

Spring 2019

Using ART to Make a Baby: How Rhode Island's Insurance Coverage Mandate is Preventing Same-Sex Couples from Having Biological Children

Carla Centanni

J.D. Candidate 2020, Roger Williams University School of Law

Follow this and additional works at: https://docs.rwu.edu/rwu_LR

 Part of the [Constitutional Law Commons](#), [Fourteenth Amendment Commons](#), and the [Law and Gender Commons](#)

Recommended Citation

Centanni, Carla (2019) "Using ART to Make a Baby: How Rhode Island's Insurance Coverage Mandate is Preventing Same-Sex Couples from Having Biological Children," *Roger Williams University Law Review*: Vol. 24 : Iss. 2 , Article 5.
Available at: https://docs.rwu.edu/rwu_LR/vol24/iss2/5

This Notes and Comments is brought to you for free and open access by the School of Law at DOCS@RWU. It has been accepted for inclusion in Roger Williams University Law Review by an authorized editor of DOCS@RWU. For more information, please contact mwu@rwu.edu.

Using ART to Make a Baby: How Rhode Island's Insurance Coverage Mandate is Preventing Same-Sex Couples from Having Biological Children

Carla Centanni*

INTRODUCTION

Consider the following hypothetical: Paula and Mary are a lesbian couple from Rhode Island who have been married since 2017.¹ Just like their opposite-sex couple neighbors, Sarah and Eric, Paula and Mary decide that they want to start a family. The two couples have one thing in common: neither can start a family without the help of assisted reproductive technology (ART). A single cycle of treatment per each couple will cost approximately \$11,000 to \$12,000.² However, because the success rate is 15.6% per cycle,³ and because the highest success rate of becoming

* Candidate for Juris Doctor, Roger Williams School of Law, 2020; B.A., Hartwick College, 2017. A special thank you to Professor Brittany Raposa for her advice and guidance throughout the writing process and thank you to my family and friends for all of your support.

1. The following example is based on a fictional couple created by the author.

2. *Cost of Fertility Treatment for Women and Men National Averages, Ranges—And Our Prices*, ADVANCED FERTILITY CTR. OF CHI. (2017), <https://www.advancedfertility.com/fertility-treatment-costs.htm> [<https://perma.cc/Y448-LGRX>] [hereinafter *Cost of Fertility Treatment*]. This is an average cost of in vitro fertilization, a common infertility treatment. A further explanation and breakdown of different fertility treatments will be discussed later in this Comment. See *infra* section I.B.

3. *In Vitro Fertilization (IVF) Success Rates*, CTR. FOR HUM. REPROD., <https://www.centerforhumanreprod.com/about/pregnancyrates/>

pregnant occurs after six to nine cycles,⁴ the couples will most likely face a minimum cost of \$66,000 for ART. The difference between the two couples is that Sarah and Eric will receive insurance coverage for their treatments, while Paula and Mary will have to pay out-of-pocket because Rhode Island's Infertility Insurance Mandate (Infertility Insurance Mandate) does not apply to same-sex couples.⁵ This law prevents Paula and Mary from receiving the same coverage as their neighbors because they are a same-sex couple and, therefore, will never be classified as infertile, which the law requires in order to have these costs covered by insurance.⁶

The Infertility Insurance Mandate states that insurance companies providing coverage for pregnancy must also provide coverage for the diagnosis and treatment of infertility.⁷ Even

[<https://perma.cc/QZ7Q-SHL8>] (last updated Oct. 4, 2018).

4. Andrew D. A. C. Smith et al., *Live-Birth Rate Associated With Repeat In Vitro Fertilization Treatment Cycles*, JAMA (Dec. 2015), <https://jamanetwork.com/journals/jama/fullarticle/2478204> [<https://perma.cc/7P8A-EF5S>].

5. 27 R.I. GEN. LAWS § 27-19-23 (2017). For the full text of the Infertility Insurance Mandate see *infra* note 7.

6. It was for this exact reason four lesbians brought an action in New Jersey. See *Krupa v. N.J. State Health Benefits Comm'n*, No. 2:16-cv-4637-SDW-LDW, 2018 WL 513208 (D. N.J. Jan. 23, 2018). In August of 2016, four lesbians brought an action in New Jersey under the New Jersey statute that governed insurance coverage for infertility treatments. *Id.* at *5–8. The plaintiffs argued that the New Jersey statute was violating the individuals' Due Process and Equal Protection rights. *Id.* at *8. Ultimately, the case was dismissed under governmental immunity and there was no decision made as to the constitutionality of the statute. See *id.* at *14–15. However, this lawsuit did spark a change in the New Jersey legislation to expand to include same-sex couples. See Susan K. Livio, *Christie Expands Public Worker Fertility Insurance Coverage to Include Lesbians*, NJ.COM (May 2, 2017), https://www.nj.com/politics/index.ssf/2017/05/christie_oks_fertility_insurance_coverage_for_lesb.html [<https://perma.cc/5PXZ-VX88>].

7. 27 R.I. GEN. LAWS § 27-19-23. In full, the Infertility Insurance Mandate provides the following:

(a) Any nonprofit hospital service contract, plan, or insurance policies delivered, issued for delivery, or renewed in this state, except contracts providing supplemental coverage to Medicare or other governmental programs, that includes pregnancy-related benefits, shall provide coverage for medically necessary expenses of diagnosis and treatment of infertility for women between the ages of twenty-five (25) and forty-two (42) years and for standard fertility-preservation services when a medically necessary medical treatment may directly or indirectly cause iatrogenic infertility to a covered person. To the extent that a nonprofit hospital service corporation provides reimbursement for a test or procedure used in the diagnosis or treatment of conditions other than infertility, those tests and

though the statute has been amended throughout the years, the Infertility Insurance Mandate remains unconstitutional because of its disparate treatment of same-sex couples as opposed to opposite-sex couples. Same-sex couples will be denied coverage for these expensive treatments because, under the statute, they can never qualify as infertile, which is required for insurance coverage.⁸ The Infertility Insurance Mandate defines “infertility” as a “condition of an otherwise presumably healthy individual who is unable to conceive or sustain a pregnancy during a period of one year.”⁹ As such, same-sex couples are “structurally” infertile; they cannot conceive naturally and are dependent on ART. This type of infertility is not included within the definition of infertility under the Infertility Insurance Mandate. The statute’s definition of infertility sets out a standard that, when applied, excludes same-sex couples from obtaining insurance coverage, thus depriving them of the same rights afforded to opposite-sex couples. Therefore, the Infertility Insurance Mandate is unconstitutional because it

procedures shall not be excluded from reimbursement when provided attendant to the diagnosis and treatment of infertility for women between the ages of twenty-five (25) and forty-two (42) years; provided, that a subscriber copayment, not to exceed twenty percent (20%), may be required for those programs and/or procedures the sole purpose of which is the treatment of infertility.

(b) For purposes of this section, “infertility” means the condition of an otherwise presumably healthy individual who is unable to conceive or sustain a pregnancy during a period of one year.

