BABY-MAKING AS FEDERAL POLICY: MANDATING INSURANCE COVERAGE FOR INFERTILITY TREATMENTS UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

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INTRODUCTION

In February of 2024, the Supreme Court of Alabama ruled that frozen embryos are children under Alabama state law.[1] *LePage v. Center for Reproductive Medicine* involved three sets of hopeful parents, the plaintiffs, who were patients undergoing in vitro fertilization (IVF) at a fertility clinic in Alabama.[2] The clinic was able to help each of the three couples conceive by fertilizing the female partner's eggs with the male partner's sperm "in vitro," meaning outside of the mothers' bodies.[3] Some of the resulting embryos were implanted into the mother's wombs, leading to healthy births.[4] The plaintiffs contracted to preserve the remaining embryos at the clinic's cryogenic nursery, which was located in the same building as a local hospital.[5]

Despite the clinic's alleged obligation to keep the cryogenically preserved embryos secured, a patient at the hospital entered the cryogenic nursery and handled several embryos.[6] Due to the subzero temperatures, the patient's hand was freeze-burned, and they dropped the embryos on the floor, which destroyed the embryos.[7]

The plaintiffs sued the clinic under Alabama's Wrongful Death of a Minor Act but also brought alternative claims of negligence so that relief could be granted if the court found that the embryos were property rather than minor children.[8] The Alabama Supreme Court reversed the trial court's dismissal of the plaintiff's wrongful death claim.[9] The Court reasoned that the wrongful death statute includes protection for unborn children that are "not contained within a biological womb,"[10] As a part of its reasoning, the court cited anti-abortion language in the "Sanctity of Unborn Life" section of the Alabama

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1. LePage v. Ctr. for Reprod. Med., P.C., No. SC-2022-0515, 2024 WL 656591 (Ala. Feb. 16, 2024), *petition for cert. filed* 2024 WL 1947312 (Ala. May 3, 2024).
2. *Id.* at 1.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 2.
9. *Id.* at 9.
10. *Id.* at 3-4.

Constitution, which "acknowledges, declares, and affirms that it is the public policy of [Alabama] to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate."[11]

The ruling set off alarms among IVF patients, providers, and advocates. Barbara Collura, CEO of Resolve: The National Infertility Association, said that "it raises questions for providers and patients, including if they can freeze future embryos created during fertility treatment or if patients could ever donate or destroy unused embryos."[12] The president of the American Society for Reproductive Medicine, Dr. Paula Amato, noted that Alabama healthcare providers would be unwilling to provide infertility treatment if such treatment could lead to civil liability or criminal charges.[13] In fact, fear of prosecution or punitive damages for patients and providers is what drove the University of Alabama at Birmingham health system to pause IVF procedures for their patients after the *LePage* decision.[14] Alabama Fertility Services and The Center for Reproductive Medicine in Alabama followed suit, pausing IVF treatment for their patients following the decision.[15] Even patients who were fortunate enough to continue treatment in the wake of the ruling were instilled with stress and fear that their treatment could be stopped in its tracks at any imminent moment.[16] Such was the case for patient Gabby Goidel, who began her IVF medication protocol on the very day that the Alabama Supreme Court issued its decision.[17]

As rapidly as the court decision impacted IVF treatment in Alabama, state legislators moved just as swiftly to provide statutory protection for IVF clinics in the state.[18] The Alabama state senate passed Senate Bill 159[19] while the

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11. *Id.* at 6 (quoting ALA. CONST. art. I, § 36.06(b)); *See also* Kim Chandler, *Warnings of the Impact of Fertility Treatments in Alabama Rush in After Frozen Embryo Ruling*, THE ASSOCIATED PRESS (Feb. 21, 2024, 6:57 AM), https://apnews.com/article/alabama-supreme-court-from-embryos-161390f0758b04a7638e2ddea20df7ca [https://perma.cc/V2TR-PZ5B] ("The Alabama Supreme Court decision partly hinged on anti-abortion language added to the Alabama Constitution in 2018, stating it is the 'policy of this state to ensure the protection of the rights of the unborn child.'").

12. Chandler, *supra* note 11.

13. *Id.*

14. Kim Chandler, *Alabama Hospital Puts Pause on IVF in Wake of Ruling Saying Frozen Embryos Are Children*, THE ASSOCIATED PRESS (Feb. 21, 2024, 11:27 PM), https://apnews.com/article/alabama-frozen-embryos-pause-4cf5d3139e1a6cbc62bc5ad9946cc1b8 [https://perma.cc/P5NJ-NNVM].

15. Kim Chandler, *More Alabama IVF Providers Pause Treatment After Court Ruling on Frozen Embryos*, THE ASSOCIATED PRESS (Feb. 22, 2024, 10:45 PM), https://apnews.com/article/alabama-frozen-embryos-ruling-ivf-pause-3ea72dd4494cad3f65c57e751e4c5c3b [https://perma.cc/6AS8-AKAK].

16. Chandler, *supra* note 11.

17. *Id.*

18. Geoff Mulvihill, *What to Know About Alabama's Fast-Tracked Legislation to Protect in Vitro Fertilization Clinics*, THE ASSOCIATED PRESS (Mar. 6, 2024, 10:46 PM), https://apnews.com/article/alabama-ivf-clinic-lawsuit-immunity-things-know-0d16d3be139f42c96bc3ab35c4467f55 [https://perma.cc/P37V-PTYW].

19. S.B. 159, 334th Leg., Reg. Sess. (Ala. 2024).

Alabama State House of Representatives advanced House Bill 237.[20] The nearly identical pieces of legislation were written to protect IVF clinics from civil lawsuits and criminal prosecution if embryos are damaged or destroyed.[21] SB 159 was enacted in Alabama on March 7, 2024, less than a month after the Alabama court decision.[22] While SB 159 does not directly address whether embryos outside of the womb are considered children, Alabama Governor Kay Ivey is "confident that this legislation will provide the assurances [Alabama] IVF clinics need and will lead them to resume services immediately."[23]

The *LePage* case and the resulting fallout highlight two concepts important to this Note's content. First, the decision marks the first instance of the *Dobbs v. Jackson Women's Health Organization*[24] impact being extended to the infertility treatment context.[25] This is significant because advocates of IVF patients anticipated that "'individual states' definitions of personhood would have legal ramifications for fertility treatment and embryos."[26] As of February 29, 2024, sixteen states have proposed more than forty bills, including personhood language.[27] Bills in Florida, Iowa, and Oklahoma are similar to the wrongful death statute relied upon by the Alabama Supreme Court.[28] Thus, post-*Dobbs*, yet another reproductive right is in jeopardy across the United States.

The second important concept stemming from the *LePage* case is the importance that legislators placed on the ability to conceive through infertility treatments. The Alabama Legislature wasted no time in responding to the consequences of the *LePage* decision by enacting statutory protection for IVF clinics.[29] There also appears to be presidential support for access to IVF treatment, in particular; former President Donald Trump said he would "strongly support the availability of IVF,"[30] and current President Joe Biden called upon Congress to "[g]uarantee [the right to IVF] nationwide" during his State of the Union address on March 7, 2024.[31]

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20. H.B. 237, 334th Leg., Reg. Sess. (Ala. 2024).

21. Mulvihill, *supra* note 18.

22. Ala. S.B. 159.

23. Mulvihill, *supra* note 18.

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

25. Mulvihill, *supra* note 18.

26. *Alabama Supreme Court Rules Frozen Embryos are 'Children', Threatening IVF Treatments*, RESOLVE: THE NATIONAL INFERTILITY ASS'N (Feb. 20, 2024), https://resolve.org/alabama-supreme-court-rules-frozen-embryos-are-children-threatening-ivf-treatments/ [https://perma.cc/W9CM-DV7N].

27. *MEMO: The Growing Threat of "Fetal Personhood" Measures Across the Country*, PLANNED PARENTHOOD (Feb. 29, 2024), https://www.plannedparenthoodaction.org/pressroom/the-growing-threat-of-fetal-personhood-measures-across-the-country [https://perma.cc/66ZF-PN89].

28. *Id.*

29. Mulvihill, *supra* note 18.

30. *Id.*

31. *Transcript of President Joe Biden's State of the Union Address*, THE ASSOCIATED PRESS (Mar. 8, 2024, 1:31 PM), https://apnews.com/article/state-of-union-transcript-biden-2024-e84f5134e5201987eb441629aef5240c [https://perma.cc/37GU-ZW54].

