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IT COSTS WHAT!? TO START A FAMILY? INFERTILITY AND THE CONSTITUTIONAL RIGHT TO PROCREATE

*Jessica Shillings-Barrera**

Access to infertility treatment, particularly Assistive Reproductive Technology ("ART"), such as In Vitro-Fertilization ("IVF"), continues to be prohibitively expensive and is not typically covered by employer-based insurance plans. Only a handful of states require employer-based insurance plans to cover any kind of infertility treatment. However, even those states that do, are inconsistent about which types of treatment must be included in the qualifying plans and differ in their definitions of infertility. These inconsistencies, in both coverage and definition, operate as discriminatory gatekeeping devices, privileging certain would-be parents while discriminating against others by barring access to screening and treatment. Without independent wealth or insurance coverage, most would-be-parents must rely only on their personal savings and an IRS rule)—Internal Revenue Code section 213(a)—that allows taxpayers to deduct the cost of medical expenses above 7.5% of their adjusted gross income. However, the IRS rule does not allow for the deduction of third-party medical expenses unrelated to the taxpayer. This discriminates against would-be-parents who utilize the assistance of (and bear the cost of) an egg donor or gestational carrier.

Access to infertility treatment should be formally recognized as a fundamental liberty interest under the Fourteenth Amendment. To guarantee consistent nationwide coverage from employer-based insurance plans, the infertility community also needs its own accompanying Infertility Discrimination Act ("IDA"), styled like the Pregnancy Discrimination Act. An effective IDA should explicitly state that an otherwise inclusive plan that singles out infertility-related benefits for exclusion is discriminatory. Additionally, the tax code should be modified to allow prospective parents to deduct medical costs

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incurred on behalf of third parties for the purpose of overcoming medical and/or circumstantial infertility.

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I. INTRODUCTION

Infertility, miscarriage and pregnancy loss are timeless personal tragedies[1] faced by couples and individuals throughout the world.[2] In some ways we have made advances in helping would-be-parents realize their dream of starting a family.[3] Modern infertility screening practices and treatment protocols provide over forty research-proven methods of medical intervention to help couples overcome the physical and circumstantial causes of infertility.[4] Despite these scientific advancements, major barriers to building a family remain.[5] In many cases, the question is not whether treatment will eventually lead to a successful live birth, but whether the prospective parents can afford the required procedures and medications.[6] For all but the most privileged would-be-parents the answer is often no, or at least not without taking on substantial debt.

Access to fertility treatment, particularly Assistive Reproductive Technology ("ART"), such as In Vitro-Fertilization ("IVF"), continues to be prohibitively expensive and is not typically covered by employer-based insurance plans.[7] Only a handful of states require employer-based insurance plans to cover any kind of infertility treatment, and even those states that do, are inconsistent about which

1. Patricia A. Butler, *Assisted Reproduction in Developing Countries - Facing Up to the Issues*, 2003 PROGRESS IN REPROD. HEALTH RES., no. 63, at 1, 1.

2. Martha F. Davis & Rajat Khosla, *Infertility and Human Rights: A Jurisprudential Survey*, 40 COLUM. J. GENDER & L. 1, 14 (2020).

3. *See* Jessica Gold, *Centuries Of Infertility: Here's How Catherine Of Aragon's Story Resembles Women's Today*, FORBES (Oct. 30, 2020, 10:00 AM), https://www.forbes.com/sites/jessicagold/2020/10/30/centuries-of-infertility-heres-how-catherine-of-aragons-story-resembles-womens-today/?sh=54006ded183f (discussing that despite scientific advancement, "[t]here is something beautiful, yet complicated trying to mesh the past with the present and noticing how many parallels still exist between women in the 16th century and women today." For example, "…stress is too often and incorrectly blamed for miscarriages and so people historically (and still do) suffer in silence for fear of being blamed for being too stressed.")

4. *The psychological impact of infertility and its treatment*, 25 HARV. MENTAL HEALTH LETTER, May 2009, at 1, 2, http://www.mindingmatters.com/wp-content/uploads/2017/03/PsychologicalimpactofIFanditsRx.pdf.

5. *See* Rachel Gurevich, *When Your Access to Fertility Treatment Is Limited*, VERYWELL FAM., https://www.verywellfamily.com/access-to-fertility-treatments-4135572 (last updated Apr. 19, 2020).

6. *Id.*

7. *See* Madeline Curtis, *Inconceivable: How Barriers to Infertility Treatment for Low-Income Women Amount to Reproductive Oppression*, 25 GEO. J. ON POVERTY L. & POL'Y 323, 328 (2018); *see also* Gabriela Weigel, *Coverage and Use of Fertility Services in the U.S.*, (Sept. 15, 2020), https://www.kff.org/womens-health-policy/issue-brief/coverage-and-use-of-fertility-services-in-the-u-s/.

types of treatment must be included in qualifying plans.[8] Another issue with this state-by-state approach is that each state's statutory definition of infertility varies.[9] These inconsistencies in both coverage and definition operate as discriminatory gatekeeping devices, privileging certain would-be-parents while discriminating against others by barring access to screening and treatment.

The reality in the United States today is that without independent wealth or insurance coverage, most would-be-parents must rely only on their personal savings and an IRS rule)—Internal Revenue Code section 213(a)—that allows taxpayers to deduct the cost of medical expenses above 7.5% of their adjusted gross income.[10] However, the IRS rule does not allow for deduction of third-party medical expenses unrelated to the taxpayer.[11] This discriminates against would-be-parents who utilize the assistance of an egg donor or gestational carrier, including many same-sex couples and individuals pursuing single parenthood.

Even assuming the benefit of the IRS medical expense deduction, most would-be-parents do not possess sufficient financial resources to cover the cost of treatment without incurring a significant amount of debt,[12] or delaying treatment for years which affects the likelihood of a successful outcome.[13] As a result, some would-be-parents are forced to abandon the hope of starting a family altogether after seeing the price tag. This financial barrier hits would-be-parents of low income and marginalized backgrounds hardest,[14] further perpetuating reproductive inequity despite Supreme Court recognition that the Right to Procreate is a fundamental liberty interest protected under the Fourteenth Amendment to the Constitution.[15]

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8. *Insurance Coverage by State*, RESOLVE, https://resolve.org/learn/financial-resources-for-family-building/insurance-coverage/insurance-coverage-by-state/ (last visited Jan. 20, 2021).