(c) For purposes of this section, “standard fertility-preservation services” means procedures consistent with established medical practices and professional guidelines published by the American Society for Reproductive Medicine, the American Society of Clinical Oncology, or other reputable professional medical organizations.

(d) For purposes of this section, “iatrogenic infertility” means an impairment of fertility by surgery, radiation, chemotherapy, or other medical treatment affecting reproductive organs or processes.

(e) For purposes of this section, “may directly or indirectly cause” means treatment with a likely side effect of infertility as established by the American Society for Reproductive Medicine, the American Society of Clinical Oncology, or other reputable professional organizations.

(f) The health insurance contract may limit coverage to a lifetime cap of one hundred thousand dollars (\$100,000).

Id.

8. *See id.* § 27-19-23(b).

9. *Id.*

violates a same-sex couple's Due Process and Equal Protection rights under the Fourteenth Amendment. To correct this unconstitutional statute, the Rhode Island General Assembly should amend the Infertility Insurance Mandate to include same-sex couples in the statutory definition of infertility.

Part I of this Comment provides a background on same-sex reproductive rights, including the different options a same-sex couple has for reproduction, along with the history of the Infertility Insurance Mandate and how it compares to other states' statutes that include same-sex couples. Specifically, this Part points out that other states' statutes explicitly include same-sex couples, which provides examples for Rhode Island to follow. Part II analyzes how the Infertility Insurance Mandate violates same-sex couples' Due Process and Equal Protection rights, and thus is unconstitutional. Part II will also propose statutory language that should be added to the Infertility Insurance Mandate, with similar language used in other state statutes that explicitly include same-sex couples in their definition of infertility. Finally, Part III concludes that the Infertility Insurance Mandate must be changed to include same-sex couples, arguing that they are constitutionally entitled to the same opportunities to have biological children that are provided to opposite-sex couples.

I. THE VARIOUS ART OPTIONS AND THE CONSEQUENCES THE INFERTILITY INSURANCE MANDATE HAS ON SAME-SEX COUPLES

A. *Where Same-Sex Reproductive Rights Stand Today*

As marriage rights have expanded for same-sex couples since the United States Supreme Court holding in *Obergefell v. Hodges*, it follows that same-sex reproductive rights should be expanding as well.¹⁰ The decision in *Obergefell* is a crucial link between the reproductive rights previously awarded to opposite-sex couples and those that should apply to same-sex couples.¹¹ In *Obergefell*, the Supreme Court equated the right to marry for same-sex couples to the right to procreation when it said: "[l]ike choices concerning contraception, family relationships, *procreation*, and childrearing,

10. See 135 S. Ct. 2584 (2015).

11. See Kristiana P. Boutell, Note, *Redefining Infertility After Obergefell v. Hodges: Why the Fourteenth Amendment Warrants Infertility Insurance Coverage for Same-Sex Couples to Achieve Biological Parenthood*, 595 MICH. ST. L. REV. 597, 652 (2017).

all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.”¹² When considering the reproductive rights of same-sex couples, the language of *Obergefell* makes it clear that procreation is a “correlating privilege of marriage,” and therefore same-sex couples inherently have the same reproductive rights as an opposite-sex couple.¹³

The Supreme Court held in *Skinner v. Oklahoma*, that sterilization as a criminal punishment was unconstitutional because even criminals have the right to procreation.¹⁴ Since this decision in 1942, it has been understood that “[m]arriage and procreation are fundamental to the very existence and survival of the race.”¹⁵ Throughout the years, reproductive rights have been equated to the right to privacy, with the discussion focused mainly on women’s reproductive rights.¹⁶ Through this evolution of case law and the development of the “right to privacy,” women have been granted the rights to avoid pregnancies.¹⁷ Therefore, it logically follows that individuals also have the right to choose when they want to bear a child.¹⁸

With same-sex couples, the problem lies in how to protect their right to choose when they want to have their own child. Same-sex couples are “structurally infertile,” meaning that they cannot naturally conceive through unprotected sexual intercourse, and instead must rely on ART to produce a biological child.¹⁹ This means they are essentially in the same position as an infertile opposite-sex couple.²⁰ Supreme Court precedent has established that fertile individuals clearly have a right to procreate, so the question becomes, as one commenter put it: “[i]f fertile persons

12. *Obergefell*, 135 S. Ct. at 2599 (emphasis added).

13. Boutell, *supra* note 11, at 652.

14. *See* 316 U.S. 535, 538 (1942).

15. *Id.* at 541.

16. Jill Lepore, *To Have and to Hold*, NEW YORKER (May 18, 2015), <https://www.newyorker.com/magazine/2015/05/25/to-have-and-to-hold> [<https://perma.cc/GE9X-7B33>].

17. *See* *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (allowing the right to use contraceptives); *see also* *Roe v. Wade*, 410 U.S. 113, 153 (1973) (allowing the right to abortion).

18. *See* *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (allowing the right to “bear or beget” a child).

19. Boutell, *supra* note 11, at 598.

20. *See id.* Heterosexual infertility is referred to as medical infertility; this is how the majority of the public understands the definition of infertility. *Id.*

possess a right to reproduce, shouldn't infertile persons be extended the same rights through the vehicle of ARTs?"²¹ The following section will define the different ART options available to same-sex couples, which are their only viable options to have the same reproductive rights that the Supreme Court affords to an opposite-sex couple.

B. *The Different Forms of ART*

ART is a process that assists infertile individuals. Same-sex couples are dependent on ART because, as stated above, they are structurally infertile.²² As a solution, there are three forms of ART that a same-sex couple could use to have a biological child: (1) in vitro fertilization (IVF); (2) intrauterine insemination (IUI); and (3) gestational surrogacy.

IVF is a procedure in which the doctor fertilizes the egg with a sperm outside of the body and transfers the embryo into the female's uterus.²³ IVF, however, does not always produce the highest success rates. IVF has a success rate of 15.6% after one cycle,²⁴ which means that most couples who go through this treatment will require more than one cycle. A recent study showed that IVF is most successful after six to nine cycles,²⁵ with an average cost of \$11,500 per cycle.²⁶ Thus, a same-sex couple without insurance coverage could potentially pay more than \$103,500 to conceive a child using IVF.

A second ART option for same-sex couples is IUI, also known as artificial insemination. This procedure is less expensive and less intense than IVF. During this procedure, the doctor places the sperm directly into the uterus in order to increase the chances of the sperm fertilizing the egg.²⁷ Generally, the female is given

21. Radhika Rao, *Conflicting Interests in Reproductive Autonomy and Their Impact on New Technologies: the Personal Right: Privacy, Property, of Child?: Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1463 (2008).

22. Boutell, *supra* note 11, at 598.

23. See, e.g., *In Vitro Fertilization (IVF)*, CTR. FOR HUM. REPROD. <https://www.centerforhumanreprod.com/services/infertility-treatments/ivf/howitworks/> [<https://perma.cc/U2XT-2B8H>] (last updated Nov. 15, 2014).