While guaranteeing the continuity of existing fertility treatment is extremely important, this Note presents a different call to action for Congress. Following *LePage*, the opportunity is ripe for Congress to double down and not only protect existing access to IVF and other infertility treatments but also expand access by passing a federal health insurance coverage mandate for infertility treatments. The time is now, in the face of state bill proposals that may lead to a *LePage* effect in other parts of the country.[32] The lack of financial resources and support for those in need of infertility treatment is often overlooked as an issue worth addressing.[33] On average, IVF, in particular, is about $12,000 to $15,000 out-of-pocket cost per cycle.[34] Given that those dollar amounts do not even include the added costs of medication, additional testing, and embryo storage, seeking treatment through IVF is not a realistic option for many.[35] In addition to the physical and financial burdens, and probably largely due to those burdens, infertility taxes patients' mental health just as other serious medical conditions do.[36] Even for those who can afford the cost of treatment, undergoing treatment itself can contribute to "psychological stress, anxiety, and depression."[37]

This Note will examine the extent to which the law would allow for an impactful federal insurance coverage mandate for infertility treatments under the Patient Protection and Affordable Care Act. Part I will introduce a focused definition of infertility, treatment options, and the high costs that can accompany a predominant treatment method, IVF. Part II briefly explains why the federal government should be concerned with infertility and assisting with infertility treatment costs in the first place. Part III presents current means to address infertility treatment costs and why those means are inadequate. Part IV introduces two alternative paths to including infertility treatment within the Patient Protection and Affordable Care Act and how those paths are shaped by existing federal statutes, regulations, and case law. Finally, Part V offers a concise solution under existing law and briefly addresses the argument that the cost of providing insurance coverage for infertility treatments is a barrier.

It is worth pointing out that this Note's focus on a heteronormative definition of infertility and specific financial obstacles is not intended to detract

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32. *See* PLANNED PARENTHOOD, *supra* note 27.

33. *See* Jessica Shillings-Barrera, *It Costs What?! To Start a Family? Infertility and the Constitutional Right to Procreate*, 62 SANTA CLARA L. REV. 683, 693-94 (2022).

34. *How Much Does IVF Cost?*, BUNDL, https://bundlfertility.com/how-much-does-ivf-cost/#:~:text=Each%20cycle%20of%20treatment%20can,the%20number%20of%20cycles%20needed [https://perma.cc/XP4Z-WZGU] (last visited Oct. 21, 2023).

35. *See* discussion *infra* Section I.C.

36. *See* Iris G. Insogna & Elizabeth S. Ginsburg, *Infertility, Inequality, and How Lack of Insurance Coverage Comprises Reproductive Autonomy,* 20 AMA J. ETHICS 1152, 1153 (Dec. 2018) ("One study of 488 American women found that infertile women had rates of anxiety or depression equivalent to those of patients diagnosed with cancer, hypertension, myocardial infarction, or HIV.").

37. CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL PUBLIC HEALTH ACTION PLAN FOR THE DETECTION, PREVENTION, AND MANAGEMENT OF INFERTILITY 3 (Jun. 2014).

from the widely diverse factors contributing to the gaps in affordable access to infertility treatments. Any comprehensive federal solution to treatment accessibility issues should address all such factors contributing to the inability to conceive so as not to exclude any segment of the American population based on an "outdated, gendered, and narrow" definition of infertility.[38] Also bear in mind that "geographic, racial, and ethnic disparities play a role in limiting access, as does discrimination on the basis of sexual orientation, gender identity, and relationship status."[39]

I. INFERTILITY AND THE HIGH COSTS IT CARRIES

A. What Infertility Means

While the inability to conceive presents in multiple ways depending on factors like relationship status, sexual orientation, gender identity,[40] and treatment for serious illnesses like cancer,[41] this Note presents infertility as experienced between heterosexual partners. The general definition of infertility that this Note focuses on is "not being able to get pregnant (conceive) after [one] year (or longer) of unprotected sex."[42] For women aged thirty-five and older, the threshold for meeting the definition is sometimes only six months of unprotected sex due to women's fertility steadily declining with age.[43]

The Centers for Disease Control and Prevention (CDC) reports that in the United States, about one out of five "married women aged 15 to 49 years with no prior births" struggle to conceive after one year, thus satisfying the general definition of infertility.[44] That statistic is especially alarming because it does not account for unmarried women, men facing infertility, and other segments of the population that do not fall within the narrow definition of infertility.[45] In sum, millions of Americans are affected.[46]

Infertility among women is most often attributed to conditions affecting vital organs of the female anatomy, namely the ovaries, fallopian tubes, and

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38. Elpida Velmahos, *Fertile Ground for Change: Infertility, Employee-Based Health Insurance, and an Unprotected Fundamental Right*, 17 J. HEALTH & BIOMEDICAL L. 267, 268 (2022).

39. Sigal Klipstein & Lee Rubin Collins, *Mandated Fertility Coverage: The Resounding Choice When Morality, Medicine, and Money Align*, 120 FERTILITY AND STERILITY 821 (2023) ("There is a moral imperative to overcome these barriers . . . from the perspective of compassion for those with a disease, condition, or status that prevents them from creating a family . . . .").

40. *See* Velmahos, *supra* note 38, at 278.

41. *See* Insogna & Ginsburg, *supra* note 36, at 1155.

42. *Infertility: Frequently Asked Questions*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 15, 2024), https://www.cdc.gov/reproductive-health/infertility-faq/index.html [https://perma.cc/4A2T-4Y87].

43. *Id.*

44. *Id.*

45. *See* Velmahos, *supra* note 38, at 278.

46. Insogna & Ginsburg, *supra* note 36.

uterus.[47] Conditions may include endometriosis, luteal phase defect, failed or irregular ovulation, polycystic ovary syndrome, commonly referred to as PCOS, and pelvic adhesions, which can block or impair fallopian tubes.[48] Causes of infertility can also be found among men.[49] Some issues impacting fertility in men include structural abnormalities within the reproductive tract, sperm production disorders, including, but not limited to, hormonal abnormalities and varicoceles, and ejaculatory disorders that prevent sperm from reaching the egg.[50] In some cases, couples are diagnosed with unexplained infertility, meaning there is no identified cause even after testing for specific conditions.[51]

B. Infertility Treatment

Infertility can be treated with timed intercourse, medications, surgery, intrauterine insemination, or assisted reproductive technology.[52] Treatments vary depending on the underlying cause of infertility and whether the inability to conceive is attributable to female or male factors.[53] For women, medication can include those that trigger ovulation or those that stimulate the growth of mature eggs.[54] Medication for men may be used to treat low sperm count caused by low levels of the hormones that signal the testicles to produce sperm.[55] Surgical procedures for women include the removal of abnormal endometrial tissue and pelvic adhesions caused by endometriosis.[56] Men may require surgery to treat varicoceles, which can cause a rise in testicular temperature and impair sperm production.[57]

Intrauterine insemination (IUI), also referred to as artificial insemination, is a procedure in which specially prepared sperm are inserted directly into a woman's uterus.[58] IUI is often used in response to male factor infertility, though women undergoing IUI may be prescribed the medications that trigger

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47. CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 42.

48. *Underlying Causes*, RESOLVE: THE NATIONAL INFERTILITY ASS'N, https://resolve.org/learn/infertility-101/underlying-causes/ [https://perma.cc/TG98-SD33] (last visited Mar. 10, 2024).

49. *Male Factor Infertility*, RESOLVE: THE NATIONAL INFERTILITY ASS'N, https://resolve.org/learn/infertility-101/underlying-causes/male-factor/ [https://perma.cc/XFU9-A6HA] (last visited Mar. 10, 2024).

50. *Id.*

51. *Unexplained Infertility,* RESOLVE: THE NATIONAL INFERTILITY ASS'N, https://resolve.org/learn/infertility-101/underlying-causes/unexplained-infertility/ [https://perma.cc/Z3Y5-AR57] (last visited Aug. 26, 2024).

52. CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 42.

53. *Id.*

54. *Id.*

55. RESOLVE: THE NATIONAL INFERTILITY ASS'N, *supra* note 49.

56. *Endometriosis*, RESOLVE: THE NATIONAL INFERTILITY ASS'N, https://resolve.org/learn/infertility-101/underlying-causes/endometriosis/ [https://perma.cc/WX4Z-4LAY] (last visited Mar. 10, 2024).