9. *Id.*

10. *Topic No. 502 Medical and Dental Expenses*, IRS, https://www.irs.gov/taxtopics/tc502 (last updated Feb. 17, 2022).

11. John T. Lutz, *IRS Issues Guidance on the Deductibility of Fertility Treatments For Same-Sex Couples*, McDermott Will & Emery (July 28, 2021), https://www.mwe.com/insights/irs-issues-guidance-on-the-deductibility-of-fertility-treatments-for-same-sex-couples/.

12. *See* Dan Mangan, *High cost of fertility treatment sends many into debt*, CNBC (May 20, 2015, 4:08 PM), https://www.cnbc.com/2015/05/20/high-cost-of-fertility-treatment-sends-many-into-debt.html.

13. *Id.*

14. *See also* Curtis, *supra* note 7, at 330; *see* Allison S. Komorowski & Tarun Jain, *A Review of Disparities in Access to Infertility Care and Treatment Outcomes Among Hispanic Women*, 20 Reprod. Biology & Endocrinology 1, 2 (2022).

15. MERYL B. ROSENBERG, THE INDIVIDUAL RIGHT TO PROCREATE AND GESTATIONAL SURROGACY (n.d.), https://www.lcc.mn.gov/lcs/meetings/10112016/ABA%20Paper%20The%20Individual%20Right%20to%20Procreate%20Final%202016.pdf.

Historically, the Americans with Disabilities Act ("ADA") has not recognized infertility as a disability[16] and Title VII of the Civil Rights Act has not guaranteed infertility coverage through employer-based plans .[17] Almost two decades ago, these issues were raised in *Saks v. Franklin Covey Co.* where the Second Circuit Court of Appeals dismissed the plaintiff's Title VII claim against her employer for refusing to cover surgical treatment as a result of medically diagnosed infertility.[18] Despite finding that infertility is a disability under the ADA, the court held that the refusal to cover the procedures did not constitute discrimination because Ms. Saks, a woman with diagnosed infertility, had equal access to the same insurance policy as her nondisabled coworkers since the plan excluded coverage for surgical impregnation procedures for every employee, regardless of their fertility status.[19] Moreover, the court found that the Pregnancy Discrimination Act ("PDA") did not afford protection to Ms. Saks because incorporating infertility as a "related medical condition" into the definition of pregnancy would "result in the anomaly of defining a class that simultaneously includes equal numbers of both sexes and yet is somehow vulnerable to sex discrimination."[20]

First, this Note will argue that access to infertility treatment should be formally recognized as a fundamental liberty interest under the Fourteenth Amendment.[21] An extension of the recognized right to procreate would prevent the federal and state government from limiting access to infertility treatment of any would-be-parents unless it survived strict scrutiny.[22] Second, this Note will argue that Congress should modify the IRS' medical deduction to allow prospective parents to deduct the medical costs incurred on behalf of third parties for the purpose of overcoming the taxpayer's medical or circumstantial infertility. Third, this Note will argue that, as a result of *Saks*, Title VII's protections should be expanded to include infertility in addition to "race,

16. Bragdon v. Abbott, 524 U.S. 624, 638-39 (1998).
17. *See* 42 U.S.C. § 2000e–2(a)(1) (2018).
18. Saks v. Franklin Covey Co., 316 F.3d 337 (2d Cir. 2003).
19. *Id.* at 346.
20. *Id.*
21. ROSENBERG, *supra* note 15. In a number of landmark cases outlined in this source, the United States Supreme Court found that "married couples had a fundamental right to privacy, based on the Due Process Clause of the Fourteenth Amendment" and that the " ' …[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices' which include marriage, procreation, contraception, childrearing and education and family relationships." These extensions of the right to privacy create a right to procreate as a fundamental liberty interest protected by the Fourteenth Amendment. *Id.*
22. *Id.* (explaining that any limits to the right to procreate is subject to the strict scrutiny standard.).

color, religion, sex, or national origin."[23] To guarantee consistent nationwide coverage from employer-based insurance plans, the infertility community also needs its own accompanying Infertility Discrimination Act ("IDA"), styled like the PDA. An effective IDA should explicitly state that an otherwise inclusive plan that singles out infertility-related benefits for exclusion is discriminatory.

II. BACKGROUND

A. Definitions of Infertility

The Centers for Disease Control and Prevention ("CDC") defines infertility as "not being able to conceive after one year of regular, unprotected sexual intercourse."[24] Other definitions of infertility identify longer or shorter time periods of trying for pregnancy.[25] California defines infertility as "the presence of a demonstrated condition recognized by physicians and surgeon as a cause of infertility or the inability to conceive a pregnancy or carry a pregnancy to a live birth after a year or more of regular sexual relations without contraception."[26] Additionally, definitions tend to vary with the age and gender of the individuals.[27]

Infertility is not always defined in reference to a medical condition. If one partner in a monogamous heterosexual couple is fertile, but the other is not, the fertile partner suffers from circumstantial infertility as they remain committed to their partner. In the case of same-sex couples, both partners may be medically fertile but require reproductive assistance to overcome circumstantial infertility. And fertile individuals who chose to conceive a child without a partner may also be medically fertile but circumstantially infertile.

Infertility is not confined to a clinical definition.[28] In some jurisdictions, the all-important legislative "diagnosis of infertility is reserved for individuals attempting to conceive or sustain a pregnancy within marriage."[29] The "limitation of the term 'infertility' to married couples . . . reflects a discriminatory legislative choice" that denies

23. *See* 42 U.S.C. § 2000e–2(a)(1) (2018).

24. EMILY K. LANE, CONG. RESEARCH SERV., IF11504, INFERTILITY IN THE MILITARY (2020). The World Health organization [WHO] similarly defines infertility as "a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse." Davis & Khosla, *supra* note 2, at 4.

25. *Id.* at 5.

26. *Insurance Coverage by State*, *supra* note 8.