24. *In Vitro Fertilization (IVF) Success Rates*, *supra* note 3.

25. Andrew D. A. C. Smith et al., *supra* note 4.

26. *Cost of Fertility Treatment*, *supra* note 2.

27. *Artificial Insemination for Infertility, Intrauterine Insemination—IUI*, ADVANCED FERTILITY CTR. OF CHI. (2017), <https://www.advancedfertility.com/insem.htm> [<https://perma.cc/UL3U-B53S>].

rounds of medication before the procedure to increase the amount of eggs released.²⁸ The cost of IUI can range from \$300 to \$800, plus the cost of the medication given to the female before the procedure.²⁹ Depending on the drugs administered, the success rate for a single insemination is approximately ten to fifteen percent.³⁰ A doctor will usually only attempt IUI three times before moving on to a more accurate procedure, such as IVF.³¹

A third ART option is gestational surrogacy, more commonly known as surrogacy.³² All male-male couples need to utilize this form of ART, in addition to IVF or IUI, because a surrogate female would need to be impregnated and carry the child until birth.³³ The cost of surrogacy can range anywhere from \$65,000 to \$100,000, including the associated costs such as legal fees, agency fees, surrogate mother compensation, and the cost of the fertilization.³⁴ As far as success rates go, a same-sex couple using surrogacy would need to use some form of ART in order to impregnate the surrogate.³⁵ Couples that use surrogacy risk an even higher cost if the IVF or IUI procedures require more than one cycle to be successful. Surrogacy, just like the two other forms of ART, has its own risks, which can be discouraging to couples who know they must face these costs out-of-pocket. As the following section will discuss, the Infertility Insurance Mandate has been amended throughout the years to expand the range of people who receive insurance coverage for these expensive treatments. However, there has yet to be a change in the Infertility Insurance Mandate that would also include same-sex couples.

C. *How the Infertility Insurance Mandate Has Changed*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Gestational Surrogacy: Definition & Explanation*, FERTILITY SOLUTIONS, <https://www.fertilitysolutionsne.com/treatment-options/gestational-surrogacy> [<https://perma.cc/XLD6-YSJX>] (last visited Apr. 7, 2019).

33. *Id.* Of course, this can also be used for a female-female couple, but if medically capable, one of the female partners could carry the child in order to cut down on costs of the already expensive treatments. *Id.*

34. *Id.*

35. *See id.*

Throughout the Years

The year 1989 not only brought Rhode Island's first "test-tube baby,"³⁶ but also saw the enactment of the first of many versions of the Infertility Insurance Mandate.³⁷ Currently, the statute states that if a person's insurance plan provides coverage for pregnancy, the plan "shall provide coverage for medically necessary expenses of diagnosis and treatment of infertility for women between the ages of twenty-five (25) and forty-two (42) . . . for standard fertility-preservation services"³⁸ The statute allows an insurance company to limit coverage to a "lifetime cap" of \$100,000.³⁹ The statute does not define the treatments that are required to obtain coverage, but it seems logical that at least IVF or IUI would fall into the category of "medically necessary" treatments for infertility.⁴⁰

The initial version of the statute required an insurance company to provide coverage for "medically necessary expenses of diagnosis and treatment of infertility" only if the plan provided coverage for pregnancy.⁴¹ Originally, the statute defined infertility as "the condition of an otherwise presumably healthy married individual who is unable to conceive or produce conception during a period of one (1) year."⁴² The general public met the enactment of the Infertility Insurance Mandate with mixed approval. Insurance companies urged against passage because the more expansive the mandate, the more premiums would increase.⁴³ Alternatively, infertile couples were hopeful the law would pass, as they seemed to be the focus for the purpose of passing this

36. Douglas R. Riggs, *First Baby Born in R.I. In-Vitro Program*, PROVIDENCE J., Mar. 5, 1989, at A-01. "Test-tube baby" is a term commonly used to refer to a child born through IVF. *Id.*

37. H.B. 6373, 1989 Jan. Sess. (R.I. 1989).

38. 27 R.I. GEN. LAWS § 27-19-23.

39. *Id.*

40. Meghan Boone, *It's Only Covered if You Keep It: The Legality of Surrogacy Pregnancy Exclusions in Health Insurance Policies*, 14 GEO. J. GENDER & L. 677, 686 (2013). Although it is the only option for a male same-sex couple to have a biological child, it might not be considered "medically necessary" under the Rhode Island statute. *See id.* This is its own issue outside the scope of this Comment.

41. H.B. 6373.

42. *Id.* This definition has since changed. *See infra* text accompanying note 49.

43. Kevin Sullivan, *Bill Would Compel Insurers to Cover In Vitro Fertilization*, PROVIDENCE J., Mar. 11, 1989, at C-01.

legislation.⁴⁴ Deeming the original version of this statute the “Family Building Act,” the Rhode Island General Assembly heard testimony from infertile individuals about how much this bill would help the struggle they had been going through because of the high-priced cost of treatment.⁴⁵

Small changes continued to be made to the Infertility Insurance Mandate.⁴⁶ The next big change to the statute occurred in 2007 when the Rhode Island General Assembly sought to eliminate the requirement that “infertile” individuals be married in order to receive coverage.⁴⁷ Lawmakers passed a bill which effectuated the removal of this requirement, but the Governor quickly vetoed the bill.⁴⁸ In a letter to the Speaker of the House of Representatives, the Governor expressed concerns that allowing this expansion to include unmarried women was not only “unnecessary and unwarranted, and allows for even further creeping of cost in our health care system,” but also “force[d] health insurance companies to subsidize out-of-wedlock births.”⁴⁹ With the veto came cries of dissatisfaction from the public.⁵⁰ Many called for all women to receive fertility treatments regardless of their marital status; one woman stated, “the word ‘married’ makes what would be a compassionate mandate simply unjust.”⁵¹

44. *Id.*

45. *Id.*

46. See H.B. 7120, 2005–06 Leg. Sess. (R.I. 2005) (set the maximum age at forty years old and increased the prescribed period for how long a married couple must attempt to conceive before receiving coverage); see also S.B. 453, 2007 Jan. Sess. (R.I. 2007) (increased the maximum age for coverage to forty-two years old and decreased the prescribed period for conception down to one year).

47. See H.B. 5251, 2007 Legis. Bill Hist. (R.I. 2007) (vetoed) [hereinafter Governor’s Message]; see also Lisa Vernon-Sparks, *Expanded Infertility Coverage Vetoed*, PROVIDENCE J., July 20, 2007, at B-01.

48. Vernon-Sparks, *supra* note 47. The Governor of Rhode Island at this time was Donald Carcieri. *Id.*

49. Governor’s Message, *supra* note 47.

50. See Rebecca Laptook, *Letters to The Editor*, PROVIDENCE J., May 12, 2017, at A14.

51. *Id.*

If a single woman had cancer or any other documented medical issue, she would not be denied coverage based on her marital status, or her gender, sexual orientation, race or religion. In this day and age of striving for equality, this state law is in immediate need of reevaluation and reform.