57. RESOLVE: THE NATIONAL INFERTILITY ASS'N, *supra* note 49.

58. CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 42.

ovulation.[59] Artificial reproduction technologies (ARTs) are distinct from IUI because the term comprises fertility treatments "in which either eggs or embryos are handled outside of the body."[60] IVF, the treatment jeopardized by the *LePage* case, is an ART.[61]

Since IVF is a predominant,[62] yet excessively costly, form of infertility treatment employed to circumvent the factors contributing to infertility, the discussion throughout this Note focuses on this treatment method.

C. The High Cost of IVF Treatment

After nearly five years of trying to get pregnant, a Reddit user explains that she and her spouse are "planning to use money from [their] *retirement savings* to make an attempt (at something that's far from guaranteed)."[63] By "an attempt at something that's far from guaranteed," she is referring to pursuing IVF.[64] The user goes on to list other potential uses for the money that will be put toward "something that is supposed to happen spontaneously" but "just won't happen" for her and her spouse, including paying off "a fair bit" of their mortgage.[65] In response, another user relates by saying, "[i]t's so hard and unfair having to pay for something that most people get for free."[66] Yet another response empathizes about the fact that "[i]t's really hard not to be bitter about spending *tens of thousands on a gamble* for a baby . . . ."[67] These Reddit users are certainly not alone in their predicament, nor their sentiments; it is an emotional toll encountered by the millions of Americans suffering from infertility and the inability to conceive a child, a burden further insulted by the excessive costs of treatment required to overcome their serious medical condition.[68]

The average cost of $12,000 to $15,000 for a single IVF cycle is just the initial expenditure; there are additional, often unexpected, costs for medication,

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59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. bf2gud, *57 Cycles of Trying: How do I Come to Terms With the Upcoming Cost of IVF?*, REDDIT (Oct. 3, 2023), https://www.reddit.com/r/TryingForABaby/comments/16ylvm8/57_cycles_of_trying_how_do_i_come_to_terms_with/ [https://perma.cc/77RA-P2KL] (emphasis added).
64. *Id.*
65. *Id.*
66. Major-Art-3111 Comment to *57 Cycles of Trying: How do I Come to Terms With the Upcoming Cost of IVF?*, REDDIT (Oct. 3, 2023), https://www.reddit.com/r/TryingForABaby/comments/16ylvm8/57_cycles_of_trying_how_do_i_come_to_terms_with/ [https://perma.cc/77RA-P2KL].
67. teacherlady4846 Comment to *57 Cycles of Trying: How do I Come to Terms With the Upcoming Cost of IVF?*, REDDIT (Oct. 3, 2023), https://www.reddit.com/r/TryingForABaby/comments/16ylvm8/57_cycles_of_trying_how_do_i_come_to_terms_with/ [https://perma.cc/77RA-P2KL] (emphasis added).
68. Insogna & Ginsburg, *supra* note 36.

genetic testing, additional embryo transfers, and embryo cryopreservation and storage.[69]

Throughout an IVF cycle, medication is used to suppress and stimulate hormonal processes, such as egg maturation, triggering ovulation, and preparing the uterus for embryo transfer.[70] Medication protocols and dosages can vary based on factors such as "age, weight, previous response to medication," and blood-hormone levels,[71] and costs can range from about $4,000 to $7,000.[72] After an egg has been retrieved from the uterus and successfully fertilized by sperm; genetic testing can be employed to test the resulting embryo for chromosomal abnormalities prior to implanting the embryo in the uterus.[73] Genetic testing costs roughly $2,000 to $5,000,[74] depending on the lab performing the testing.[75] Embryo transfer refers to the process of transferring one or more embryos to the uterus.[76] A single IVF cycle can include multiple embryo transfers, costing around $5,000 per transfer for a process that "typically takes less than ten minutes."[77] Patients may require cryopreservation of embryos if there is any reason to delay embryo transfer, such as performing genetic testing or saving embryos for later use.[78] Storage of frozen embryos can cost around $700 annually after the first year.[79] A quick tally of the math reveals that a single IVF cycle can cost about $18,000 to $27,000 without the costs of additional embryo transfers. It may be surprising to find that the cumulative cost of IVF itself is not the extent of it as more costs can stem from undergoing infertility treatment, such as time away from work to undergo treatment, which can sometimes be unpaid; travel time and expenses for clinic visits; and often, the impact to creditworthiness because of financing IVF.

Yet, there is still potential for even *more* costs associated with an IVF cycle. Some women require medical treatment for a condition called ovarian hyperstimulation syndrome because of the high amount of hormone-based

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69. BUNDL, *supra* note 34.

70. Online Video Module: Introduction to In Vitro Fertilization, Controlled Ovarian Stimulation: The Drugs and Protocols (Ind. Fertility Inst.) (Feb. 2, 2024) (on file with author); Online Video Module: Introduction to In Vitro Fertilization, Embryo Transfer (Ind. Fertility Inst.) (Feb. 2, 2024) (on file with author).

71. Ind. Fertility Inst.,, *supra* note 70.

72. E-mail from Ind. Fertility Inst. (Aug. 18, 2023, 8:54 AM EDT) (on file with author) (providing an estimate of IVF costs).

73. Online Video Module: PGT-A, PGT-A Introduction (Ind. Fertility Inst.) (last visited Feb. 2, 2024) (on file with author).

74. Insogna & Ginsburg, *supra* note 36, at 1153.

75. BUNDL, FINANCING FERTILITY DIGITAL GUIDEBOOK 5 (2021), https://bundlfertility.com/wp-content/uploads/sites/19/2021/03/BUNDL-Fertility-Guidebook_R1_For-Web.pdf [https://perma.cc/3HWZ-HRAH].

76. Ind. Fertility Inst., *supra* note 70.

77. BUNDL, *supra* note 75, at 5; Ind. Fertility Inst., *supra* note 70.

78. Online Video Module: Introduction to In Vitro Fertilization, Cryopreservation of Embryos (Ind. Fertility Inst.) (Feb. 2, 2024) (on file with author).

79. E-mail from Ind. Fertility Inst. (Aug. 18, 2023, 8:55 AM EDT) (on file with author) (providing an estimate of additional IVF costs).

medication administered during an IVF cycle.[80] Moreover, patients who elect to transfer more than one embryo at a time to avoid the costs of multiple embryo transfers, which are considered high-risk.[81] These additional medical costs can stem from devastating effects of a multiple pregnancy such as a selective reduction procedure to terminate one or more fetus due to health reasons, or infant prematurity.[82]

What may be even more outrageous is the fact that multiple rounds of IVF are often required before success.[83] For example, for a five-foot, five-inches thirty-year-old female weighing 145 pounds with zero previous pregnancies, suffering from an ovulatory disorder, and using her own eggs, the success rate is estimated at just 59% after a single cycle.[84] At the high end, a patient can pay around at least $27,000 for just a 59% chance of receiving their legally proverbial benefit of the bargain.

II. WHY SHOULD THE FEDERAL GOVERNMENT CARE ENOUGH TO MANDATE COVERAGE?

If the federal government can protect the reproductive right to infertility treatment by ensuring continuity of access, why should the concern extend to expanding access through mandating health insurance coverage? This section makes the case for easing the impact of economic and societal issues that can be magnified by infertility over time. Such issues include birth rate maintenance and perseveration of social capital, both of which can be mitigated by supporting the willful pursuit of conceiving a child.[85] Furthermore, the federal government should be concerned with ensuring equal access to infertility treatment for lower-income populations afflicted by infertility.

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80. Online Video Module: Introduction to In Vitro Fertilization, Risks from Fertility Medication (Ind. Fertility Inst.) (last visited Oct. 21, 2023) (on file with author).

81. *See* Benjamin J. Peipert et al., *Impact of In Vitro Fertilization State Mandates for Third Party Insurance Coverage in the United States: A Review and Critical Assessment*, 20 REPROD. BIOLOGY AND ENDOCRINOLOGY 1, 6 (2022) ("[F]inancial barriers may influence the transferring of more than a single embryo, raising the risks of multiple pregnancy and its concomitant associated morbidity."); Online Video Module: Introduction to In Vitro Fertilization, The Number of Embryos to Transfer (Ind. Fertility Inst.) (Oct. 21, 2023) (on file with author).

82. Online Video Module: Introduction to In Vitro Fertilization, Risks of Multiple Pregnancies (Ind. Fertility Inst.) (Oct. 21, 2023) (on file with author).

