-family-building-benefits/story?id=100243800 [https://perma.cc/R4JD-C8DF].

201. *Disparate Treatment vs Disparate Impact: What's the Difference?*, WORKPLACE RTS. L. GRP. (Feb. 16, 2021), https://workplacerightslaw.com/library/discrimination/disparate-treatment/ [https://perma.cc/XWS3-M4TQ].

202. Cat Symonds, *Disparate Treatment & Disparate Impact: What's the Difference?*, FACTORIAL (Nov. 10, 2023), https://factorialhr.com/blog/disparate-treatment/ [https://perma.cc/FH7R-8ESA].

203. *Id.*

204. *Id.*

class[,] 3. [a] harmful act occurred[,] and 4. [o]ther similarly situated individuals were treated more favorably or not subjected to the same treatment."[205]

Under the *Bostock* holding,[206] Title VII protects employees from discrimination based on "sex," including sexual orientation and gender identity. Therefore, an LGBTQ+ person who brings a disparate treatment claim against their employer for receiving less favorable treatment would constitute a "member of a protected class" under Title VII.[207] Using Briskin and Maggipinto as an example, Briskin's employer, the City of New York, was likely aware of his status as a member of a protected class, especially considering the couple repeatedly tried to obtain IVF coverage.[208] For the couple, a "harmful act occurred" when they were excluded from insurance coverage for IVF, making it financially impossible for them to have a biological child of their own.[209] Unlike the heterosexual couples, lesbian couples, and single females who were covered under the same health plan, Briskin and Maggipinto could never obtain the IVF benefits.[210] But if they were of a different sex or sexual orientation and unable to conceive a child with their partner, their insurance policy *would* deem them "infertile," and they *would* be entitled to coverage.[211] The current enforcement of these types of "infertility" definitions in insurance plans creates insurmountable obstacles that exist only for some LGBTQ+ individuals and not for other similarly situated individuals.[212] Thus, the insurance policy constitutes disparate treatment under Title VII.

While this sort of facial inequality argument is new to Title VII sex discrimination claims, it has appeared in cases related to same-sex marriage.[213] Some might argue that the infertility definition should not constitute sex discrimination because the policy does not "single out men or women as a class for disparate treatment, but rather prohibit[s] men and women equally" from fertility insurance.[214] Courts have long rejected this argument.[215] For example, in *City of Los Angeles, Department of Water & Power v. Manhart*, the Supreme Court established that, under Title VII, employment practices must "pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'"[216]

Therefore, even if a law or rule treats men and women equally, this is not enough; insurance practices must follow policies that do not differentiate

205. *Disparate Treatment vs Disparate Impact: What's the Difference*?, *supra* note 201.

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

207. *Disparate Treatment vs Disparate Impact: What's the Difference*?, *supra* note 201.

208. Branigin, *supra* note 2.

209. *Disparate Treatment vs Disparate Impact: What's the Difference*?, *supra* note 201; Branigin, *supra* note 2.

210. Romer-Friedman, Friedman & Wardenski, *supra* note 8, at 1.

211. *Id.*

212. *Id.*

213. Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2099–2100 (2014).

214. *See* Baker v. State, 744 A.2d 864, 880 n.13 (Vt. 1999).

215. *Id.*

216. City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978).

treatment by a person's sex.[217] Fertility insurance prerequisites that define infertility as "not being able to get pregnant . . . after one year . . . of unprotected sex"[218] are like same-sex marriage laws because while they both prohibit men and women equally from fertility insurance and marriage, they also distinguish between couples consisting of a man and a woman and couples consisting of individuals of the same sex.[219] Both depend on a person's sex.[220] Therefore, just as same-sex marriage laws have been found to constitute unlawful discrimination,[221] so should heteronormative definitions of infertility in fertility insurance plans.