Id.

Despite numerous attempts, the marriage requirement was not repealed until 2017.⁵² This long-awaited amendment now allows for unmarried women to receive insurance coverage for infertility treatments.⁵³ Coinciding with the amendment to remove the marriage requirement from the Infertility Insurance Mandate's definition of infertility, the Rhode Island General Assembly expanded coverage under the statute, bringing it to its current version.⁵⁴ This additional component to the Infertility Insurance Mandate provides coverage for "standard fertility-preservation" for women who are at risk of becoming infertile due to medical treatments such as chemotherapy or radiation, also known as "iatrogenic infertility."⁵⁵ Even though the removal of the marriage requirement was ten years in the making, the 2017 amendment to the Infertility Insurance Mandate was most notable because it effectuated the inclusion of women with iatrogenic infertility.⁵⁶ After the 2017 amendment, Rhode Island became the first state in the country to mandate coverage for both ART for women who are infertile under the statute's definition and for fertility preservation procedures for women with iatrogenic infertility.⁵⁷

Each amendment to the Infertility Insurance Mandate expanded the reach of the statute, providing insurance coverage to a wider range of individuals. Unfortunately, the definition of infertility under the Infertility Insurance Mandate still deprives same-sex couples of benefits that are provided to unmarried heterosexual women and opposite sex-couples.

D. *The Infertility Insurance Mandate's Definition of Infertility and What It Means for Same Sex Couples*

As it stands, the Infertility Insurance Mandate defines infertility as "the condition of an otherwise presumably healthy individual who is unable to conceive or sustain a pregnancy during

52. H.B. 6170, 2017 Jan. Sess. (R.I. 2017).

53. *Id.*

54. *See id.*; *see also* 27 R.I. GEN. LAWS § 27-19-23.

55. § 27-19-23(c).

56. *See, e.g., RI Becomes First State to Explicitly Require Coverage for Fertility Preservation for At-Risk Patients*, WOMEN AND INFANTS (July 31, 2017), <http://www.womenandinfants.org/news/fertility-preservation-legislation.cfm> [<https://perma.cc/MX9D-W5SC>]; *see also* Lynn Ardit, *RI News*, PROVIDENCE J., Aug. 2, 2017, at A6.

57. *RI Becomes First State to Explicitly Require Coverage for Fertility Preservation for At-Risk Patients*, *supra* note 56; Ardit, *supra* note 56.

a period of one year.”⁵⁸ Therefore, under the statute, a woman must attempt to conceive for one full year before she can receive insurance coverage.⁵⁹ For an opposite-sex couple, this can be accomplished at no cost through unprotected intercourse. However, a same-sex couple does not have that option if they wish to conceive a child with each other. Instead of being considered medically infertile, same-sex couples are considered structurally infertile.⁶⁰ Structurally infertile means that in order for a couple to reproduce, they must do so through a manner other than sexual intercourse because biologically they cannot do so.⁶¹ Therefore, same-sex couples are not able to reproduce without ART, but a same-sex couple cannot receive coverage for those procedures because they are unable to satisfy the statutory definition of infertility. Thus, this section of the Infertility Insurance Mandate must be amended to include same-sex couples.

E. *How the Infertility Insurance Mandate Compares to Those in Other States*

Fifteen states mandate insurance coverage for infertility treatments.⁶² These statutes vary in restrictions and requirements.⁶³ In comparison, Rhode Island’s Infertility Insurance Mandate falls in the middle between the most restrictive statutes and statutes that expressly allow for same-sex couples to receive coverage.⁶⁴ In reviewing the state statutes that mandate insurance coverage for infertility treatments, the most important difference is how each state defines infertility. There is a clear dichotomy in how states define infertility; states statutorily define infertility to either exclude same-sex couples by setting an unattainable standard—like Rhode Island—or explicitly include same-sex couples.⁶⁵ Thus, because the exclusion of same-sex couples is unconstitutional as applied, Rhode Island should

58. 27 R.I. GEN. LAWS § 27-19-23(b).

59. *Id.*

60. *See supra* text accompanying notes 19–21.

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

62. *State Laws Related to Insurance Coverage for Infertility Treatment*, NCSL (Apr. 27, 2018), <http://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx#1> [<https://perma.cc/K8NS-DZBC>].

63. *See id.*

64. *See id.*

65. *See supra* text accompanying note 62.

explicitly include same-sex couples as other states do.

The Infertility Insurance Mandate is not as restrictive or outright exclusive as other states. Some states, such as Hawaii, limit coverage to only a single round of IVF and still contain the marriage requirement that Rhode Island repealed in 2017.⁶⁶ Additionally, unlike other states' statutes, Rhode Island's statute does not explicitly require that an individual conceive through "unprotected sexual intercourse." For example, under Illinois's statute, infertility is defined as "the inability to conceive after one year of unprotected sexual intercourse."⁶⁷ Where the Illinois statute excludes same-sex couples by setting a standard that a same-sex couple clearly cannot meet, Rhode Island's statute is more discreet, but still is discriminatory when applied to same-sex couples. Conversely, two states, California and Maryland, expressly include same-sex couples in their statutes.⁶⁸

1. *California's Statute Expressly Includes Same-Sex Couples in Its Definition of Infertility*

California expressly includes same-sex couples in its statute by listing specific groups of people against whom insurance companies cannot discriminate.⁶⁹ California is unique because the statutory definition of infertility still contains the "heteronormative language" that other states like Illinois have.⁷⁰ The California statutory definition of infertility is "the inability to conceive a pregnancy or to carry a pregnancy to a live birth after a year or more of regular sexual relations without contraception."⁷¹ Instead of amending the definition of infertility, California, in 2013, added language that states, "coverage for the treatment of infertility shall be offered and, if purchased, provided without discrimination on the basis of . . . sexual orientation."⁷² A simple change like this could solve the huge problem that the Rhode Island statute is causing for

66. HAW. REV. STAT. § 431:10A-116.5 (2005); Valarie Blake, *It's an ART not a Science: State-Mandated Insurance Coverage of Assisted Reproductive Technologies and Legal Implications for Gay and Unmarried Persons*, 12 MINN. J. L. SCI. & TECH 651, 670 (2011).

67. 215 ILL. COMP. STAT. ANN. § 5/356m(2)(c) (West 2008); Blake, *supra* note 66, at 667.

68. Boutell, *supra* note 11, at 629.

69. CAL. HEALTH & SAFETY CODE § 1374.55(g) (West 2013).

70. Boutell, *supra* note 11, at 630–31.

71. CAL. HEALTH & SAFETY CODE § 1374.55(b).

72. *Id.* § 1374.55; Boutell, *supra* note 11, at 630.

same-sex couples. Amending the Infertility Insurance Mandate to include language similar to California's statute would make Rhode Island's statute constitutional without having to amend the definition of infertility, especially because the Infertility Insurance Mandate's definition of infertility does not explicitly require the inability to conceive through natural intercourse, which is more inclusive than the California statute.