27. *See id.*

28. Davis & Khosla, *supra* note 2, at 5.

29. *Id.*

fundamental rights to anyone who happens to fall outside that privileged status.[30] Simply being a member of a same-sex relationship or wishing to pursue single parenthood is presumably not considered "a demonstrated condition by physicians and surgeons" without additional mitigating circumstances.[31] As a result, the limitation of an infertility diagnosis to only married couples fails to acknowledge the existence of infertility in other cases and fails to honor the legitimacy of such would-be-parents.

By making such value judgements, legislatures are sending the message that anyone that does not fall within a limited set of circumstances does not deserve access to reproductive healthcare to help create their own families. These inequitable definitions impact real lives. Because of these definitions, same-sex couples and single persons face additional limitations and often insurmountable barriers to receiving fertility services, even if those same services would be offered to their heterosexual coupled counterparts free of charge.[32] Some providers completely deny individuals seeking to become single parents access to public funding for IVF on the grounds that their family composition is undesirable.[33] These arbitrary and discriminatory barriers to fertility treatment are a reminder that "childlessness arising from legal, regulatory, or social constraints on access to fertility treatments may be as consequential for individuals as disease-based childlessness."[34] Legal constraints may also limit would-be-parents access to reproductive technology based on age, HIV status or presence of a disability.[35]

B. Causes of Infertility

The CDC estimates that about twelve percent of women aged fifteen to forty-four years in the United States have difficulty getting pregnant or carrying a pregnancy to term.[36] Infertility "may be caused by a myriad of factors including genetic abnormalities, aging, acute and chronic diseases, treatments for certain conditions, behavioral factors, and exposure to environmental, occupational, and infectious agents."[37]

30. *Id.*
31. *See Insurance Coverage by State*, *supra* note 8.
32. *Id.* at 12.
33. *Id.*
34. *Id.* at 6.
35. *Id.* at 6-7
36. *See* Curtis, *supra* note 7, at 325.
37. CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL PUBLIC HEALTH ACTION PLAN FOR THE DETECTION, PREVENTION, AND MANAGEMENT OF INFERTILITY 1, 3 (2014).

This includes, "[a]ny condition affecting the ovaries, fallopian tubes and/or uterus can result in infertility among females."[38]

Infertility is not always the result of complications in the female body. In about thirty-five percent of couples with infertility, a male factor is identified along with a female factor.[39] In about eight percent of couples with infertility, a male factor is the only identifiable cause.[40] Hormonal disorders or disruptions to testicular function can cause infertility in men.[41] Increased age, smoking, excessive alcohol use, extreme weight gain or loss, sexually transmitted infections, exposure to radiation, exposure to environmental toxins, excessive physical stress, or emotional stress are additional risk factors associated with increased infertility in men.[42]

C. Diagnosis and Treatment of Infertility

There are about forty ways to treat infertility, starting with a variety of diagnostic tests to identify the problem.[43] For men, diagnostic tests can include semen analysis, hormone testing, genetic testing, testicular biopsy, and imaging.[44] Treatment for men includes changing lifestyle factors, taking medications to improve sperm count, quality and production, and surgery.[45] Diagnostic testing for women can include ovulation testing, evaluation of the uterus and fallopian tubes, ovarian reserve testing, a hysteroscopy, and laparoscopy.[46] Conventional treatment for women includes stimulating ovulation with fertility drugs, intrauterine insemination,[47] surgery to correct uterine problems,[48] and advice about timing of intercourse.[49] "Only about three percent of patients make use of more advanced assisted reproductive technology such as in vitro fertilization ("IVF")."[50]

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38. LANE, *supra* note 24.
39. *See* CTR. FOR DISEASE CONTROL & PREVENTION, *supra* note 37, at 5.
40. *Id.*
41. *See Infertility FAQ's*, CDC, https://www.cdc.gov/reproductivehealth/infertility/index.htm (last visited Jan. 30, 2021).
42. *Id.*
43. *The psychological impact of infertility and its treatment*, *supra* note 4.
44. *Infertility*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/infertility/diagnosis-treatment/drc-20354322 (last visited Jan. 30, 2021).
45. *Id.*
46. *Id.*
47. Healthy sperm are placed directly in the uterus around the time the ovary releases one or more eggs to be fertilized. *Id.*
48. *Id.*
49. *The psychological impact of infertility and its treatment*, *supra* note 4.
50. *Id.*

Another type of fertility treatment is Assisted reproductive technology ("ART") in which the egg and sperm are handled.[51] The younger a woman can undergo ART, the greater chance she has that the procedure will successfully lead to a live birth.[52] The CDC found that the average percentage of fresh, nondonor ART cycles that led to a live birth were thirty-one percent in women younger than thirty-five years of age, twenty-four percent in women aged thirty-five to thirty-seven years, and sixteen percent in women aged thirty-eight to forty years.[53]

D. Cost of Infertility

The cost of infertility treatment can vary significantly, with the various forms of ART treatment requiring a financial investment akin to purchasing a car.[54] For example, one cycle of IFV can cost between $10,000 to $20,000.[55] However, the cost of one cycle alone does not tell the whole financial picture.[56] A 2012 study found that 10,001 cycles performed in 2012 yielded a total estimated ART treatment costs of $157.2 million.[57] These cycles resulted in 3,300 (thirty-three percent) singleton, 2,399 (twenty-four percent) twin, and 70 (0.7%) triplet or higher-order live births, with estimated total pregnancy/infant associated medical costs of $423.8 million.[58] Adding those totals together, the costs of the ART live births in 2012 were $58,087 per cycle.[59] Given the hefty price tag, it is hardly surprising that "about seventy percent of women who turn to IVF go into debt."[60] In fact one study revealed that forty-four percent of women who sought infertility treatment had more than $10,000 in associated debt.[61] For one-third of these patients, the debt came in the form of high interest credit card charges.[62] This financial stress, on top of the medical side effects of treatment and emotions associated with the uncertain process "can lead to emotional, physical, and financial exhaustion."[63]

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51. *Infertility FAQ's*, *supra* note 41.
52. *See Infertility FAQ's*, *supra* note 41.
53. *How Age of Both Men & Women Can Impact IVF*, OC FERTILITY: BLOG (Aug. 13, 2019), https://www.ocfertility.com/blog/how-age-of-both-men-women-can-impact-ivf.
54. *See* Curtis, *supra* note 7.
55. *Id.*
56. Sara Crawford et al., *Costs of Achieving Live Birth from Assisted Reproductive Technology: A Comparison of Sequential Single and Double Embryo Transfer Approaches*, 105 FERTILITY & STERILITY 444, 447 (2016).
57. *Id.*
58. *Id.*
59. *Id.*
60. Curtis, *supra* note 7.
61. Mangan, *supra* note 12.
62. *Id.*
63. Curtis, *supra* note 7.