If courts follow *Bostock* and the idea that sex discrimination includes discrimination based on sexual orientation and gender identity, [222] then current fertility insurance requirements are *even more* facially discriminatory than they were previously. The current definitions of infertility in many insurance plans clearly discriminate based on one's sexual orientation—a gay man or lesbian woman will not qualify for the insurance, while a straight man or woman will.[223] Backed by the precedent of *Bostock*,[224] same-sex couples have strong disparate treatment discrimination claims against fertility insurance plans that define infertility heteronormatively.

b. Disparate Impact

Some might argue that fertility insurance plans do not explicitly discriminate on the basis of sex but rather on the basis of one's "infertility." Thus, the basis for the "less favorable treatment" is not an individual's status in a protected class.[225] Even under this argument, however, LGBTQ+ individuals maintain strong claims of disparate impact discrimination. In terms of filing a disparate impact theory of liability under Title VII, the Supreme Court has previously acknowledged in *Texas Department of Housing* that the language of "otherwise adversely affect" in Title VII's discrimination provision indicates the statute's willingness to look at the results of a policy.[226] In doing so, the Supreme Court stated that "the text of these provisions focuses on the effects of the action on the employee rather than the motivation for the action of the employer and therefore compels recognition of disparate impact liability."[227] Thus, plaintiffs can bring a

217. *See id.*

218. *Frequently Asked Questions*, *supra* note 142.

219. *See id.*; Obergefell v. Hodges, 576 U.S. 644, 653 (2015).

220. *See Frequently Asked Questions*, *supra* note 142; *Obergefell*, 576 U.S. at 653.

221. *See Obergefell*, 576 U.S. at 665.

222. *See generally* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

223. *See Insurance Coverage by State*, *supra* note 136.

224. *See generally Bostock*, 140 S. Ct. 1731.

225. *Disparate Treatment vs Disparate Impact: What's the Difference*?, *supra* note 201.

226. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 532–33 (2015) ("The Smith plurality emphasized that both §703(a)(2) of Title VII and § 4(a)(2) of the ADEA contain language 'prohibit[ing] such actions that 'deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's' race or age.'").

227. *Id.* at 533.

disparate impact claim under Title VII.[228] Disparate impact analysis is largely reserved for situations of unintentional discrimination, whereby a policy uses some factor (other than race or sex) to impose a burden or benefit.[229] In these cases, a policy is facially neutral but has a disparate impact that disproportionally affects a specific group of individuals.[230] To prove disparate impact, plaintiffs must often rely on sufficient statistical evidence to allow a court to infer that discrimination occurred as a result of some employer's practice or policy.[231]

Here, if fertility insurance plans are not seen as facially discriminatory under the disparate treatment theory, they are nonetheless discriminatory under the disparate impact theory. While the insurance plans utilizing the CDC's definition of infertility impact both homosexual and heterosexual couples, as both groups may not meet the criteria for "infertility," they disproportionally impact same-sex couples because same-sex couples are *never capable* of meeting the definitional requirements.[232] Consequently, while some heterosexual couples may not meet the definition, *all* homosexual couples are unable to do so.[233] Practically speaking, the infertility definition employed by most insurance plans disproportionally impacts homosexual couples, a specific group of individuals.[234] Thus, if not facially discriminatory, infertility definitions are certainly discriminatory under the disparate impact theory.

Critics of *Bostock*, like Justice Alito, argue that "sex" under Title VII cannot include sexual orientation because statutory terms must be interpreted to "mean what they conveyed to reasonable people at the time they were written."[235] In a similar vein, Justice Kavanaugh argued that the majority should have followed the ordinary meaning of "sex" to people in 1964, meaning sexual orientation would not be included.[236] But these arguments would force the Supreme Court to consistently revert to old ideologies, effectively limiting societal progress. Indeed, when referencing these arguments in *Bostock*, Justice Gorsuch noted that "[w]hen a new application emerges that is both unexpected and important, they would seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms in the meantime."[237] But, as he further notes, "[t]hat is exactly the sort of reasoning this Court has long rejected."[238]

Additionally, the Supreme Court has previously shown that the plain or ordinary meaning of statutory terms can encompass logical extensions of the

228. *See id.*

229. Stephen Clark, *Same-Sex But Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L.J. 107, 153 (2002).

230. *Id.*

231. *Disparate Treatment vs Disparate Impact: What's the Difference*?, *supra* note 201.