2. *Maryland Makes it "Impermissible" to Exclude Same-Sex Couples from Receiving Insurance Coverage for ART*

In 2015, when Maryland amended its statute for infertility insurance coverage, it did not change its definition of infertility.⁷³ Instead, the Maryland Insurance Code set out "impermissible requirements" that prohibited insurance companies from setting certain requirements that would discriminate against same-sex couples.⁷⁴ Specifically, the statute states a company cannot

require a condition of . . . coverage, for a patient who is married to an individual of the same sex: (1) that the patient's spouse's sperm be used in the covered treatments or procedures; or (2) that the patient demonstrates infertility exclusively by means of a history of unsuccessful heterosexual intercourse.⁷⁵

Due to the structure of the Infertility Insurance Mandate, the Rhode Island General Assembly would have to make substantial changes to its statute to add Maryland's impermissible requirements and, thus, it is not as simple of a solution as the California method, which would simply require the legislature to add language barring discrimination based on sexual orientation.

3. *New Jersey Has Different "Scenarios" in Which Same-Sex Couples Would Qualify for Insurance Coverage of ART*

New Jersey is the third state that has amended its definition of infertility, but only after a lawsuit sparked the need for new legislation.⁷⁶ In 2016, four lesbians sued the state of New Jersey

73. Boutell, *supra* note 11, at 631–32.

74. *Id.*

75. MD. CODE ANN., INS. § 15-810(b) (West 2016).

76. See *Krupa v. N.J. State Health Benefits Comm'n*, No. 2:16-cv-4637-SDW-LDW, 2018 WL 513208 (D. N.J. Jan. 23, 2018).

arguing that its statute was unconstitutional because it did not account for lesbian couples who rely on sperm donors.⁷⁷ New Jersey has since changed its definition to include a list of different “scenarios” in which an individual would be able to receive coverage. It appears that there are two scenarios that lesbian couples could fall into: (1) “A female without a male partner and under 35 years of age who is unable to conceive after 12 failed attempts of intrauterine insemination under medical supervision”; or (2) “A female without a male partner and over 35 years of age who is unable to conceive after six failed attempts of intrauterine insemination.”⁷⁸ New Jersey was compelled to change its statute due to the public backlash it received for originally excluding same-sex couples from receiving insurance coverage. Rhode Island should learn from New Jersey and be proactive to change its statute before a lawsuit is filed. The following section will propose new language for the Rhode Island statute, along with the reasons why it needs to change in the first place.

II. THE INFERTILITY INSURANCE MANDATE IS UNCONSTITUTIONAL WHEN APPLIED AND SHOULD BE AMENDED TO EXPLICITLY INCLUDE SAME-SEX COUPLES

Article I, Section 2 of the Rhode Island State Constitution is the state’s version of the Due Process and Equal Protection clauses.⁷⁹ When this section was drafted, both gender and race were specifically included as classes with guaranteed protection, but sexual orientation was not because the legislative committee in charge of drafting these provisions did not interpret the word “gender” to include sexual orientation.⁸⁰ The Rhode Island Supreme Court has stated that, when analyzing Article I, Section 2, the court will refer to the same analysis a federal court would use in analyzing the Fourteenth Amendment of the United States Constitution.⁸¹ The following analysis will mirror the analysis used by courts when evaluating the United States Constitution,

77. Livio, *supra* note 6.

78. N.J. REV. STAT. § 17:48-6x(a)(4)–(5) (2017).

79. R.I. CONST. art. I, § 2.

80. PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., *THE RHODE ISLAND STATE CONSTITUTION* 56–57 (2011).

81. *See Kleczek v. R.I. Interscholastic League, Inc.*, 612 A.2d 734, 738 (R.I. 1992).

which is simply a baseline or minimum law that can be enforced.⁸² Rhode Island, like all states, is allowed to implement stricter laws that guarantee its citizens further protections so long as these laws do not violate the United States Constitution.⁸³ For example, in 2001, Rhode Island provided additional protections to homosexual individuals by enacting a law that safeguards homosexual individuals, along with a long list of other classifications, from discrimination when seeking employment.⁸⁴ Therefore, concerning the Infertility Insurance Mandate, Rhode Island could provide additional protections to same-sex couples without a court's ruling that the statute is unconstitutional.

A. *The Infertility Insurance Mandate Violates the Due Process Clause of the Fourteenth Amendment*

The right to procreate and the decision to reproduce has long been grounded in an individual's right to privacy.⁸⁵ Through the United States Supreme Court's classification of this right to privacy, the right to reproduce is a fundamental right guaranteed to the citizens of the United States.⁸⁶ An individual's constitutional right to Due Process under the Fourteenth Amendment can be violated in two different ways.⁸⁷ Procedural due process guarantees that the procedure a government uses to enact laws is not defective, and substantive due process guarantees that the government cannot deprive someone of his or her fundamental

82. See Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1398 (2006).

83. See *id.*

84. See 28 R.I. GEN LAWS § 28-5-3 (2001) ("It is declared to be the public policy of this state to foster the employment of all individuals in this state in accordance with their fullest capacities, regardless of their race . . . sexual orientation, gender identity or expression, . . . and to safeguard their right to obtain and hold employment without such discrimination.").

85. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

86. See Rao, *supra* note 21, at 1462.

87. *Harrah Indep. Sch. Dist. v. Martin*, 440 U.S. 194, 197 (1979) ("[T]he Due Process Clause of the Fourteenth Amendment not only accords procedural safeguards to protected interests, but likewise protects substantive aspects of liberty against impermissible governmental restrictions.").

rights.⁸⁸

The Infertility Insurance Mandate violates a same-sex couple's substantive due process rights because it takes away their fundamental right to procreate. Determining that the Infertility Insurance Mandate violates substantive due process is guided by three factors set out by the United States Supreme Court: first, the type of private interest that is being affected; second, the risk of deprivation of this private interest; and third, the government's interest in justifying their otherwise unconstitutional action.⁸⁹ Courts employ a strict scrutiny standard when applying these factors to determine whether the government is depriving an individual of his or her fundamental rights—like the right to procreate.⁹⁰ Under strict scrutiny, which is the most stringent standard of the judicial reviews, the government has a “heavy burden of justification,” and the discriminatory law must be narrowly tailored to achieving the governmental interest.⁹¹ The Infertility Insurance Mandate restricts same-sex couples' fundamental right to procreate and therefore the statute is subject to strict scrutiny.⁹²

When examining the first factor—the type of private interest that is being affected—a court must determine if that private interest is a fundamental right. Supreme Court precedent makes it clear that the right to procreate is a fundamental liberty, which is the type of private interest that triggers a substantive due process analysis.⁹³ In *Skinner*, when deciding on the law that allowed for sterilization as a criminal punishment, the Court stated that the law “deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.”⁹⁴ This concept was reinforced in *Eisenstadt v. Baird*, where the Court recognized the right of both married and unmarried individuals to purchase contraceptives.⁹⁵ In that case, the Court said that the decision to “bear or beget a child” was an individual fundamental right and because of this, a person should be free from any

88. See *Washington v. Glucksberg*, 521 U.S. 702, 755–56 (1997).

89. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

90. See *Zablocki v. Redhail*, 434 U.S. 374, 381 (1978).

91. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16–17 (1973).

92. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

93. *Id.*

94. *Id.* at 536.

95. 405 U.S. 438, 446 (1972).

governmental intrusion into the choice to bear a child.⁹⁶ Therefore, because Rhode Island is denying insurance coverage for same-sex couples, it is infringing on their substantive due process right to choose “to bear” a biological child, making the law unconstitutional.⁹⁷

In addition to the clear rulings from the Supreme Court, indicating that the fundamental right to procreation triggers the first factor of the analysis, Supreme Court precedent indicates this private interest applies to same-sex couples. Considering the Supreme Court’s decisions in *Zablocki v. Redhail* and *Obergefell*, a logical connection can be made between the fundamental right of same-sex couples to marry and the fundamental right to procreate.⁹⁸ In *Zablocki*, the Court directly connected the right to procreate with the right to marry by not only saying that the decision to marry “has been placed on the same level of importance” as decisions such as procreation, but by also stating that “if [the] right to procreate means anything at all,” it must imply some right to enter into a marriage.⁹⁹ *Obergefell* then reiterated this connection when the Supreme Court ruled that the fundamental right to marry applied to same-sex couples.¹⁰⁰ Therefore, because the Court held in *Obergefell* that same-sex couples have the fundamental right to marry, and the Court concluded in *Zablocki*, that the right to marry goes “hand-in-hand” with the right to procreate, procreation is clearly a fundamental right of same-sex couples.¹⁰¹

Because procreation is the type of private interest that is fundamental, and this right applies to same-sex couples, the analysis must continue with the second and third factor in order to show that the Infertility Insurance Mandate violates the Due Process Clause of the Fourteenth Amendment. Looking to the second factor, the Infertility Insurance Mandate is denying insurance coverage for ART, and therefore the private interest of procreation is at a very high risk of being deprived because ART is

96. *Id.* at 453.

97. *See* Boutell, *supra* note 11, at 655.

98. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

99. *Zablocki*, 434 U.S. at 386.

100. *Obergefell*, 135 S. Ct. at 2604–05.

101. *See* Boutell, *supra* note 11, at 655.

the only way a same-sex couple can have a biological child.¹⁰² Finally, as to the third factor, there is no strong government interest that would justify excluding same-sex couples under the Infertility Insurance Mandate.¹⁰³ When the government is denying insurance coverage for ART to same-sex couples, it would be “difficult to conceive any potential reasons that are not ludicrous” as to what the governmental interest would be, especially where insurance coverage to procreate via ART has been afforded to opposite-sex couples since 1989.¹⁰⁴

When strict scrutiny is applied to the three factors, it is clear that the Infertility Insurance Mandate is unconstitutional because there is no adequate justification as to why Rhode Island is allowing opposite-sex couples to pursue their fundamental right, while prohibiting same-sex couples from the same opportunity.¹⁰⁵ Without adequate justification, meaning that there is no government interest behind this statute, the Infertility Insurance Mandate violates the Due Process Clause of the Fourteenth Amendment. Therefore, Rhode Island should amend the statute to afford same-sex couples their constitutional right to procreate.

B. *The Infertility Insurance Mandate Violates the Equal Protection Clause of the Fourteenth Amendment*

Along with the Due Process Clause, the Fourteenth Amendment also contains the Equal Protection Clause, which affords citizens of the United States “equal protection of the laws.”¹⁰⁶ The Supreme Court has made it clear that statutes implicating certain suspect and quasi-suspect characteristics, such as race and sex, require the Court to apply a heightened level of scrutiny when reviewing the statute.¹⁰⁷ Sexual orientation is not one of the characteristics that require heightened scrutiny.¹⁰⁸ Therefore, because the Infertility Insurance Mandate discriminates based on sexual orientation, the statute is only subject to a rational

102. *Id.*

103. *Id.* at 654.

104. *See id.* at 655–56.

105. *See id.* at 655.

106. U.S. CONST. amend. XIV.

107. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756 (2011).

108. *Id.*

basis review, which is the lowest standard.¹⁰⁹ The problem with rational basis review is that it “generally results in the validation of state action,” and thus, a court would likely conclude that the Infertility Insurance Mandate does not violate the Equal Protection Clause.¹¹⁰ In order to bypass this result, same-sex couples can make three possible arguments which arise out of three different Supreme Court cases. First, sexual orientation should be considered a class that requires a heightened scrutiny standard.¹¹¹ Second, even if sexual orientation is not considered a class that requires heightened scrutiny, a law nevertheless cannot target or discriminate against certain groups.¹¹² Finally, a law violates the Equal Protection Clause if there is evidence of a discriminatory impact and a discriminatory intent.¹¹³

1. *Lawrence v. Texas Suggests Sexual Orientation is a Class Subject to Strict Scrutiny*

The Supreme Court in *Lawrence v. Texas* held that a Texas law prohibiting same-sex sodomy was unconstitutional under the Due Process Clause because homosexual individuals have the fundamental right to choose those with whom they are intimate.¹¹⁴ However the Court left room for interpretation that sexual orientation can be a classification that is subject to strict scrutiny.¹¹⁵ In fact, the Court stated that an argument for Equal Protection was “tenable.”¹¹⁶ The *Lawrence* Court combined both an Equal Protection and Due Process argument, and ultimately recognized that a continuation of discrimination would “demean[] the lives of homosexual persons.”¹¹⁷ The holding in *Lawrence*, that

109. *Id.*

110. *Id.* at 755–56.

111. Boutell, *supra* note 11, at 653.

112. *See Romer v. Evans*, 517 U.S. 620 (1996); Boutell, *supra* note 11, at 654.

113. *See Washington v. Davis*, 426 U.S. 229, 237 (1976); Blake, *supra* note 66, at 684.

114. 539 U.S. 558, 575 (2003).

115. *Id.*; *see* Boutell, *supra* note 11, at 652–53.

116. *Lawrence*, 539 U.S. at 574–75; Yoshino, *supra* note 107, at 777.