In some respects, the couples who can afford to try ART, even on credit, are the privileged ones.[64] Some couples look at the price tag and simply walk away from the possibility of having a child altogether.[65] For example, only one in four couples in need of ART receive it.[66] The CDC's National Survey of Family Growth, found that eleven percent of women and nine percent of men reported struggling to conceive.[67] However, just thirty-eight percent of women with suspected fertility problems sought out or received any fertility care.[68] "Within this group of women, most only received fertility testing and advice—but not treatment."[69]

1. Insurance Coverage of Infertility Treatments

Insurance coverage of infertility diagnosis and treatment vary based on the individual's state of residence and their insurance plan.[70] IVF and other infertility treatments are generally not covered under Medicaid,[71] a national public healthcare program jointly administered by both the states and federal government that provides health coverage to millions of Americans, including eligible low-income adults, children, pregnant women, elderly adults, and people with disabilities.[72] Additionally, since the Affordable Care Act does not classify infertility treatment as an "Essential Health Benefit," it is up to the individual states to decide whether or not to mandate insurance coverage for any infertility screening or treatment measures.[73]

As of August 2020, nineteen states have passed fertility insurance coverage laws of some kind.[74] However only thirteen of those laws include IVF coverage.[75] State-based requirements offer coverage that ranges from paying for fertility testing only to multiple cycles of 1VF.[76] Ten states have fertility preservation laws that compel insurers to cover fertility preservation procedures for patients facing potential or probable

64. *See* Gurevich, *supra* note 5.
65. *See id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. Curtis, *supra* note 7.
71. *See* Laura Shauuer, *The Right to Procreate: When Rights Claims Have Gone Wrong*, 40 MCGILL L.J. 823, 831 (1995).
72. *Medicaid*, MEDICAID.GOV, https://www.medicaid.gov/medicaid/index.html (last visited Feb. 12, 2022).
73. Curtis, *supra* note 7.
74. *Insurance Coverage by State*, *supra* note 8.
75. *Id.*
76. Curtis, *supra* note 7.

infertility as a result of medical treatment of serious illness, such as cancer.[77] Some states only require that insurance companies offer policies that cover infertility treatment—not that employers actually select this plan as an option for their employees—while others require the inclusion of infertility treatment as a benefit in every plan offered.[78]

Unsurprisingly, more would-be-parents make use of infertility services in states that require insurance coverage.[79] However, there is often a catch, even in states that mandate coverage.[80] Each state may provide its own requirements for patients to meet to qualify for coverage.[81] For example, some states "…require that a woman be married in order for her fertility treatments to be covered by insurance"[82] or that she exhaust alternative treatment options before coverage of infertility treatment can begin.[83] Other states exempt small companies,[84] religious organizations, or self-insured employers from the mandate.[85]

2. Tax Deduction Under I.R.C. Section 213

Many patients undergoing infertility treatment take advantage of an IRS rule that allows medical expenses that exceed 7.5% of annual adjusted gross income to be itemized and deducted from their tax bill.[86] The Internal Revenue Code states:

> Section 213(a) allows a deduction for expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, spouse, or dependent, to the extent the expenses exceed 7.5 % of adjusted gross income. Under § 213(d)(1)(A), medical care includes amounts paid for the diagnosis,

77. *See Insurance Coverage by State*, *supra* note 8.

78. *Id.* The pull down option for California states that "No infertility treatment coverage is required. Insurers are only required to offer the following services to employers who decide if they will provide the following benefits to their employees: diagnosis, diagnostic testing, medication, surgery, and Gamete Intrafallopian Transfer (GIFT)." Compare this with the entry for Massachusetts, "All insurers providing pregnancy-related benefits shall provide for the diagnosis and treatment of infertility including the following: artificial insemination; IVF; GIFT; sperm, egg and/or inseminated egg procurement and processing, and banking of sperm or inseminated eggs, to the extent such costs are not covered by the donor's insurer, if any; ICSI; ZIFT; assisted hatching; cryopreservation of eggs." *Id.*

79. Iris G. Insogna & Elizabeth S. Ginsburg, *Infertility, Inequality, and How Lack of Insurance Coverage Compromises Reproductive Autonomy*, 20 AMA J. ETHICS 1152, 1153 (2018).

80. *See* Curtis, *supra* note 7, at 329.

81. *Id.*

82. *Id.* at 337.

83. *Id.*

84. *Id.*

85. *Id.* at 328.

86. *See Topic No. 502 Medical and Dental Expenses*, *supra* note 10.

> cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.[87]

To claim the medical expenses as a deduction under section 213, the taxpayer must itemize deductions rather than take the standard deduction.[88] The definition of qualifying medical expenses is broad enough to encompass most types of infertility treatment.[89]

E. Social-emotional Impact of Infertility on Couples

Infertility takes an emotional toll. In the face of infertility, would-be-parent(s) often experience distressing emotions that are common to those who are:

> [G]rieving any significant loss . . . . Typical reactions include shock, grief, depression, anger, and frustration, as well as loss of self-esteem, self-confidence, and a sense of control over one's destiny. Relationships may suffer—not only the primary relationship with the spouse or partner, but also those with friends and family members who may inadvertently cause pain by offering well-meaning but misguided opinions and advice. Couples and individuals dealing with infertility may also avoid social interaction with friends who are pregnant and families who have children.[90]

As a result of infertility, couples "may struggle with anxiety-related sexual dysfunction and other marital conflicts."[91] The stress of many years spent pursuing fertility treatment also takes its toll on the health of relationships.[92] A 2011 study "found that [a majority of subject] men and women in fertility treatments . . . reported a decrease in partner satisfaction 5 years after beginning treatment."[93] Another 2017 study of 47,500 Danish women found that fifty-six percent of women ten years post fertility treatment had considered divorce and seventeen percent actually ended the relationship.[94] The Danish study found that those who

87. Rev. Rul. 2003-57, 2003-22 I.R.B. 959, https://www.irs.gov/pub/irs-irbs/irb03-22.pdf; 26 U.S.C. § 213(d)(1)(A) (2018).