232. *See Frequently Asked Questions*, *supra* note 142.

233. *See id.*

234. *See Insurance Coverage by State*, *supra* note 136; Lewis, *supra* note 1.

235. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1755 (2020) (Alito, J., dissenting).

236. *Id.* at 1828–36 (Kavanaugh, J., dissenting).

237. *Bostock*, 140 S. Ct. at 1750.

238. *Id.*

definition of a word.[239] For instance, in *Oncale v. Sundowner Offshore Services*, Title VII's protections were extended to same-sex victims of sexual harassment because, as the late Justice Antonin Scalia noted, while same-sex harassment

> was assuredly not the principal evil Congress was concerned with when it enacted Title VII . . . [s]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.[240]

Even one of the biggest proponents of textualism, Justice Scalia, has acknowledged that the meaning of statutory terms can be extended to cover "reasonably comparable" elements, as exemplified by including sexual orientation within the scope of "sex."[241]

2. Equal Protection Clause

Following the textualist arguments previously used by the Supreme Court, the Equal Protection Clause of the Fourteenth Amendment may be found to protect those discriminated against on the basis of sexual orientation under the umbrella of "gender."[242]

Since *Bostock* utilized a textualist argument focused on the text of Title VII rather than the specific facts of the case, it is likely that its principles still apply when interpreting the Equal Protection Clause. In the majority opinion of *Bostock*, Justice Gorsuch framed the opinion on a textualist approach, interpreting the "words on the page" and the "ordinary public meaning" of Title VII.[243] Even though the Court insisted that the opinion was limited to Title VII, the opinion itself only depended on terms used in the statute and not anything related to the employment context, meaning the Court's rationale should extend to those same terms used in other statutes, and even in the Constitution.[244] Indeed, Justice Alito himself noted that the majority's opinion was "virtually certain to have far-reaching consequences" with "[o]ver 100 federal statutes prohibit[ing] discrimination because of sex."[245]

Like Justice Alito, some commentators have also seen the potential for *Bostock*'s broad consequences, especially on future Equal Protection claims.[246]

239. Andrew Koppelman, *Bostock: What Two Conservatives Realized and Three Dissenters Missed*, AM. PROSPECT (June 15, 2020), https://prospect.org/justice/bostock-what-two-conservatives-realized-and-three-dissenters-missed/ [https://perma.cc/P97B-4KD5].

240. 523 U.S. 75, 79 (1998).

241. *Id.*

242. *See id.*

243. *Bostock*, 140 S. Ct. at 1738.

244. *Id.* at 1753:

> The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination . . . . But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.

245. *Id.* at 1778 (Alito, J., dissenting).

246. Corbin Carter & Michael S. Arnold, *Supreme Court Rules that Title VII Protects LGBTQ Employees*, MINTZ (June 16, 2020), https://www.mintz.com/insights-center/viewpoints/2226/2020-06-16-supreme-court-rules-title-vii-protects-lgbtq-employees [https://perma.cc/PQ4B-5UKC].

While the Equal Protection Clause of the Constitution is distinct from Title VII, each has influenced the other in a multitude of cases.[247] For example, the Sixth Circuit stated in one case that "the showing a plaintiff must make to recover on a disparate treatment claim under Title VII mirrors that which must be made to recover on an equal protection claim under section § 1983."[248] Indeed, the Seventh Circuit also stated that "the teaching of an unbroken phalanx of decisions by this and other courts" is that "the aim of Title VII, as well as the method for proving violations of Title VII, are the same as those of the Equal Protection Clause."[249] Thus, it is very plausible that *Bostock* will influence the world of Equal Protection claims.[250] This could have huge implications for LGBTQ+ individuals currently excluded from fertility insurance—the heteronormative language of the standard definition of "infertility" used in most fertility insurance plans likely constitutes discrimination on the basis of sex, as defined by Title VII and the Equal Protection Clause.