117. *See Lawrence*, 539 U.S. at 575. The Court recognized the importance of both an Equal Protection and Due Process argument, stating:

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which

same-sex couples had the right to privacy in consensual adult sexual activity, can be applied to same-sex couples receiving insurance coverage for ART because the choice to have a biological child is a private consensual choice that should also be protected for same-sex couples.¹¹⁸

The Court's acknowledgment of an Equal Protection argument for sexual orientation benefitted same-sex couples more than opposite-sex couples, which as one commenter notes, gives *Lawrence* "undertones of equality."¹¹⁹ These "undertones" are the Court's suggestion that sexual orientation requires the Court to apply strict scrutiny under the Equal Protection Clause. In light of *Lawrence*, if sexual orientation is a classification that requires strict scrutiny review, the Infertility Insurance Mandate is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because it "implicitly discriminate[s] against same-sex couples via heteronormative infertility definitions."¹²⁰

2. *Romer v. Evans Prevents the Rhode Island Government from Targeting Same-Sex Couples as an "Unpopular Group"*

Even if a court were to decline to recognize sexual orientation as a protected class, *Romer v. Evans* provides another way to argue that the Infertility Insurance Mandate is unconstitutional.¹²¹

Under *Romer*, even if a court were to apply rational basis to the sexual orientation classification, an unpopular group cannot be targeted and discriminated against.¹²² However, the Court in *Romer* strayed away from the typical deference provided under the rational basis test, and applied a different version of this test, referred to as "rational basis with bite standard."¹²³ In *Romer*, Colorado passed a law that prohibited sexual orientation from being recognized as a protected class.¹²⁴ The Court ruled that the law

does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.

Id.

118. *See id.* at 578.

119. Yoshino, *supra* note 107, at 779.

120. Boutell, *supra* note 11, at 653.

121. *Romer v. Evans*, 517 U.S. 620, 624 (1996).

122. *Id.* at 634.

123. *See Yoshino, supra* note 107, at 760.

124. *Romer*, 517 U.S. at 624.

violated the Equal Protection Clause, stating, “[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws *in the most literal sense*.”¹²⁵

The Infertility Insurance Mandate deprives same-sex couples of their right to procreate because it is more difficult for them to get the “aid” provided under the statute due to their sexual orientation. Under the “rational basis with bite” standard, the Infertility Insurance Mandate fails this test because there cannot be a legitimate government interest behind a law that targets an unpopular group.¹²⁶ Under the Court’s reasoning in *Romer*, it is clear that the Infertility Insurance Mandate violates the Equal Protection Clause because the government is making it more difficult for one group, same-sex couples, to procreate, which means that it is targeting an “unpopular group.”

3. *Washington v. Davis Makes the Infertility Insurance Mandate Unconstitutional by Proving Discriminatory Intent*

The Court in *Washington v. Davis* held that a “disproportionate impact” is not enough to trigger a strict scrutiny standard, unless there is evidence that a state enacted a statute with “discriminatory intent.”¹²⁷ The Infertility Insurance Mandate clearly has a disproportionate impact on same-sex couples when it comes to receiving coverage for ART. The question then becomes: is there enough evidence to show that the Rhode Island General Assembly had the discriminatory intent required to make this law unconstitutional? To establish a discriminatory intent, it must be

125. *Id.* at 633 (emphasis added).

126. *Id.* at 634 (“If the constitutional conception of “equal protection of the laws” means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973))).

127. *See* 426 U.S. 229, 242 (1976); *see also* Yoshino, *supra* note 107, at 763–64. *Davis* involved a racial discrimination case, but the standard of disproportionate impact can still apply to the sexual orientation context in attempting to get a court to apply strict scrutiny. *See id.* at 242. In discussing disproportionate impact, the Court stated, “[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.” *Id.* (internal citation omitted).

shown that Rhode Island desired a “particular discriminatory result,” a mere “side-effect or consequence” of discriminatory intent is insufficient to make a law unconstitutional.¹²⁸ It can be difficult to ascertain whether a legislature enacted a statute with discriminatory intent. However, *Davis* provides a suggestion that one way to prove this is when “the discrimination is very difficult to explain on nonracial ground.”¹²⁹ Although *Davis* was concerned about race, this can be applied to a sexual orientation classification as well.¹³⁰ If there is evidence that the Rhode Island government intended to discriminate against same sex-couples by denying them insurance coverage for ART, the Infertility Insurance Mandate is unconstitutional.¹³¹

When examining the Infertility Insurance Mandate, it is “difficult to explain” why the government is limiting ART to a certain group of people, other than for a discriminatory reason. As one scholar puts it, if you compare the Infertility Insurance Mandate to discriminatory laws struck down by the Supreme Court in the equal protection cases discussed above,

a law limiting ARTs to married persons or to heterosexual persons should fail because it would treat the very same act—the use of a particular technology—differently based upon the marital status or sexual preference of the persons involved, with no real basis for the distinction *other than societal disapproval or prejudice*.¹³²

Looking into the legislative history of the Infertility Insurance Mandate, there is an indication of “societal disapproval.” In 2007, the Governor of Rhode Island wrote a letter stating his disapproval of removing the marriage requirement from the Infertility Insurance Mandate.¹³³ He wrote that, as a matter of “public policy,” the legislature should not pass laws that promote children born to unmarried parents, and that the Infertility Insurance Mandate was intended to be “a narrow and appropriate state policy” for married couples.¹³⁴ At that time, gay marriage was not legal in Rhode Island, so same-sex couples and their children were included

128. Blake, *supra* note 66, at 684.

129. *Id.* (quoting *Davis*, 426 U.S. at 242).

130. *Id.* at 685.

131. *Id.*

132. See Rao, *supra* note 21, at 1475–76.

133. Governor’s Message, *supra* note 47.

134. *Id.*

in the groups of people to which the governor expressed the Infertility Insurance Mandate should not be expanded to cover.¹³⁵ The marriage requirement has since been repealed, but there has never been further legislation making it clear that this statute is not intended to discriminate against same-sex couples.¹³⁶ Today, the Infertility Insurance Mandate is still discriminating against same-sex couples because they cannot satisfy the statutory definition of infertility, based solely on their sexual orientation. Therefore, undertones of this disapproval towards same-sex couples still show through the Infertility Insurance Mandate, and the Rhode Island government, at least initially, desired a particular discriminatory result when it passed the law, which the *Davis* Court required as a prerequisite for strict scrutiny review.

A careful analysis of the cases discussed above leads to the conclusion that the Infertility Insurance Mandate violates Equal Protection, but it is critical to recognize that the statute does more than just place same-sex couples at an economic disadvantage in comparison to opposite-sex couples. The problem goes much deeper. Same-sex couples depend on ART because it is the only way for them to create a biological child.¹³⁷ The real problem with the statute is that it creates an inequality among those who are able to bear a child and those who are not. Under the Infertility Insurance Mandate, the government has not only limited the uses of ART, it has deprived a certain group of people from using ART altogether. In this way, not only is the statute problematic, but it is also unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.¹³⁸

C. Addressing Possible Counterarguments

There are two foreseeable counterarguments to the assertion that the Infertility Insurance Mandate is unconstitutional. First, the Infertility Insurance Mandate's definition of infertility does not

135. 15 R.I. GEN. LAWS § 15-1-1 (2013) ("Any person who otherwise meets the eligibility requirements of chapters 15-1 and 15-2 may marry any other eligible person regardless of gender."). As a result, same-sex marriage became legal in Rhode Island in 2013. *Id.*

136. *See supra* text accompanying note 52.

137. *See supra* text accompanying notes 19–21.