83. BUNDL, *supra* note 34.

84. *IVF Success Estimator*, CENTERS FOR DISEASE CONTROL PREVENTION, https://www.cdc.gov/art/ivf-success-estimator/index.html (last visited Oct. 21, 2023) [https://perma.cc/6XUW-6YAD].

85. *See The Long-Term Decline in Fertility–and What it Means for State Budgets,* THE PEW CHARITABLE TRUSTS (Dec. 5, 2022), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/12/the-long-term-decline-in-fertility-and-what-it-means-for-state-budgets [https://perma.cc/9QT4-YE5U]; *see also* U.S. CONG. JOINT ECON. COMM., 117TH CONG., THE CONSEQUENCES OF DECLINING FERTILITY FOR SOCIAL CAPITAL (2022), https://www.jec.senate.gov/public/index.cfm/republicans/2022/12/the-consequences-of-declining-fertility-for-social-capital **[**https://perma.cc/93WQ-L256**].**

A. Impact of the Declining Birth Rate in the United States

Fewer babies are being born in the United States, and while infertility may contribute to the lower birth rate, other voluntary factors exacerbate the issue.[86] Economic downturns cause people to put off having children.[87] Shifting societal norms, such as women choosing to marry later in life or not at all, are also impactful; research shows that birth rates among single women are less than half of the rate among married women.[88] Fewer babies being born while the Baby Boomers[89] continue to age and exit the workforce can have the long-term effect of a smaller workforce, which also means a smaller pool of workers paying taxes.[90] Even the aging population that remains in the workforce can adversely affect the nation's economy due to businesses accounting for rising labor costs "including salaries, health insurance, [and] paid time off."[91]

While low birth rates age the current overall population faster, the aging population conversely contributes to low birth rates.[92] From 1990 to 2019, the number of births per 1,000 women ages twenty to twenty-four decreased from about 116.4 to 66.5, while the number of births per 1,000 women ages thirty-five to thirty-nine rose from 31.5 to 52.72 during the same period (a 42.79% decline, and a 67.35% increase, respectively).[93] Since women had children at higher rates as they aged, the "overall fertility rates declined" because the birth rates of older women were insufficient "to offset declines in birth rates of younger women."[94] This further suggests that an aging population works against sustaining the United States birth rate.

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86. *See* THE PEW CHARITABLE TRUSTS, *supra* note 85.

87. *Id.*

88. *Id.*

89. *Baby Boomers: The Gloomiest Generation*, PEW RESEARCH CENTER (June 25, 2008), https://www.pewresearch.org/social-trends/2008/06/25/baby-boomers-the-gloomiest-generation/ [https://perma.cc/9U3Q-QY2X] (describing Baby Boomers as members of the generation born in years 1946 to 1964).

90. *See id.*; *but see id.* (noting that lower fertility could reduce federal funding to states, which is arguably beneficial for the federal government); *cf. What's Next for U.S. Birth Rates?*, CENTER FOR RETIREMENT RESEARCH AT BOSTON COLLEGE (May 11, 2023), https://crr.bc.edu/whats-next-for-u-s-birth-rates/#:~:text=The%20U.S.%20fertility%20rate%20has,the%20first%20time%20since%202014 [https://perma.cc/6KMG-P724] ("A lower birth rate . . . means . . . higher required tax rates . . . .")

91. Charlotte M. Irby, *What To Do About Our Aging Workforce – The Employers' Response*, U.S. BUREAU OF LAB. STAT. (Aug. 2020), https://www.bls.gov/opub/mlr/2020/beyond-bls/what-to-do-about-our-aging-workforce-the-employers-response.htm [https://perma.cc/J4S8-N585].

92. *Id.*

93. *Fertility Rates: Declined for Younger Women, Increased for Older Women*, UNITED STATES CENSUS BUREAU (Apr. 6, 2022), https://www.census.gov/library/stories/2022/04/fertility-rates-declined-for-younger-women-increased-for-older-women.html [https://perma.cc/CPA4-MCA5].

94. *Id.; See* THE PEW CHARITABLE TRUSTS, *supra* note 85 ("Women are also delaying having children until later in life—part of the reason why fertility rates have dropped among women in their 20s, which has more than offset increases for women in their late 30s and 40s.").

In addition to economic consequences, a Congressional Joint Economic Committee recognizes the impact on social capital: since parents are more likely than non-parents "to belong to religious organizations, volunteer, and spend time with relatives," there is reduced "quality of community participation;" lower fertility leads to fewer siblings, and "[c]hildren with strong sibling relationships tend to gain stronger interpersonal skills and exhibit more self-control;" lastly, "fewer and smaller families weaken the emotional and physical support networks of the elderly."[95]

The economic and social consequences of lower birth rates are clear. While infertility is hardly the sole cause of lower birth rates, the government has an interest in supporting treatment for those who are willing to contribute to maintaining the United States population but cannot do so due to infertility. Economists have suggested that the costs of increased IVF utilization resulting from mandated coverage "pale in comparison to the socioeconomic advantages of population growth," pointing out that "American society in particular is dependent on population growth to sustain economic growth and support social programs, such as Social Security."[96]

B. Equal Access to Infertility Treatments for Lower-Income Populations

The World Health Organization (WHO) recognizes infertility as a disease that can exacerbate disparities in access to treatment that "adversely affect the poor, unmarried, uneducated, unemployed and other marginalized populations."[97] Based on the excessive costs of IVF, it is obvious why lower-income populations are disparately impacted by untreated infertility.[98] In 1942, the Supreme Court established the right to procreation as a fundamental right protected by the Fourteenth Amendment in *Skinner v. Oklahoma*.[99] Though *Skinner* does not require that the government help with procreation, it is essential to point out that its reasoning was grounded in avoiding disparate impact; notwithstanding that the *Skinner* decision is aimed at preventing such disparate impact by the hand of government bodies, the reasoning at least reinforces the equitable notion that the ability to procreate should be equally accessible to all regardless of socioeconomic factors.[100]

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95. U.S. CONG. JOINT ECON. COMM., *supra* note 85, at 2.

96. Peipert et al., *supra* note 81, at 5.

97. *Infertility*, WORLD HEALTH ORG. (May 22, 2024), https://www.who.int/news-room/fact-sheets/detail/infertility [https://perma.cc/SUG4-ZMCT].

98. *See* discussion *supra* Part I.

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

100. *Id.* at 541-42 ("We are dealing here with legislation which involves one of the basic civil rights of man. . . . In terms of fines and imprisonment, the crimes of larceny and embezzlement rate the same under the Oklahoma code. Only when it comes to sterilization are the pains and penalties of the law different. The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.").

III. Inadequacies of Current Means to Address Costs

There are some existing means of combating the cost-prohibitive nature of infertility treatments. Such means include state insurance mandates, the federal medical expense tax deduction, and IVF refund and package programs. As discussed below, those do not provide widespread, uniform efficacy because of reliance on factors like where patients live and their ability to front costs.

A. State Insurance Mandates

As of 2024, over twenty states have passed fertility treatment insurance coverage laws.[101] State mandates can generally be divided into two categories: mandate to cover or mandate to offer.[102] A mandate to cover requires "that health insurance companies provide coverage of infertility treatment as a benefit included in every policy."[103] A mandate to offer requires "that health insurance companies make available for purchase a policy which offers coverage of infertility treatment," but employers are not required to purchase such coverage from insurers.[104] An even narrower category of mandates among mandate-to-cover states is comprehensive IVF mandates, which require "insurance companies to provide coverage for the cost of IVF with minimal restrictions to patient eligibility, plan exemptions, and lifetime limits to benefits received."[105] A 2018 study demonstrated that comprehensive IVF mandates "are associated with over double the rate of IVF utilization" compared to states without such mandates and that "[l]ive birth rates are higher and multiple birth rates are lower in states with comprehensive IVF mandates."[106] The decrease in multiple birth rates is significant to women's health because patients may elect to transfer multiple embryos in a single cycle to reduce costs, which can result in a high-risk multiple pregnancy.[107]

"State infertility insurance mandates are a crucial mechanism for expanding access to fertility care in the US in the absence of federal legislation."[108] However, the level of coverage varies from state to state; self-insured plans are

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101. *Insurance Coverage by State*, RESOLVE: THE NATIONAL INFERTILITY ASS'N (June 17, 2024), https://resolve.org/learn/financial-resources-for-family-building/insurance-coverage/insurance-coverage-by-state/ [https://perma.cc/PNS6-VVUJ].