B. Using Bostock *to Change the ACA*

While *Bostock* involved Title VII, it could still significantly impact the ACA's discriminatory provisions.[251] Section 1557 of the ACA states that:

> an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of Title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance . . . .[252]

Section 1557 defines unlawful discrimination utilizing the requirements of four other civil rights statutes: Title VI, Title IX, the Age Discrimination Act, and Section 794 of Title 29.[253] Generally, the four referenced statutes prohibit discrimination based on race, color, national origin (Title VI), sex (Title IX), age (Age Discrimination Act), and disability (section 794 of title 29).[254] This section

247. *See* Taylor Flynn, *Federal Equal Protection*, *in* GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE 15-1, 15-4 n.15 (Christine Michelle Duffy & Denise M. Visconti eds., 2014) (listing cases that intermingle Title VII and the Equal Protection Clause).

248. Smith v. City of Salem, 378 F.3d 566, 577 (6th Cir. 2004) (quoting Gutzwiller v. Fenik, 860 F.2d 1317, 1325 (6th Cir. 1988)).

249. Nanda v. Bd. of Trs. of the Univ. of Ill., 303 F.3d 817, 829–30 (7th Cir. 2002) (quoting Riordan v. Kempiners, 831 F.2d 690, 695–96 (7th Cir. 1987)).

250. *Bostock*, 140 S. Ct. at 1783 (Alito, J., dissenting) ("[D]espite the important differences between the Fourteenth Amendment and Title VII, the Court's decision may exert a gravitational pull in constitutional cases.").

251. Keith, *supra* note 167.

252. 42 U.S.C. § 18116.

253. Christine J. Back, *Proposed HHS Rule Addressing Section 1557 of the ACA's Incorporation of Title IX*, CONG. RSCH. SERVICE (Sept. 2, 2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10813 [https://perma.cc/A25R-3FX5].

254. *Id.*

applies to a variety of healthcare entities, including public and private insurers that accept federal financial assistance, like Medicare and Medicaid.[255] By incorporating Title IX into the ACA, the ACA can prohibit healthcare providers and insurers from discriminating "on the basis of sex."[256] The HHS has struggled to determine which aspects of Title IX are incorporated into Section 1557.[257] For instance, in 2016, the HHS held that Section 1557 prohibited discrimination based on gender identity and sexual orientation; yet, in 2020, the HHS stated that Section 1557 does *not* reach discrimination based on sexual orientation or gender identity.[258]

While Title VII and Title IX are obviously different statutes and, thus, *Bostock* did not directly speak to Section 1557 of the ACA, Title VII and Title IX have often been viewed in a similar manner.[259] For instance, in *Franciscan Alliance*, a case concerning "sex" discrimination under the ACA, the court noted that "[g]iven that courts often look to Title VII to understand Title IX . . . and given that the ACA incorporates Title IX's prohibition on "sex" discrimination, the Supreme Court's decision in *Bostock* . . . may have a direct bearing on this case."[260] While the Trump Administration's HHS argued that Section 1557 is distinct from Title VII because the character of "sex" has "special importance in the health context" versus the employment context, the same HHS also stated that "Title VII case law has often informed Title IX case law with respect to the meaning of discrimination 'on the basis of sex.'"[261] Thus, even an administration that changed the definition of sex under the ACA to not include sexual orientation still admitted the importance of Title VII in interpreting the ACA.[262] Indeed, the HHS was correct that many cases have utilized Title VII interpretations to make decisions on the meaning of "sex" under Title IX.[263]