88. *See Topic No. 502 Medical and Dental Expenses*, *supra* note 10.

89. *Id.*

90. *The psychological impact of infertility and its treatment*, *supra* note 4, at 2.

91. *Id.*

92. *See* Mariana Veloso Martins et al., *Marital Stability and Repartnering: Infertility-Related Stress Trajectories of Unsuccessful Fertility Treatment*, 102 FERTILITY & STERILITY 1716, 1716 (2014).

93. *Id.* at 1717.

94. Shannon Firth, *Study: Infertile Couples 3 Times More Likely to Divorce*, U.S. NEWS & WORLD REP. (Jan. 30, 2014, 12:01 AM), https://www.usnews.com/news/articles/2014/01/31/study-infertile-couples-3-times-more-likely-to-divorce.

did not have a child after treatment were three times more likely to divorce or end cohabitation with their partner than those who did.[95]

F. Disparate Access to Infertility Treatment

The systemic barriers that perpetuate infertility are classist because would-be-parent(s) with the least financial resources are also more likely to experience infertility.[96] Low-income women are more likely to experience environmental factors that put them at risk for infertility, and they are less likely to have health insurance, and less likely to access health care.[97] As a result, underlying conditions often go untreated, leading to a higher risk of experiencing a medical condition that may affect fertility.[98] Income is also predictive of fertility treatment use:

> Household income is a strong predictor of the use of fertility treatments, with higher socioeconomic status being associated with a greater use of treatment. From 2006 to 2010, twenty-one percent of women whose household incomes were 400% or higher of the federal poverty level had ever used infertility services, compared with just thirteen percent of women whose household incomes were below the poverty level.[99]

The systemic barriers of infertility also have discriminatory impacts based on race. For example, Hispanic and Black women are more likely to experience infertility than White women but less likely to seek and obtain the assistance they need.[100] Black women are almost twice as likely as White women to suffer from infertility.[101] However, only about eight percent of Black women between the ages of twenty-five and forty-four seek medical help to get pregnant, compared to fifteen percent of White women.[102] Only 7.6% of Hispanic woman in this same age bracket seek medical help.[103]

95. *See* Martins et al., *supra* note 92, at 1720; Firth, *supra* note 94.
96. *See* Curtis, *supra* note 7, at 330.
97. *Id.* at 333.
98. *Id.*
99. *Id.* at 334.
100. *Id.* at 329-30.
101. Belle Boggs, *The Significance of Michelle Obama's Fertility Story*, THE ATLANTIC (Nov. 14, 2018), https://www.theatlantic.com/family/archive/2018/11/michelle-obamas-ivf-story-means-lot-black-women/575824/.
102. Jihan Thompson, *Why Are So Many Black Women Suffering Through Infertility In Silence*?, WOMEN'S HEALTH (Oct. 29, 2018), https://www.womenshealthmag.com/health/a23320626/infertility-race-survey/.
103. Allison S. Komorowski & Tarun Jain, *A Review of Disparities in Access to Infertility Care and Treatment Outcomes Among Hispanic Women*, 20 REPROD. BIOLOGY & ENDOCRINOLOGY 1, 2 (2022).

G. International and Domestic Focus on Infertility

Growing international awareness of the harms of infertility, along with evidence of high rates of infertility in many parts of the world, has increased global attention and mobilization around the issue.[104] The United Nations General Assembly proclaimed that "all people have a right to found a family" in its Universal Declaration of Human Rights of 1948.[105] As a result of this focus on the seriousness of infertility, countries around the world have taken action.[106] A 2017 policy audit of nine European countries found that all nine countries had legislation in place providing for access to infertility treatments.[107] Twenty European countries offer partial public funding for IVF treatment.[108] The Irish Legislature was the latest to join this group in 2021.[109] Outside Europe, Israel, New Zealand, and Canada offer full funding for IVF treatment[110]

Closer to home, the CDC issued its own National Public Health Action Plan in 2014 which stated that "[a] clear need exists to identify public health priorities regarding infertility and its effect on health."[111] The plan acknowledges that "[b]ecause the desire to have one's own biological children can be strong and compelling, the effects of infertility for individuals or couples who are unable to conceive can be devastating."[112] The plan focuses on:

> (1) Promoting healthy behaviors that can help maintain and preserve fertility.
>
> (2) Promoting prevention, early detection, and treatment of medical conditions that can threaten fertility.
>
> (3) Reducing exposures to environmental, occupational, infectious, and iatrogenic agents that can threaten fertility.[113]

The CDC plan calls for "treating and managing infertility" itself, as well as "improving the safety and efficacy of infertility treatments."[114]

Additionally, six bills introduced in the 116th Congress aimed to expand infertility health care services to members of the U.S. military.[115]

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104. Davis & Khosla, *supra* note 2, at 13-14.
105. Insogna & Ginsburg, *supra* note 79.
106. *See* Davis & Khosla, *supra* note 2.
107. Poland, Sweden, the Czech Republic, the United Kingdom, Italy, Romania, Spain, Germany, and France. Davis & Khosla, *supra* note 2.
108. *Id.* at 14-15.
109. *Id.* at 15.
110. *Id.* at 14.
111. CTR. FOR DISEASE CONTROL & PREVENTION, *supra* note 37.
112. *Id.*
113. *Id.*
114. *Id.*
115. LANE, *supra* note 24.