138. *See Rao, supra* note 21, at 1480 ("[L]ines drawn between different uses of ARTs are much less constitutionally problematic than lines drawn based upon the types of persons who seek to use ARTs.").

require a couple to be unable to naturally conceive through unprotected intercourse; rather, the definition only refers to those who are “unable to conceive or sustain a pregnancy during a period of one year.”¹³⁹ One could argue that the definition does not exclude same-sex couples because they can use ART for one year without insurance coverage and pay the cost out-of-pocket, and if the couple is unable to conceive within that year, then they can receive the insurance coverage. However, this creates an inequality for same-sex couples because the statute does not limit the inability to conceive to those who are unable to conceive through ART. An opposite-sex couple can attempt to naturally conceive through unprotected intercourse for one year and then receive the coverage, never having to pay the out-of-pocket prices their same-sex couple counterpart did.¹⁴⁰ As currently written, the Infertility Insurance Mandate prevents same-sex couples from having a biological child because without the ability to afford ART, they are left with no other option when it comes to procreation.

The second counterargument is that, even if procreation is recognized as a fundamental right under the Constitution, there is no fundamental right to insurance coverage for ART.¹⁴¹ Regardless of the groups of people being discriminated against, “a state government is currently under no obligation to provide access to ART for anyone and, thus, can act to provide access to some and not others without infringing on the due process privacy rights of its citizens.”¹⁴² This argument is correct in that neither the Rhode Island courts nor the Supreme Court have declared that there is an explicit right to ART; however, there is an implied right in the fundamental right to procreate because ART is required in order for same-sex couples to reproduce.¹⁴³ Because Rhode Island has this insurance mandate for ART, it suggests that the State acknowledges the right to insurance coverage for infertility treatments for its citizens.¹⁴⁴ Additionally, this suggests that Rhode Island intends to provide additional protection beyond the

139. 27 R.I. GEN. LAWS § 27-19-23.

140. *See id.*

141. Blake, *supra* note 66, at 682–83.

142. *Id.* at 683.

143. Brittany Raposa, Note, *Maria’s Law: Extending Insurance Coverage for Fertility Preservation to Cancer Patients in Massachusetts*, 9 U. MASS. L. REV. 334, 357 (2014).

144. *See id.*

fundamental right of procreation currently recognized by the Supreme Court.¹⁴⁵ A same-sex couple cannot reproduce without ART, so depriving them of this coverage and access to ART deprives them of the fundamental right to procreate.¹⁴⁶ Accordingly, the Infertility Insurance Mandate must be amended to comply with the right guaranteed by the Due Process Clause.

D. *Proposed Language for the Rhode Island Statute*

In addition to pointing out the unconstitutionality of the Infertility Insurance Mandate, it helps to suggest new language that Rhode Island can add to effectuate the inclusion of same-sex couples. The best and simplest option for the Rhode Island General Assembly is to model its new language after the California statute.¹⁴⁷ Under the guidance of the California Statute, the legislature could include the following language in the Infertility Insurance Mandate:

(g) . . . coverage for the treatment of infertility shall be offered, and if purchased, without discrimination on the basis of age, ancestry, color, disability, domestic partner status, gender, gender expression, gender identity, genetic information, marital status, national origin, race, religion, sex, or sexual orientation.¹⁴⁸

The language explicitly includes same-sex couples and leaves no room for doubt that insurance companies cannot deny coverage to same-sex couples coverage based on their sexual orientation. The proposed language provides a simple solution that eliminates the need to amend the statutory definition of infertility because this language makes it clear that same-sex couples cannot be discriminated against. The current definition, when considered in isolation, excludes same-sex couples, but the additional language would put insurance companies on notice that opposite-sex couples and same-sex couples must be treated equally, which means that

145. *See id.*

146. *See id.*

147. CAL. HEALTH & SAFETY CODE § 1374.55 (West 2013).

148. *Id.* § 1374.55(g). This language comes directly from California's insurance mandate for ART. Of course, Rhode Island is free to change what it wants to be covered under the statute and to add to or take away from this list. The most important part of this list is the explicit inclusion of same-sex couples by stating that insurance companies cannot discriminate based on sexual orientation.

they should pay the same prices. Even though the validity of the Infertility Insurance Mandate has never successfully been challenged in a lawsuit, amending the statute to include the language proposed above is the best way to avoid such a challenge.¹⁴⁹ The Infertility Insurance Mandate has evolved substantially since its enactment in 1989, and the proposed addition to the statutory language would be the final step in ensuring that same-sex couples are being afforded the same fundamental rights as opposite-sex couples.

CONCLUSION

The Infertility Insurance Mandate has been amended numerous times since it was enacted in 1989. In 2017, the Rhode Island General Assembly took a huge step in the right direction by repealing the marriage requirement and making Rhode Island the first state to mandate insurance coverage for fertility preservation.¹⁵⁰ However, Rhode Island has continued to leave same-sex couples without coverage, and has even made members of the legislature unsure how the statute would apply to same-sex couples.¹⁵¹ There is no reason that the Rhode Island General Assembly should not take one extra step to ensure that Rhode Island is being inclusive of same-sex couples, and avoid the all-but-inevitable constitutional challenges to the Infertility Insurance Mandate. If Rhode Island did not intend to discriminate against same-sex couples based on their sexual orientation, then there should be no opposition to the suggested change in the Infertility Insurance Mandate, as such amendments would confirm and make it clear that same-sex couples are covered by the statute.

As the Infertility Insurance Mandate stands today, Paula and Mary will not be able to have their own biological children unless they spend a minimum of \$66,000, a price that is eighty-two percent of their annual combined income.¹⁵² This is a price that their

149. See *Krupa v. N.J. State Health Benefits Comm'n*, No. 2:16-cv-4637-SDW-LDW, 2018 WL 513208 (D. N.J. Jan. 23, 2018). For a discussion concerning New Jersey and the lawsuit brought against it for its statute see *supra* text accompanying note 6.

150. See *supra* text accompanying notes 52–57.

151. Lynn Arditi, *Health Insurers Must Cover 'Fertility Preservation'*, PROVIDENCE J., Aug. 2, 2017, at A1.

152. COMMUNITY SURVEY, CENSUS.GOV (2016), <https://www.census.gov/data/tables/time-series/demo/same-sex-couples/ssc-house-characteristics.html> [<https://perma.cc/Q3WE-3ABP>]. In 2016, the average household income for a

neighbors, Sarah and Eric, will never have to pay because they can meet the current statutory standard of infertility without spending a single penny. Unfortunately, Paula and Mary, due solely to their sexual orientation, can never meet this definition. A change in the Infertility Insurance Mandate to provide the explicit inclusion of same-sex couples is needed to make it clear that Paula and Mary will obtain the insurance coverage that their fundamental right to procreate requires. For Paula and Mary, and every other same-sex couple in Rhode Island, their constitutional right to have a child is dependent on ART, and without change, Rhode Island law is the reason that these couples will not get the protections they deserve.

same-sex female-female couple was \$80,755. *Id.*