Additionally, interpreting the ACA in accordance with Title VII would further align the ACA with the views of President Biden's administration. On January 20, 2021, President Biden issued an Executive Order stating that "laws that prohibit sex discrimination . . . prohibit discrimination on the basis of gender identity or sexual orientation."[264] Then, on May 10, 2021, the HHS issued a notice stating that "[c]onsistent with the Supreme Court's decision in Bostock and Title IX," the Office of Civil Rights "will interpret and enforce section 1557's

255. Amy Post, Ashley Stephens & Valarie Blake, Note, *Sex Discrimination in Healthcare: Section 1557 and LGBTQ Rights After Bostock*, 11 CALIF. L. REV. ONLINE 545, 547 (2021).

256. Sarah Clemens, *A Band-Aid Fix: Section 1557 of the Affordable Care Act and the Need for Federal Laws to Protect Transgender People in Healthcare*, 54 SUFFOLK U. L. REV. 31, 43 (2021).

257. Back, *supra* note 253.

258. *Id.*

259. Keith, *supra* note 167.

260. Plaintiffs-Appellants' Unopposed Mot. to Stay, 3, Franciscan All., Inc. v. Azar, 414 F. Supp. 3d 928 (N.D. Tex. 2019).

261. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160, 37168 (June 19, 2020).

262. Weigel et al., *supra* note 20; *see id.*

263. *See* Jared P. Cole & Christine J. Back, *Title IX: Who Determines the Legal Meaning of "Sex"?*, CONG. RSCH. SERV. (Dec. 12, 2018), https://sgp.fas.org/crs/misc/LSB10229.pdf [https://perma.cc/W956-Y9NM].

264. Exec. Order No. 13,988, 86 Fed. Reg. 7023, 7023 (Jan. 20, 2021).

prohibition on discrimination on the basis of sex to include: (1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity."[265]

Lastly, on August 4th, 2022, the HHS published a Notice of Proposed Rulemaking ("NPRM") proposing various changes to the current interpretations of Section 1557.[266] In particular, the NPRM emphasized the phrase "ground prohibited" in Section 1557 to conclude that the ACA is meant to include the grounds prohibited by Title IX's prohibition on sex discrimination.[267] This emphasis suggests that the HHS supports the inclusion of current interpretations of Title IX's sex discrimination provision in Section 1557 of the ACA. Additionally, the proposed rule would clarify that Section 1557 prohibits discrimination in health insurance and other health-related coverage.[268] Therefore, Section 1557 of the ACA should be interpreted to prohibit discrimination on the basis of sexual orientation in health insurance, indicating that existing federally funded insurance plans employing the heteronormative definition of "infertility" must redefine "infertility" to be more inclusive of LGBTQ+ individuals.

IV. RECOMMENDATION

Since the advent of ART in the 1850s, fertility treatments have provided an invaluable way for more individuals to experience biological parenthood.[269] But throughout history, LGBTQ+ individuals have faced increased barriers to accessing fertility treatments, coupled with discrimination based on their sexual orientation.[270] Because the current forms of fertility insurance analyzed above—the ACA and NYC's self-insured plan—discriminate on the basis of sex, new legislation and definitions in insurance plans are imperative to implementing fertility insurance that equally applies to both heterosexual and LGBTQ+ individuals.

Several solutions exist to improve fertility insurance across the nation. First, this Part will discuss legislation that would improve access to fertility insurance nationwide. Next, this Part will suggest improvements to the ACA and federal law guiding self-insured plans, like NYC's health insurance. Lastly, this Part will suggest wider mandates that would significantly improve access to fertility insurance at the state level.

265. Bos. All. of Gay, Lesbian, Bisexual & Transgender Youth v. U.S. Dep't of Health & Hum. Servs., 557 F. Supp. 3d 224, 233 (D. Mass. 2021).