TRICARE, the insurance of the armed forces, does not cover infertility treatment[116] but "an increased number of female servicemembers and members of the public are interested in reproductive care."[117] Currently, the Department of Defense ("DoD") does offer some infertility services, including ART, that servicemembers can purchase out of pocket.[118] Infertility among female servicemembers garnered attention in 2018 when the Service Women's Action Network ("SWAN") reported on the experiences of military females who attempt to access reproductive care.[119] The report was based on a survey that SWAN conducted of 799 military females, including 262 active duty females.[120] Thirty-seven percent of active duty respondents to the survey said they had trouble getting pregnant when actively trying to do so.[121]

III. ANALYSIS

A. Jurisprudential Treatment of Infertility

Courts in the United States have never directly addressed the accessibility of infertility treatment. Possible exceptions to this assertion are tax court decisions affirming that IVF-related expenses are qualifying medical costs that can be deducted from the taxpayer's burden, but only if the expenses were incurred on behalf of the taxpayer or related individual. While jurisprudential history has clearly established constitutional rights to privacy, marriage and procreation, Courts have interpreted these rights as prohibiting limitations the government might place on these rights rather than an obligation to provide access to the means of fulfillment. Acknowledgement of infertility as a disability under the Americans with Disabilities Act was not sufficient to guarantee insurance coverage for infertility treatment, and infertility is not related enough to pregnancy to be covered under the Pregnancy Discrimination Act.

1. Constitutional Right to Marry and Procreate

In a series of cases, the Supreme Court has historically recognized that the right to procreate is a fundamental liberty interest protected by

116. *Id.* Active duty servicemembers incur no out-of-pocket costs for health care services covered by DOD's health benefits program, also known as TRICARE. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. LANE, *supra* note 24.

the Fourteenth Amendment to the Constitution.[122] As a result, any attempt by a state to limit this right will be subject to strict scrutiny.[123] This means that the state must have a compelling interest for limiting the right to procreate, and that the state must narrowly tailor its limits to protect those state interests.[124]

The modern right to procreate began in *Skinner v. Oklahoma*.[125] In *Skinner*, Jack Skinner was prosecuted under an Oklahoma statute that would render "criminals . . . 'sexually sterile'" if they had been convicted of crimes involving "moral turpitude" on two or more occasions.[126] In the *Skinner* case:

> The state began proceedings to sterilize Skinner because he had been convicted once for stealing chickens and convicted twice for armed robbery. After subjecting the statute to "strict scrutiny," the Court found that the law violated the Equal Protection Clause of the Fourteenth Amendment. The Court explained the need for such scrutiny because the law infringed on the right to procreate, "one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.[127]

The Supreme Court has also protected our right to family planning information and resources. In *Griswold v. Connecticut*, the Court invalidated a state law that prohibited dispensing information about contraception to married couples.[128] The Court found that married couples had a fundamental right to privacy, which included the right to privacy in one's marital relations as well as the right to use contraceptives "for the purpose of preventing pregnancy."[129] In *Eisenstadt v. Baird*, the court extended the right to privacy to individuals, not just married couples, as it struck down a Massachusetts law banning the distribution of information regarding contraceptives to single people.[130] In *Carey v. Population Services International, Inc.*, the court protected minors' rights to access to information about sex and contraception, as well as to obtain contraception itself.[131] The Court

122. *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965); *See also* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972); Roe v. Wade, 410 U.S. 113, 152 (1973).

123. ROSENBERG, *supra* note 15.

124. *Id.*

125. Skinner v. State of Okl. ex rel. Williamson, 316 U.S. 535 (1942).

126. William A. Sieck, *In Vitro Fertilization and the Right to Procreate: The Right to No*, 147 U. PA. L. REV. 435, 448 (1998).

127. *Id.* (footnotes omitted).

128. *Id.* at 450.

129. *See id.*

130. *Id.* at 450-51.

131. ROSENBERG, *supra* note 15.

stated, " ' [t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices' which include marriage, procreation, contraception, childrearing and education and family relationships."[132] In *Obergefell v. Hodges*, the Court held that "[t]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."[133] It is clear from this holding that the point of the decision was to extend to same-sex couples the same rights enjoyed by married heterosexual couples.[134] It logically and morally "follows that it would be a violation of the Due Process and Equal Protection clauses to treat same-sex couples differently than heterosexual couples with respect to the right to procreate."[135]

The constitutional right to procreate is well established, but what exactly do we mean when we use the term procreate? The area of procreative rights itself needs greater conceptual clarity, as the term could be used to assert a number of rights, including:

> [A] right to make procreative decisions without governmental restriction or force; a right to procreate without discrimination by doctors or others; an equal right of infertile people to procreate when fertile people can do so; a right to be assisted in procreating; a right to engage in reproductive contracts or multiple-party interventions; and a right to have procreative assistance funded.[136]

With these possibilities on the table, why doesn't the right to procreate benefit those seeking to start their families in the face of infertility?

So far, the right to procreate has not been interpreted as a positive entitlement to bear or beget children. It has been defined instead as a negative right rooted in an individual's fundamental right to privacy and generally limited only by the rights or interests of future children.[137] Procreative rights have generally focused on the protection of "negative" rights by prohibiting limitations on the time and manner in which one reproduces, rather than creating a "positive" or affirmative right to have a child.[138] In other words, the right to procreate does not require the government to *assist* individuals in matters of family planning, only that the government *cannot easily restrict* these individual choices once

132. *Id.*
133. Obergefell v. Hodges, 576 U.S. 644, 647 (2015).
134. ROSENBERG, *supra* note 15.
135. *Id.*
136. Shauuer, *supra* note 71, at 826.
137. *See id.*
138. *Id.* at 841.

made. As a result, the right to procreate would need to be defined in a "positive" way to support any sort of right to reproductive technologies.[139]

2. Infertility as a Disability Under the ADA

Bragdon v. Abbott established the inability to reproduce as a disability under the American with Disabilities Act.[140] In that case, an HIV positive respondent successfully argued that her HIV status constituted a disability as a physical impairment that substantially limited a major life activity.[141] The major life event was the respondent's inability to reproduce.[142] The Court's holding was "confirmed by a consistent course of agency interpretation before and after enactment of the ADA."[143] In fact "[e]very agency to consider the issue under the Rehabilitation Act found statutory coverage for persons with asymptomatic HIV."[144]