102. *Health Insurance 101*, RESOLVE: THE NATIONAL INFERTILITY ASS'N, https://resolve.org/learn/financial-resources-for-family-building/insurance-coverage/health-insurance-101/ [https://perma.cc/HB26-W36K] (last visited Feb. 2, 2024).

103. *Id.*

104. *Id.*

105. Peipert et al., *supra* note 81, at 3.

106. BENJAMIN J. PEIPERT ET AL., IMPACT OF STATE IVF INSURANCE MANDATES ON IVF UTILIZATION AND OUTCOMES IN THE UNITED STATES 1 (2021).

107. *See* Peipert et al, *supra* note 81, at 6 ("[F]inancial barriers may influence the transferring of more than a single embryo, raising the risks of multiple pregnancy and its concomitant associated morbidity."); *See* discussion *supra* Section I.C.

108. Peipert et al., *supra* note 81, at 1.

exempt from state mandates,[109] IVF is not covered under all state mandates,[110] and Medicaid recipients remain uncovered in the majority of instances.[111] Some states even require that eggs be fertilized by the patient's spouse's sperm, which effectively excludes non-married individuals and same-sex couples.[112] Thus, not only are state health insurance mandates for infertility treatments found few and far between, but the existing mandates do not provide adequate or widespread benefit. Moreover, waiting for states to act individually can leave many Americans behind with little biological time to spare,[113] hence the need for action at the federal level.

B. Medical Expense Tax Deduction

Another existing method to offset the cost of infertility treatments is a federal tax deduction. The Internal Revenue Service (IRS) authorizes a medical expense tax deduction for qualified expenses.[114] In some instances, the costs of infertility treatments can be deducted from the patient's taxable income.[115] While this seems promising, the tax deduction falls short of being a reasonable solution. Leveraging the tax deduction assumes that patients can afford the cost in the first place, as it can only be deducted once the patient has covered the expense. Also, depending on the time of year the patient undergoes IVF treatment, they may be waiting close to a year before they can file their taxes and realize the benefit of the deduction. Lastly, legal analysis suggests that only certain infertility treatment expenses may be eligible for the tax deduction.[116]

C. IVF Refund and Package Programs

Patients sometimes have the option to opt into IVF refund and package programs.[117] These programs offset the costs of undergoing multiple IVF rounds

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109. *See* RESOLVE: THE NATIONAL INFERTILITY ASS'N, *supra* note 101.

110. *Id.*

111. Tim Henderson, *Few States Extend Fertility Treatment Coverage to Medicaid Recipients*, OHIO CAP. J. (Aug. 15, 2023), https://ohiocapitaljournal.com/2023/08/15/few-states-extend-fertility-treatment-coverage-to-medicaid-recipients/#:~:text=Only%20two%20states%20provide%20significant,sterile%2C%20such%20as%20for%20cancer [https://perma.cc/D45S-66VQ], (writing that only New York and Illinois provide fertility coverage through Medicaid).

112. Peipert et al., *supra* note 81, at 8.

113. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 42 ("Fertility in women is known to decline steadily with age. As a result, some providers evaluate and treat women aged 35 years or older after 6 months of unprotected sex.").

114. 26 U.S.C. § 213.

115. *See* Katherine Pratt, *The Curious State of Tax Deductions for Fertility Treatment Costs*, 28 S. CAL. REV. L. & SOC. JUST. 261 (2019).

116. *See id.* at 275-79.

117. *IVF Refund and Package Programs*, FERTILITYIQ BY INFLECTION, https://www.fertilityiq.com/topics/cost/ivf-refund-and-package-programs [https://perma.cc/WFU2-LKX5] (last visited Oct. 21, 2023).

by packaging multiple cycles for a reduced per-cycle cost.[118] Such programs also refund the cost of IVF if patients do not experience a live birth by the time they use their last packaged cycle.[119] That sounds great because it takes the gamble out of paying for a mere chance of conceiving and provides a safeguard absent having insurance coverage. However, such packages, like those offered by Bundl[120], still require up-front costs, so much like the medical expense tax deduction; this solution operates under the assumption that patients can afford to pay the costs in the first place.[121] For example, the up-front cost of up to two IVF cycles can still be around $29,000.[122] While it is better than a high-end cost of about $54,000[123] for two cycles, $29,000 is still an excessive cost that may require financing or simply put the dream of receiving IVF treatment entirely out of reach for some patients. Furthermore, such money-back guarantees are subject to specific eligibility requirements that some patients may not be able to meet, such as being thirty-nine years old or younger at the first egg retrieval; meeting specified hormone level thresholds; having a normal ultrasound or hysteroscopy; having a body mass index under thirty-five; experiencing no more than two pregnancy losses, or no more than one failed IVF cycle; and having a normal sperm count.[124]

IV. How the Current Legal Landscape Could Impact a Federal Infertility Treatment Coverage Mandate

Given the inadequacies of existing means to address the costs of infertility treatments, a federal health insurance mandate would be incredibly beneficial for those facing the excessive costs of treatments. If a mandate were to be encompassed within the Patient Protection and Affordable Care Act, would such a mandate have enough force to provide enhanced, widespread accessibility? The following explores two potential paths to mandating coverage under the Patient Protection and Affordable Care Act, along with attendant considerations.

A. The New Essential Health Benefit Path

One potential path to mandating insurance coverage for infertility treatments is amending the Patient Protection and Affordable Care Act to

118. *Id.*

119. *Id.*

120. *What is Bundl?*, BUNDL, https://bundlfertility.com/fertility-treatment-cost/ [https://perma.cc/D2UD-DNTA] (last visited Mar. 10, 2024) ("Bundl is a unique program that allows you to lower fertility treatment cost by packaging multiple treatment cycles together at one reduced, up-front cost.").

121. *Id.*

122. E-mail from Bundl (Sep. 13, 2023, 11:29 AM EDT) (on file with author) (advising as to a two-cycle package cost).

123. *See* discussion *supra* Section I.C.

124. *Assure IVF Refund Program,* CCRM FERTILITY, https://www.ccrmivf.com/ivf-refund-program/ [https://perma.cc/C6TB-GZTN] (last visited Mar. 10, 2024).

include all forms of treatment and related prescription medications as a new essential health benefit. Enacted in March 2010, the Patient Protection and Affordable Care Act, known as the Affordable Care Act (ACA), was healthcare reform legislation meant to "[m]ake affordable health insurance available to more people."[125] One of the most well-known features of the ACA is its requirement that qualified plans provide coverage for "[ten] general categories of health care services, described as 'Essential Health Benefits' (EHB)."[126] The list of EHBs includes ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; and pediatric services, including oral and vision care.[127]

The ACA does provide for amendments to the statutory EHB list.[128] In fact, the Secretary of the United States Department of Health and Human Services (HHS) is required to "periodically update the essential health benefits . . . to address any gaps in access to coverage;" perhaps gaps such as the wide one that exists for access to infertility treatment coverage.[129] However, since EHB requirements went into effect in 2014, there have not been any additions to the list, and the HHS only just requested public comments on updating EHB requirements for the first time at the end of 2022.[130]

Moreover, a potential roadblock to adding infertility treatments and required medication as an EHB lies within the ACA itself:

> The Secretary shall ensure that the scope of the essential health benefits . . . is equal to the scope of benefits provided under a typical employer plan, as determined by the Secretary. To inform this determination, the Secretary of Labor shall conduct a survey of employer-sponsored coverage to determine the benefits *typically covered by employers*, including multiemployer plans, and provide a report on such survey to the Secretary.[131]

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125. *About the Affordable Care Act*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, https://www.hhs.gov/healthcare/about-the-aca/index.html [https://perma.cc/2EUV-RLMB] (last visited Nov. 28, 2023); *see also* Patient Protection and Affordable Care Act (ACA), 42 U.S.C. § 18001.

126. JOHN K. DIMUGNO & PAUL E.B. GLAD, CALIFORNIA INSURANCE LAW HANDBOOK, § 37A:17 (Apr. 2024); *see also* 42 U.S.C. § 18022.

127. 42 U.S.C. § 18022.

128. *Id.*

129. *Id.*

130. *HHS Considers Updating the Essential Health Benefits*, THE COMMONWEALTH FUND (Jan. 11, 2023), https://www.commonwealthfund.org/blog/2023/hhs-considers-updating-essential-health-benefits [https://perma.cc/28X6-TXJM].

131. 42 U.S.C. § 18022 (emphasis added).