266. *See generally* 87 Fed. Reg. 47824 (Aug. 4, 2022).

267. *Id.*; Back, *supra* note 253.

268. *See generally* 87 Fed. Reg. 47824 (Aug. 4, 2022).

269. *The Evolution of Fertility Treatments and Development of IVF*, SCRC (Nov. 29, 2016), https://blog.scrcivf.com/ivf-the-history-and-evolution-of-fertility-treatments [https://perma.cc/E5JT-JNE3].

270. Weigel et al., *supra* note 20.

A. Legislation

The ideal solution to protect LGBTQ+ individuals' access to fertility insurance involves federal legislation mandating fertility insurance coverage in all health insurance plans, utilizing a definition of "infertility" that includes LGBTQ+ individuals. To assist with implementing inclusive definitions, Congress should adopt the legislation proposed by Representative Rosa DeLauro and Senator Cory Booker—the Access to Infertility Treatment and Care Act.[271] Under this legislation:

> A group health plan or a health insurance issuer offering group or individual health insurance coverage shall ensure that such plan or coverage provides coverage for—
>
> (1) the treatment of infertility, including nonexperimental assisted reproductive technology procedures, if such plan or coverage provides coverage for obstetrical services; and
>
> (2) standard fertility preservation services when a medically necessary treatment may directly or indirectly cause iatrogenic infertility.[272]

This act would require most private health insurance plans, as well as plans offered by Medicaid and other federal programs, to cover infertility treatment.[273] Beyond just requiring infertility treatment coverage, the bill provides an inclusive definition of "infertility." Under H.R. 4450:

> (2) the term 'infertility' means a disease, characterized by the failure to establish a clinical pregnancy—
>
> (A) after 12 months of regular, unprotected sexual intercourse; or
>
> (B) due to a person's **incapacity for reproduction either as an individual or with his or her partner**, which may be determined after a period of less than 12 months of regular, unprotected sexual intercourse, or based on medical, **sexual and reproductive history**, age, physical findings, or diagnostic testing. . .[274]

Thus, this bill would significantly improve LGBTQ+ individuals' access to fertility treatments nationwide, promoting fertility equality. Unfortunately, neither chamber on Capitol Hill has taken up H.R. 4450 since July 2021.[275] But in lieu of federal legislation, states themselves could adopt these provisions, promoting infertility coverage in each state.

271. *See* Access to Infertility Treatment and Care Act, H.R. 4450, 117th Cong. (2021).

272. *Id.*

273. *Booker, DeLauro Re-Introduce Bill to Increase Access to Infertility Treatment*, CORY BOOKER (July 16, 2021), https://www.booker.senate.gov/news/press/booker-delauro-re-introduce-bill-to-increase-access-to-infertility-treatment [https://perma.cc/2VGT-AATG].

274. Access to Infertility Treatment and Care Act, *supra* note 271 (emphasis added).

275. Stein, *supra* note 19.

B. The ACA

Given the challenges faced by the Access to Infertility Treatment and Care Act in garnering bipartisan support, another potential solution is for the Biden administration to adopt a new, more inclusive definition of "infertility." The Biden administration should use the Illinois definition of "infertility," which would avoid the discrimination found under the current ACA definition.[276] While Illinois previously used a heteronormative definition of infertility, the state's General Assembly updated the definition in the Public Act 102-0170 to a:

> disease, condition, or status characterized by: (1) a failure to establish a pregnancy or to carry a pregnancy to live birth after 12 months of regular, unprotected sexual intercourse if the woman is 35 years of age or younger, or after six months if the woman is over 35 years of age . . . (2) a person's inability to reproduce either as a single individual or with a partner without medical intervention; or (3) a licensed physician's findings based on a patient's medical, sexual, and reproductive history, age, physical findings, or diagnostic testing.[277]