Under the Americans with Disabilities Act, an individual has a disability if he or she has "(1) a physical or mental impairment that substantially limits one or more major life activities . . . ; (2) a record of such impairment; or (3) is regarded as having such impairment."[145] In *Bragdon*, the Supreme Court noted that the HIV infection limited the plaintiff's ability to reproduce in two independent ways.[146] First, a woman infected with HIV who tries to conceive a child imposes a significant risk of infection on her sexual partner.[147] Second, an HIV-positive mother risks passing the infection to her baby.[148] Thus, while conception and childbirth are not impossible for an HIV positive individual, the Court noted that these births are "without doubt…dangerous to the public health."[149] This danger satisfied the standard because "the Act addresses substantial limitations on major life activities, not utter inabilities."[150] As a result, "[w]hen significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable."[151]

139. *Id.* at 840.
140. Bragdon v. Abbott, 524 U.S. 624 (1998).
141. *Id.* at 639.
142. *Id.*
143. *Id.* at 642.
144. *Id.*
145. 42 U.S.C. § 12102(1) (2018).
146. Abbott, 524 U.S. at 639.
147. *Id.*
148. *Id.* at 640.
149. *Id.* at 641.
150. *Id.*
151. *Id.*

Hopes were high that *Bragdon v. Abbott* "would effectively prevent employers from prohibiting infertile employees from taking time off from work, and more importantly, would force insurers to provide insurance coverage" for infertility treatment.[152] However, the decision in *Saks v. Franklin Covey Co*, discussed in further detail below,[153] turned these hopes into disappointment when the United States Court of Appeals for the Second Circuit based its ruling on the fact that "the defendant's plan offered the same insurance coverage to all its employees."[154] On the other hand, *Saks* did not undo *Bragdon v. Abbott*'s positive effect of giving employees the "opportunity to take time off from work in order to undergo lengthy infertility treatment procedures."[155]

"In *Laporta v. Wal-Mart Stores*, [LaPorta,] a former employee[,] who was infertile brought suit against her employer, Wal-Mart, alleging that her termination violated the ADA".[156] Laporta argued "that her failure to show up for work on days that she had scheduled infertility treatments was the basis for her dismissal."[157] "In denying the [d]efendant's motion for summary judgment, the [U.S. District Court for the Western District of Michigan] applied *Bragdon* and agreed with LaPorta that as an infertile employee, she was entitled to protection under the ADA."[158] Thus, her employer was required to make "reasonable accommodations" for her disability.[159]

3. Title VII of the Civil Rights Act and Pregnancy Discrimination Act

Title VII of the Civil Rights Act prohibits employment practices that "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[160] This prohibition extends to discrimination in providing health insurance and other fringe benefits.[161] As the court in *Saks v. Franklin Covey Co*. summarized:

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152. James B. Roche, *After Bragdon v. Abbott: Why Legislation Is Still Needed to Mandate Infertility Insurance*, 11 B.U. Pub. Int. L.J. 215, 221 (2002).

153. *See infra* Part II.1.iii.

154. Roche, *supra* note 152.

155. *See id.* at 222.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 222.

160. 42 U.S.C. § 2000e–2(a)(1) (2018).

161. *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983).

> The Pregnancy Discrimination Act ["PDA"] amends Title VII's definition of discrimination 'because of sex' to include discrimination 'because of or on the basis of pregnancy, childbirth, or related medical conditions.' [162] The PDA further mandates that 'women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.[163] Under the PDA, 'an otherwise inclusive plan that single[s] out pregnancy-related benefits for exclusion is discriminatory on its face.' [164]

In *Saks v. Franklin Covey Co.*, the Second Circuit Court of Appeals affirmed the district court's decision to dismiss the plaintiff's Title VII claim against her employer for refusing to cover surgical treatment as a result of medically diagnosed infertility.[165] The district court found that discrimination did not exist because Ms. Saks had equal access to the same insurance policy as her nondisabled coworkers and the plan excluded coverage for surgical impregnation procedures for every employee, regardless of their fertility status.[166] The Second Circuit affirmed the district court's dismissal, holding that "infertility standing alone does not fall within the meaning of the phrase 'related medical conditions' under the PDA"[167] because the result would be "incompatible with the PDA's purpose of clarifying the definition of 'because of sex' and the Supreme Court's interpretation of the PDA in *Johnson Controls*."[168] In the Second Circuit's view, "the PDA comports with the Supreme Court's reasoning in *International Union v. Johnson Controls, Inc.*, in which the Court indicated that, although discrimination based on 'childbearing capacity' violates Title VII as modified by the PDA, discrimination based on 'fertility alone' would not."[169]

The Second Circuit reasoned that:

> Because reproductive capacity is common to both men and women, we do not read the PDA as introducing a completely new classification of prohibited discrimination based solely on reproductive capacity. Rather, the PDA requires that pregnancy, and

162. Saks v. Franklin Covey Co., 316 F.3d 337, 343 (2d Cir. 2003) (citing 42 U.S.C. § 2000e(k)).
163. *Id.*
164. *Id.* (citing *Newport News Shipbuilding & Dry Dock Co.*, 462 U.S. at 684).
165. *Saks*, 316 F.3d at 337.
166. *Id.* at 342.
167. *Id.* at 346.
168. *Id.*
169. *Id.* at 345-46.

> related conditions, be properly recognized as sex-based characteristics of women.[170]

As a result, including infertility within the PDA's protection as a "related medical condition" would "result in the anomaly of defining a class that simultaneously includes equal numbers of both sexes and yet is somehow vulnerable to sex discrimination."[171]

Saks demonstrates[172] that infertility must be added to the current list of protected attributes of Title VII—such as "race, color, religion, sex, or national origin"—and have its own accompanying analog to the Pregnancy Discrimination Act's explicit guarantee of insurance coverage for infertility treatment.[173] One can only imagine that the court's judgement was heartbreaking for Ms. Saks personally. However, in many important ways the Second Circuit was correct in its assertion that the causes and remedies of infertility are much larger in scope than the PDA ever foresaw or intended.[174] The *Saks* opinion can be read as a first step to acknowledging the diverse issues that arise among individuals and couples impacted by infertility and that these issues surpass the limited realm of women's health and pregnancy discrimination.[175]

4. I.R.C. Section 213 and Tax Court

Many patients undergoing infertility treatment take advantage of an IRS rule that allows medical expenses that exceed 7.5% of annual adjusted gross income to be itemized and deducted from their tax bill.[176] On its face, the tax deduction for medical expenses may seem to be a silver bullet solving the high cost of infertility treatment for many would-be-parents. However, it is insufficient. It overlooks many would-be-parents when they need it the most and it discriminates against would-be-parents who incur medical costs on behalf of a third party such as a donor or surrogate.