Given that less than half of the states have passed infertility treatment insurance coverage laws as of 2023, and only a subset of those are mandated to cover, it is doubtful that infertility treatments would be found to be "typically covered by employers."[132] Overcoming this roadblock may eventually become possible, however, given that in 2023, 40% of employers offered fertility benefits, up from 30% in 2020.[133]

1. EHB-Benchmark Plans Selected by States.—It is important to note that adding a new EHB would only be part of the equation under this path. Since EHBs are such broad categories of care, states are entitled to define precisely what should be covered under each EHB.[134] The exception is coverage of preventive health services, for which coverage is carefully outlined by regulation.[135] To facilitate states defining EHB coverage, the HHS promulgated regulations to define EHB-benchmark standards.[136] States are required to select one of four options as a benchmark plan.[137] The benchmark plan must provide coverage for the EHBs, and where a particular benchmark plan does not include coverage of one of the EHBs, there are rules for supplementation.[138] For example, if the selected benchmark plan does not cover pediatric oral services, such services must be supplemented by the entire category of pediatric oral benefits from either the federal employee dental and vision insurance program (FEDVIP) or the state's children's health insurance program (CHIP).[139]

This has important implications because coverage could still vary from state to state, even with a federal mandate in place. For example, under an EHB broadly categorized as "infertility treatments and medications," Indiana may provide that IVF patients are limited to one IVF cycle per year, while California may allow up to two IVF cycles per year.[140]

Both private and public plans[141] are required to provide coverage for EHBs and are subject to the EHB-benchmark plan regulations.[142]

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132. RESOLVE: THE NATIONAL INFERTILITY ASS'N, *supra* note 101; 42 U.S.C. § 18022.

133. Nyah Phengsitthy, *Fertility Insurance Increase Hinges on Courts State Mandates*, BL. (Aug. 4, 2023, 5:05 AM), https://news.bloomberglaw.com/health-law-and-business/fertility-insurance-increase-hinges-on-courts-state-mandates [https://perma.cc/QBV7-U7P6].

134. *Essential Health Benefits*, HEALTHINSURANCE.ORG, https://www.healthinsurance.org/glossary/essential-health-benefits/#:~:text=Large%20group%20plans%20are%20also,%2C%20unless%20they're%20grandfathered [https://perma.cc/EJK9-N8LY] (last visited Aug. 15, 2024).

135. 45 C.F.R. § 147.130 (2020).

136. 45 C.F.R. §§ 156.100-156.155 (2018).

137. 45 C.F.R. § 156.100 (2018).

138. 45 C.F.R. § 156.110 (2015).

139. *Id.*

140. HEALTHINSURANCE.ORG, *supra* note 134 (providing an example of differing coverage for physical therapy under New York law versus Colorado law).

141. *See infra*, Section C.

142. *See* 45 C.F.R. § 156.100 (2018); *see also* 42 C.F.R. § 440.347 (2013).

B. Following The Contraceptive Coverage Mandate Path

An alternative to adding infertility treatment as a new, distinct EHB is following the same path as the contraceptive mandate. This would mean including infertility treatments within the definition of one of the existing EHBs: Preventive wellness services.

Private health insurance plans must provide coverage for preventive care cost-sharing.[143] The Women's Health Amendment to the ACA provides preventive services for women, which must include services listed within guidelines supplied by the Health Resources and Services Administration (HRSA).[144] Based on a finding that "contraceptive services are essential for women's health" by the Institute of Medicine, HRSA determined that contraceptive services should be included in its Women's Preventive Services Guidelines.[145] The requirement that contraceptive services be covered by insurance became a federal administrative rule in 2012.[146]

Contraception is arguably on the complete opposite end of the reproductive rights spectrum compared to infertility treatments like IVF. However, like infertility treatments, access to contraceptives directly impacts one's freedom to decide "if and when to have children."[147] The contraceptive mandate is worth discussing because it was not initially among the ACA's list of EHBs but was later recognized as being included within an existing EHB, preventive services, because of how crucial equal access to contraceptive services is;[148] the importance of equal access to infertility treatment is precisely the argument put forth throughout this Note.

1. The Contraceptive Mandate and Religious Objections.—With the contraceptive mandate came objections rooted in religious beliefs, which would likely be the case for an infertility treatment coverage mandate.[149] A few key Supreme Court cases summarize the issues litigated.

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143. RYAN J. ROSSO ET AL., CONG. RSCH. SERV., R45146, FEDERAL REQUIREMENTS ON PRIVATE HEALTH INSURANCE PLANS 5 (2023).

144. *Id.; see* Patient Protection and Affordable Care Act (ACA) 42 U.S.C. § 300gg-13.

145. JOHN K. DIMUGNO & PAUL E.B. GLAD, CALIFORNIA INSURANCE LAW HANDBOOK, § 37A:13, (Apr. 2024); *see Women's Preventive Services Guidelines*, HEALTH RESOURCES & SERVICES ADMINISTRATION, https://www.hrsa.gov/womens-guidelines [https://perma.cc/P43U-BEUR] (last updated Dec. 2022).

146. 45 C.F.R. § 147.131 (2012).

147. *Assisted Reproduction*, CENTER FOR REPRODUCTIVE RIGHTS, https://reproductiverights.org/our-issues/assisted-reproduction/ [https://perma.cc/7RTJ-72YV] (last visited Jan. 30, 2024); *see also Contraception*, CENTER FOR REPRODUCTIVE RIGHTS, https://reproductiverights.org/our-issues/contraception/ [https://perma.cc/8MPX-AN7N] (last visited Jan. 30, 2024) ("The ability to decide whether and when to have children is critical for achieving gender equality . . . . Yet in many areas throughout the world, high-quality contraception is difficult to obtain . . . .").

148. DIMUGNO & GLAD, *supra* note 145; *see also* HEALTH RESOURCES & SERVICES ADMINISTRATION, *supra* note 145.

149. DIMUGNO & GLAD, *supra* note 145.

The first case worth discussing is *Burwell v. Hobby Lobby*.[150] *Hobby Lobby* involved three for-profit entities founded on Christian values: Conestoga Wood Specialties, Hobby Lobby, and Mardel.[151] The companies all sued federal administrative agencies "under [the Religious Freedom Restoration Act (RFRA)] and the Free Exercise Clause of the First Amendment, seeking to enjoin application of ACA's contraceptive mandate insofar as it requires them to provide health insurance coverage for four FDA-approved contraceptives that may operate after the fertilization of an egg."[152] When the case reached the Supreme Court, the issue was whether the RFRA permitted administrative agencies to demand that the companies "provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners."[153]

The *Hobby Lobby* Court held that the contraceptive mandate violates the RFRA.[154] The RFRA "prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest."[155] The Court first found that presenting Conestoga, Hobby Lobby, and Mardel with the choice between violating their religious beliefs or being subjected to fines of $475 million, $33 million, and $15 million per year, respectively, was substantially burdensome.[156] In this case, it was assumed that the government had a compelling interest behind mandating coverage for contraceptives, however the mandate was not found to be the least restrictive means of serving that interest.[157]

One alternative means offered by the Court is for the government to assume the cost of providing contraceptives without cost-sharing itself.[158] The Court also pointed out the fact that there was already an established accommodation process "for nonprofit organizations with religious objections" proved that there was alternative means at the federal government's disposal.[159] With the existing accommodation, organizations could self-certify their opposition to providing coverage for contraceptives.[160] Once the organization completed the self-certification, the

> organization's insurance issuer or third-party administrator must "'[e]xpressly exclude contraceptive coverage from the group health

150. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).
151. *Id.*
152. *Id.* at 701.
153. *Id.* at 689-90.
154. *Id.* at 731.
155. *Id.* at 690-91.
156. *Id.* at 720.
157. *Id.* at 728.
158. *Id.*
159. *Id.* at 730.
160. *Id.*

> insurance coverage provided in connection with the group health plan' and '[p]rovide separate payments for any contraceptive services required to be covered' without imposing 'any cost-sharing requirements . . . on the eligible organization, the group health plan, or plan participants or beneficiaries.'"[161]

Thus, once the accommodation process has been successfully invoked, the health insurance issuer, not the organization, would become responsible for providing coverage for contraceptive services.[162]