This definition is far more inclusive of LGBTQ+ individuals, especially same-sex male couples, since it defines infertility as a "status" that can be characterized by "a person's inability to reproduce either as a *single individual* or *with a partner* without medical intervention."[278] This new definition of infertility expands the eligibility criteria, allowing more individuals to qualify for coverage for infertility services from insurers regulated by the Illinois Insurance Code.[279] If it were incorporated into the ACA, this definition of infertility could assist millions of LGBTQ+ Americans aspiring to have biological children.[280]

C. Self-Funded Plans & ERISA

For the growing number of Americans, like Briskin and Maggipinto, who are covered by self-funded insurance plans that do not receive federal funds, updates to the ACA infertility definition will make no difference. To protect individuals covered by these plans, ERISA must change. Under ERISA, self-funded insurance plans are preempted from state regulation.[281] This means that any employee under a self-funded insurance plan is subject to the rules of ERISA, not the rules of their state.[282] For instance, if an LGBTQ+ employee in Illinois was covered by a self-funded insurance plan, the Illinois definition of "infertility"

276. *Guide to Navigating Infertility Treatment Coverage in Illinois—2022*, *supra* note 39.

277. H.R. 3709, 102d Gen. Assemb., Reg. Sess. (Ill. 2021).

278. *See generally Insurance Coverage by State*, *supra* note 136; *Frequently Asked Questions*, *supra* note 142.

279. *Governor Pritzker Signs New Laws to Improve Health and Well-being of LGBTQ Illinoisans*, HOWARD BROWN HEALTH (July 27, 2021), https://howardbrown.org/governor-pritzker-signs-new-laws-to-improve-health-and-well-being-of-lgbtq-illinoisans/ [https://perma.cc/PPS8-BLDD].

280. Vankar, *supra* note 35.

281. Hoyt, *supra* note 30.

282. *See id.*

would not govern their coverage; ERISA federal law would instead.[283] ERISA would preempt any state mandates or attempts to limit discrimination.[284]

ERISA does not contain a sex nondiscrimination provision that would protect LGBTQ+ employees.[285] Consequently, implementing a sex nondiscrimination provision into ERISA itself, like that in Title VII, would be the best way to protect employees of self-funded insurance plans. Congress should introduce a specific provision in ERISA explicitly prohibiting sex discrimination. Unfortunately, the current divided Congress may be unlikely to enact such a provision.[286]

Another potential solution is to have the Department of Labor ("DOL") suggest that ERISA be interpreted under *Bostock*.[287] The DOL has regulatory oversight authority over ERISA, primarily regulating the "areas of reporting and disclosure, fiduciary responsibility . . . and administration and enforcement under Title I of ERISA."[288] Under Title I of ERISA, the goal is to "protect the interests of participants and their beneficiaries in employee benefit plans."[289] Thus, the DOL could pass regulation stating that *Bostock* should be used in the "administration and enforcement" of ERISA to "protect the interests of [all] participants . . . in employee benefit plans."[290] By proposing this suggestion through the DOL instead of pursuing legislation in Congress, it may be more possible to specify that sex nondiscrimination only applies to fertility insurance plans, preventing pushback from people worried about broader consequences.

Lastly, ERISA reform could be implemented through actual lawsuits claiming discrimination on the basis of "sex" using the reasoning from *Bostock*.[291] Because *Bostock* interprets sex discrimination under Title VII to encompass sexual orientation and gender identity, employees covered by self-funded plans could sue their employers, claiming their fertility insurance violates Title VII.[292] Further, since *Bostock* likely extends to Equal Protection claims, plaintiffs could also assert that their constitutional rights have been violated.[293]

Using the expanded definition of sex discrimination from *Bostock*,[294] there may be a greater chance of reaching into the realm of employee benefit plans governed by ERISA. Because ERISA does not preempt other federal laws, like

283. *See id.*

284. *Id.*

285. Jason Gordon, *Non-Discrimination Rule—Explained*, BUSINESS PROFESSOR (Sept. 26, 2021), https://thebusinessprofessor.com/en_US/employment-law/non-discrimination-rule-definition [https://perma.cc/TH7E-DG4Z].