In *Zubik v. Burwell*, the accommodation process was challenged under the RFRA on the grounds that compliance with regulation through self-certification was still a violation of religious employers' beliefs.[163] Declining to address the merits, the Supreme Court instead requested that the parties provide briefs addressing whether supplemental coverage for contraceptives could still be provided without religious employers abiding by the accommodation.[164] Despite the parties agreeing that "such an option [was] feasible," no solution was ever reached.[165] The Trump administration responded to the conundrum with new rules that expanded the reach of the religious exemption to include non-profit and for-profit closely held and publicly traded entities; added a moral exemption, permitting objections that were not based on religious grounds; and permitted objectors to stop providing coverage without providing notices or self-certification.[166] The legality of this move by the Trump administration was litigated in *Little Sisters v. Pennsylvania.*[167]

In *Little Sisters*, Pennsylvania and New Jersey sued Trump-era administrative agencies, claiming that the agencies lacked authority to promulgate rules expanding the religious exemptions and that the Administrative Procedures Act (APA) was violated since the typical notice and comment process was circumvented.[168] Upon considering whether the administration's exemptions were lawful, the Court found that the ACA gives HRSA, in particular, "exclusive discretion" to make determinations about preventive screenings and "create exemptions from its own [g]uidelines."[169] Therefore, a statutory grant of rulemaking authority supported the administration's action.[170] The Court also found that the APA notice

161. *Id.* at 731 (quoting 45 C.F.R. § 147.131; 26 C.F.R. § 54.9815-2713A).
162. 45 C.F.R. § 147.131 (2019).
163. Zubik v. Burwell, 578 U.S. 403, 407 (2016).
164. DIMUGNO & GLAD, *supra* note 145; *Zubik*, 578 U.S. at 407.
165. *Zubik,* 578 U.S. at 407.
166. DIMUGNO & GLAD, *supra* note 145; 45 C.F.R. § 147.131 (2018).
167. Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 591 U.S. 657 (2020).
168. *Id.* at 673.
169. *Id.* at 677-78.
170. *Id.* at 677.

requirements were satisfied and ultimately held that the Trump administration's rules were lawfully promulgated.[171]

2. Anticipating Religious Objections to an Infertility Treatment Coverage Mandate.—Whether infertility treatments are added as a new EHB or included within the definition of preventive and wellness services, objections on religious grounds are likely. "[A]ssisted reproduction is totally unacceptable to Roman Catholicism."[172] Most forms of treatment are acceptable for Protestants, Anglicans, Coptic Christians, and Sunni Muslims so long as gamete or embryo donation is not involved.[173] Meanwhile, "[o]rthodox Christians are less strict than Catholic Christians but still refuse third party involvement."[174] It is also telling that in 2022 eight states included religious exemptions within the respective state mandates for infertility treatment coverage.[175]

A benefit gained from the contraceptive mandate cases is that if religious objectors are no longer required to adhere to the accommodation process, the alternative means of serving the government's interest in mandating coverage, as presented in Hobby Lobby, is no longer viable alternatives.[176] Recall that one of the alternative means offered by the *Hobby Lobby* Court is the government assuming the cost of providing the mandated coverage itself.[177] This alternative is more reasonable when it is applied to contraceptives, given that birth control pills, for example, can cost between $0 and $50 a month.[178] Surely, the same cannot be said for procedures that can cost up to $27,000 for the first of multiple attempts at success.[179] The other alternative the *Hobby Lobby* court discussed was the accommodation process, which, at the time, required objectors to self-certify, and the associated insurer would then be required to provide separate payment for the mandated coverage.[180] *Little Sisters* left a gap by shielding the religious exemption from the accommodation process; if insurers have no notice through the accommodation process, separate payment for coverage cannot be provided.[181] This means that the accommodation process can no longer serve as a reliable alternative to serve the government's interest in mandating coverage. This is significant because, in theory, this should mitigate the force of challenges

171. *Id.* at 683-85.

172. H.N. Sallam & N.H. Sallam, *Religious Aspects of Assisted Reproduction*, 8(1) FACTS VIEWS VIS OBGYN 33 (Mar. 28, 2016).

173. *Id.*

174. *Id.*

175. Peipert et al, *supra* note 81, at 3.

176. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014).

177. *Id.*

178. *How Much do Birth Control Pills Cost?*, PLANNED PARENTHOOD (June 29, 2020), https://www.plannedparenthood.org/blog/how-much-do-birth-control-pills-cost#:~:text=Birth%20control%20pills%20cost%20between,local%20Planned%20Parenthood%20health%20center [https://perma.cc/N5E7-8N2H].

179. *See* discussion *supra* Section I.C.

180. *Hobby Lobby,* 573 U.S. at 728.

181. *See* Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 591 U.S. 657 (2020).

to an infertility treatment coverage mandate grounded in the RFRA since the lack-of-less-restrictive means test would be satisfied.[182]

Despite the gap left open by the string of contraceptive mandate litigation, a federal insurance coverage mandate for infertility treatments is unlikely to garner support without a religious exemption.

C. Which Health Plans Are Subject to the EHBs?

Not all health plans are required to provide coverage for EHBs. If a federal mandate is to be enacted by either adding a new EHB to the ACA or including infertility treatment within an existing EHB, it is important to understand which types of health plans would be impacted and which would not.

1. Private Health Plans.—With respect to private insurance, federal statutory law only mandates that individual or small group plans ensure coverage for the EHBs.[183] Individual plans are those for individuals not associated with a group and purchase directly from an insurer.[184] States can define small groups as "those with 50 or fewer individuals … or groups with 100 or fewer individuals."[185] Private large group plans, i.e., those with either greater than fifty-one or greater than 101 individuals, are not required to provide coverage for EHBs.[186] Other private plans exempt from providing coverage for EHBs include self-insured and grandfathered plans.[187] Self-insured plans are provided by organizations setting aside funds to cover medical claims without a third-party insurer.[188] Grandfathered plans are those "in which individuals were enrolled on March 23, 2010, the date the ACA was enacted . . . ."[189] Grandfathered plans can include individual, small group, large group, and self-insured plans.[190]

While large group and self-insured plans are generally exempt from providing coverage for the EHBs, both types of plans are required to provide coverage of preventive services without cost-sharing, along with individual and small group plans.[191] Grandfathered plans, regardless of the type, are exempt from providing coverage of preventive services.[192]

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182. *See Hobby Lobby*, 573 U.S. at 682 (providing an application of the less restrictive means test under the RFRA).

183. 42 U.S.C. § 300gg-6.

184. ROSSO ET AL., *supra* note 143, at 7 n. c.

185. *Id* . at 7 n. f.

186. *Id.* at 5, 7 n. f.

187. *Id.* at 7; VANESSA C. FORSBERG & RYAN J. ROSSO, CONG. RSCH. SERV. R46003, APPLICABILITY OF FEDERAL REQUIREMENTS TO SELECTED HEALTH COVERAGE ARRANGEMENTS 21 (2019).

188. ROSSO ET AL., *supra* note 143, at 7 n. e.

189. DIMUGNO & GLAD, *supra* note 145.

190. FORSBERG & ROSSO, *supra* note 187, at 13.

191. ROSSO ET AL., *supra* note 143, at 5.

192. FORSBERG & ROSSO, *supra* note 187, at 21.

2. Public Health Benefits Through Medicaid.—Medicaid is a joint federal and state program that provides healthcare for low-income populations.[193] The ACA initially provided for expanding Medicaid coverage to adults under 65, including those without dependent children, with incomes less than or equal to 138% of the federal poverty level.[194] In *NFIB v. Sebelius*, the Supreme Court held that Medicaid expansion could not be mandatory for states but retained the expansion as an optional provision for states to elect to implement voluntarily.[195] Adults covered by the forty-one states that have adopted Medicaid expansion are known as the "new adult group," and they receive an alternative benefit plan (ABP), which is "modeled on commercial insurance coverage."[196] ABPs are required to provide coverage for the ACA's EHBs.[197]

V. OFFERING A SOLUTION BASED ON CURRENT LAW

The ACA should be amended so that treatments for infertility and all required medications are included among the EHBs. Including infertility treatments among the ACA's EHBs comes with the advantages of an existing statutory scheme. Such advantages include notice as to which types of plans are required to comply and statutory provisions that have already been litigated; both provide legislators and other interested parties with the benefit of predictability regarding the impact and the challenges to the law. Moreover, including infertility treatments among the EHBs ensures coverage is also available to low-income individuals receiving healthcare through a Medicaid ABP.[198]

Another advantage is that there are at least two paths to infertility treatments becoming one among the EHBs, though following the contraceptive mandate path by including infertility treatment in preventive services may be more strategically sound. To become a net new essential health benefit, infertility treatments, and medications must be recognized as "benefits typically covered by employers."[199] This may become possible if there continues to be an increase

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193. *Medicaid 101*, MEDICAID AND CHIP PAYMENT AND ACCESS COMMISSION, https://www.macpac.gov/medicaid-101/ [https://perma.cc/627V-2USX] (last visited Feb. 2, 2024).

194. *Medicaid Expansion to the New Adult Group*, MEDICAID AND CHIP PAYMENT AND ACCESS COMMISSION (Mar. 30, 2023), https://www.macpac.gov/subtopic/medicaid-expansion/#:~:text=The%20Patient%20Protection%20and%20Affordable,federal%20poverty%20level%20(FPL) [https://perma.cc/AN42-P8TM]; *Status of State Medicaid Expansion Decisions: Interactive Map*, KAISER FAMILY FOUNDATION (May 8, 2024), https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/ [https://perma.cc/ZXV3-D5Z6].

195. Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

196. MEDICAID AND CHIP PAYMENT AND ACCESS COMMISSION, *supra* note 194; *See* KAISER FAMILY FOUNDATION, *supra* note 194 ("To date, 41 states (including DC) have adopted the Medicaid expansion . . . .).

197. 42 C.F.R. § 440.347 (2013).

198. *See* discussion *supra* Section IV.C.

199. Patient Protection and Affordable Care Act (ACA), 42 U.S.C. § 18022.

in infertility treatment coverage through employer plans without a federal mandate,[200] but it is difficult to predict when the required threshold may be satisfied. On the other hand, a more straightforward path may be advocating that fertility treatment is so essential as to be a necessary preventive service, especially with IVF gaining a sociopolitical spotlight. Another significant advantage of the preventive services path over the new EHB path is that all private plans must cover preventive services, while only individual and small group plans must cover other EHBs.[201]

Yet another important advantage arises in the context of EHB-benchmark plans.[202] As a preventive service, coverage for infertility treatments would likely be well-defined under 45 C.F.R. § 147.130, so states would not be entitled to define what is covered under the broad umbrella of "infertility treatments."[203] As such, it would be prudent to encompass all available methods of infertility treatments, including, but certainly not limited to, medication, surgical procedures, IUI, and all forms of ARTs.[204] Additional features of a well-defined infertility treatment benefit include explicit language indicating that the mandate is to cover infertility treatment, not simply to offer such coverage; gender neutrality; impartiality to relationship status and sexual orientation; and uniform standards as to the minimum amount of visits and procedures within a year, for all patients regardless of location.[205]

Lastly, while the force of religious challenges may be weaker in the infertility treatment context than it is in the contraceptive context under current case law, the RFRA is not entirely stripped of its protective qualities.[206] An exemption is necessary to avoid challenges and foster acceptance, but perhaps the fact that *Hobby Lobby*'s lack-least-restrictive-means test is arguably met for infertility treatment coverage calls for reinstating the accommodation process, even if just for infertility treatments.[207]

A. What Is the Cost, and Who Pays?

Perhaps the most apparent counterargument to mandating coverage for infertility treatments as costly as IVF is the cost to businesses and insurers. In 2023, the California senate considered a bill requiring large employers to cover

200. *See* Phengsitthy, *supra* note 133.

201. *See* discussion *supra* Section IV.C.

202. *See* discussion *supra* Section IV.C.

203. *See* discussion *supra* Section IV.A.

204. *See* discussion *supra* Section I.B.

205. *See* discussion *supra* Section III.A; *see also* discussion *supra* Section IV.A.

206. *See* discussion *supra* Section IV.B.

207. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (providing an application of the less restrictive means test under the RFRA); *see also* Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 591 U.S. 657 (2020) (upholding a Trump administration rule allowing religious objectors to bypass the accommodation process).

procedures such as IVF.[208] A spokeswoman for the California Association of Health Plans cited an analysis concluding that such a bill "could increase premiums by as much as $1 billion in the state."[209] The cited analysis may be flawed because it aggregates the impact by state rather than individual employer, as employer surveys do not support such a drastic result. In 2006, a survey of more than 600 employers providing infertility treatment coverage revealed that more than 90% of those surveyed did not see a significant cost increase.[210] Fifteen years later, in 2021, an employer survey conducted by Mercer indicated that "97% of respondents offering infertility treatment have not experienced an increase in their medical costs as a result of providing [infertility treatment] coverage."[211] The impact of costs on Medicaid funds remains to be seen, but perhaps it is reasonable to be hopeful that results may mirror those seen in the private sector.

It is also telling that infertility treatment coverage is getting more attention from legislators, outside of the recent *LePage*-IVF context,[212] in part due to "more employers advocat[ing] for protection of the expensive treatment."[213] Moreover, employers appear to be willing to offer coverage for IVF. Mercer also found that in 2022, 54% of U.S. employers with 20,000 or more workers offered coverage for IVF, an 18% increase from 2015 for such employers.[214] Even among employers with 500 or more workers, 43% offered coverage in 2022.[215] Large tech companies like Google and Apple and law firms like Cooley LLP and Reed Smith have added such coverage to employee health plans to help with recruitment.[216] The fact that employers are steadily recognizing the importance of infertility treatment coverage, whether mandated or not, to the point where it is becoming a perk that draws talent to top U.S. companies demonstrates not only that fear of excessive costs is likely unfounded but also suggests that the need for such coverage is becoming an imperative among our population.

208. Tom Murphy, *Infertility is Common in the US, but Insurance Coverage Remains Limited,* THE ASSOCIATED PRESS (May 16, 2023, 4:41 PM), https://apnews.com/article/ivf-fertility-health-insurance-2052f7a172a271c4e9c038721f28c883 [https://perma.cc/EB7J-7E8U].

209. *Id.*

210. Peipert et al, *supra* note 81, at 5.

211. *Fertility Insurance Coverage Myths and Facts*, RESOLVE, https://resolve.org/learn/financial-resources-for-family-building/insurance-coverage/fertility-insurance-coverage-myths-and-facts/ [https://perma.cc/M6Q9-8TDJ] (last visited Feb. 2, 2024).

212. *See* discussion *supra* Introduction.

213. *See* Phengsitthy, *supra* note 133.

214. Murphy, *supra* note 208.

215. *Id.*

216. *See* Phengsitthy, *supra* note 133.

CONCLUSION

Infertility confronts its victims with an array of challenges. Suffering from infertility is fatiguing enough on one's mental health, and the mental and emotional tolls are only compounded by the excessive costs of treatments, which cause financial stress and setbacks.[217] Hidden costs quickly add up,[218] leaving many patients in debt; those who do not have the creditworthiness to attain the financing required to undergo treatment are simply left to hope for a conception miracle. Even for patients who can afford the costs of IVF without financing, significant financial losses may turn out to be all for naught if all cycles are unsuccessful, absent eligibility for a package and refund program.[219] On top of the financial and emotional stress attendant to infertility, patients now fear that their reproductive rights are under threat by today's post-*Dobbs* political climate.[220]

This Note argued that coverage for costly infertility treatment should be mandated at the federal level by including such treatment among the essential health benefits under the Patient Protection and Affordable Care Act. Congress has an opportunity to reinforce existing access to infertility treatment, ensure the long-term preservation of the United States citizenry and workforce, and expand access to more of those in need of costly treatment, including a portion of the low-income population.

While the law has a pivotal role in defining potential solutions to the overbearing costs of infertility treatment, at the core, it is more than a legal issue; it is an issue rooted in humanity and compassion for those seeking to fulfill a dream that can seem so out of reach and out of their control.[221] Commitment to such humanity was exhibited by the Alabama state legislators who acted quickly to protect treatment for their constituency. Even if federal law does not allow for the most perfect universal solution, many Americans would be in a much better position to realize their goals of conception with a federal coverage mandate in place.

At the end of the day, the full spectrum of reproductive healthcare, including infertility treatments, should be widely accessible, lawful, and affordable.[222]

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217. CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 37.

218. BUNDL, *supra* note 34.

219. *See* discussion *supra* Section III.C.

220. *See supra* Introduction.

221. *See* Klipstein & Collins, *supra* note 39, at 821 ("There is a moral imperative to overcome these barriers . . . from the perspective of compassion for those with a disease, condition, or status that prevents them from creating a family . . . .").

222. Faculty Advisor Notes from Aila Hoss, Assoc. Professor of L., Ind. Univ. Robert H. McKinney Sch. of L., to author (Mar. 25, 2024) (on file with author).