286. Drew Desilver, *The Polarization in Today's Congress Has Roots That Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/ [https://perma.cc/K2AJ-KBNH].

287. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

288. COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 1, 7, 30 (2018).

289. *History of EBSA and ERISA*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa (last visited Jan. 29, 2024) [https://perma.cc/A4QR-ALP5].

290. MEDILL, *supra* note 288, at 7, 30; *id.*

291. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739–43 (2020).

292. *See supra* Section II.A.

293. *Id.*

294. Hoyt, *supra* note 30.

federal nondiscrimination laws, the new interpretation of Title VII from *Bostock* may help protect those bringing sex discrimination claims under self-insured, ERISA-governed plans.[295]

D. State Mandates

State insurance law governs all insurance plans that individuals and businesses purchase from an insurance company.[296] Thus, state mandates promoting broader coverage of fertility treatments would greatly impact access to fertility insurance overall.[297] To promote state mandates, the HHS should list fertility treatments as an "essential health benefit."[298] Because they are not currently "essential," states fear the added costs associated with creating a new benefit.[299] While some states have issued fertility mandates and worked to get around the issue,[300] others remain fearful of high costs.[301] New York, for example, had an estimated cost of $59 million to $69 million per year if covering one cycle of IVF or $98 million to $116 million per year if covering unlimited cycles of IVF.[302] Therefore, to avoid these added costs effectively preventing states from implementing fertility insurance coverage, the HHS should include fertility treatments as a new "essential health benefit," especially considering "pregnancy care" is already listed.[303]

V. CONCLUSION

In the wake of *Bostock*,[304] the case for fertility equality is even clearer. Couples like Briskin and Maggipinto[305] have stronger discrimination cases against their employers for fertility insurance plans that exclude them from the necessary insurance coverage they need to have biological children of their own. Under the Equal Protection Clause and Title VII, LGBTQ+ couples have compelling claims for sex discrimination, particularly in light of *Bostock*'s expanded definition of "sex."[306] With the ever-growing rise in the use of ARTs[307],

295. Catherine Stamm, Matthew Calloway & Rich Glass, *A Primer on ERISA's Preemption of State Laws*, MERCER (Mar. 22, 2022), https://www.mercer.com/our-thinking/law-and-policy-group/a-primer-on-erisas-preemption-of-state-laws.html [https://perma.cc/96ZA-KXDH].

296. Louise Norris, *Does the ACA Require Infertility Treatment to Be Covered by Health Insurance?*, HEALTH INSURANCE.ORG (Jan. 19, 2023), https://www.healthinsurance.org/faqs/does-the-aca-require-infertility-treatment-to-be-covered-by-health-insurance/ [https://perma.cc/P9JV-P7VV].

297. *Id.*

298. *Id.*

299. Stein, *supra* note 19.

300. *Id.*

301. *Id.*

302. Weigel et al., *supra* note 20.

303. Monique M. Johnson, *What Essential Health Benefits Must All ACA Plans Provide?*, GOODRX HEALTH (Nov. 1, 2022), https://www.goodrx.com/insurance/aca/affordable-care-act-essential-health-benefits [https://perma.cc/U4LK-SD63].

304. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

305. Lewis, *supra* note 1; Kaufman, *supra* note 23.

306. *See Bostock*, 140 S. Ct. at 1743.

307. *See supra* Part I.

especially among LGBTQ+ couples, there is an increasing need for fertility insurance. To ensure that LGBTQ+ individuals have equal access to building a biological family, improvements must be made through federal legislation, the ACA, ERISA, and state mandates. A lack of fertility insurance coverage is, in large part, the only thing standing in the way for numerous LGBTQ+ couples hoping to start a family.