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170. *Id.* at 345.

171. *Saks*, 316 F.3d at 346.

172. *See id.* at 345-46 (The Saks court acknowledged that "We have no doubt that by including the phrase 'related medical conditions,' the statutory language clearly embraces more than pregnancy itself." However, "…the PDA requires that pregnancy, and related conditions, be properly recognized as sex-based characteristics of women." The PDA, then, would not apply infertility because "Infertility is a medical condition that affects men and women with equal frequency.") *Id.*

173. 42 U.S.C. § 2000e–2(a)(1) (2018).

174. *See Saks*, 316 F.3d 337 at 346.

175. *See id.* As the court points out, infertility is a malady impacting both men and women. *Id.*

176. *Topic No. 502 Medical and Dental Expenses*, *supra* note 10.

a. Limited Financial Resources

The first problem with the current tax law is that individuals and families are expected to somehow "front" the full cost of medical treatment before receiving a refund, a refund that could take many months, or even a year to receive. Given that the median household bank balance in 2019 was $5,300, paying for the full cost of medical treatment ordinarily requires access to credit.[177] However, credit is a privilege not afforded to everyone. Even with credit, the time delay before the cost is mitigated through the tax deduction sticks the individual or couple with non-deductible interest payments on the debt.[178] This also assumes that the taxpayer has knowledge of the medical tax deduction as well as the prowess to effectively navigate complex IRS processes or can afford to pay for an accountant's help.

To qualify for the medical deduction on taxes, prospective parent(s) must pay 7.5% of their income that will not be reimbursed at all.[179] This is a tall order given the lack of discretionary income in most American households. Discretionary income is the amount of income a household or individual has to invest, save, or spend after taxes and necessities are paid—such as, mortgages, rent, utilities, student loans and credit card debts.[180] As an example, suppose a couple filing jointly has an income of $100,000 and pays the 2021 income tax rate of twenty-two percent.[181] Now let's assume that this couple's regular bills are $66,861, which is the average annual expense for a family of two to cover transportation, rent, insurance, food, clothing, and other necessities in 2021.[182] The

177. Adrian Mak, *Average US Savings Account Balance*, ADVISOR SMITH (June 22, 2021), https://advisorsmith.com/data/average-savings-account-balance/.

178. Michelle Black & Robin Saks Frankel, *What Is The Average Credit Card Interest Rate?*, https://www.forbes.com/advisor/credit-cards/average-credit-card-interest-rate/ (last updated Apr. 1, 2022). Assuming that an individual or couple carries $20,000 in credit card debt for one year, at the 2021 average credit card interest rate of 16.45%, they will pay $3,290 in interest over the 12 months. *See id.*

179. *Topic No. 502 Medical and Dental Expenses*, *supra* note 10.

180. *See* Steven Nickolas, *Disposable Income vs. Discretionary Income: What's the Difference?*, INVESTOPEDIA, https://www.investopedia.com/ask/answers/033015/what-difference-between-disposable-income-and-discretionary-income.asp (last updated Feb. 17, 2022).

181. Troy Segal, *Tax Rate*, INVESTOPEDIA, https://www.investopedia.com/terms/t/taxrate.asp (last updated Dec. 28, 2021); *see also* Nickolas, *supra* note 180.

182. Hal M. Bundrick, *Average Monthly Expenses: From Single Person to Family of 5*, NERDWALLET (Apr. 29, 2021), https://www.nerdwallet.com/article/finance/monthly-expenses-single-person-family. Of course, the cost of living fluctuates depending on a number of factors. For example, the Economic Policy Institute estimates that a household with two adults and no children in Santa Clara County, California requires $78,150 to attain a modest yet adequate standard of living, while the same household in Dauphin County, Pennsylvania would require $54,217. *Family Budget Calculator*, ECON. POL'Y INST., https://www.epi.org/resources/budget/ (last visited Jan. 21, 2021).

couple's discretionary income is $11,139.[183] If this couple pursues IVF and expects to be reimbursed through the medical tax exemption, they will forever lose $7,500 or sixty-seven percent of their $11,139 discretionary income.[184] This directly competes with other financial goals such as saving for retirement or for the purchase of a home.

b. Discrimination in Exclusion of Third-Party Expenses

The second problem is that the current tax deduction discriminates against same sex couples, single prospective parents and many other types of would-be-parents that rely on gestational carriers and egg donors. The tax law does not allow these individuals or families deduct infertility-related medical costs for third parties.

In a Private Letter Ruling (PLR 202114001), released on April 9, 2021, the IRS held that the costs and fees related to egg donation and IVF procedures would not qualify as deductible medical expenses under Section 213 when they are incurred for third parties, such as gestational surrogates or egg donors.[185] The ruling was issued in response to a legal challenge by a married male same-sex couple who wished to have a child with as much representative DNA as possible.[186] To this end, the couple planned for an egg donation from the sister of one of the spouses, a sperm donation from the other spouse, and for an unrelated gestational surrogate to carry the child to term.[187] The IRS concluded that the costs and fees related to egg donation, IVF procedures and gestational surrogacy would not qualify as deductible medical expenses under section 213 when they are incurred for third parties, such as the taxpayer's sister and the unrelated surrogate.[188] In contrast, medical costs and fees directly attributable to the taxpayers are deductible within the limitations of Section 213, including sperm donation and sperm freezing.[189]

183. Segal, *supra* note 181; *See* Nickolas, *supra* note 180; *Family Budget Calculator*, *supra* note 182. This figure was calculated by subtracting $22,000—the amount of taxes owed on a $100,000 salary based on a twenty percent tax bracket—and $66,861, the average annual expense for a family of two, from the hypothetical $100,000 income. *See id.*

184. *See id.* This figure was calculated by multiplying the hypothetical $100,000 income by 7.5%—the percentage of income required to qualify for medical tax deduction that cannot be reimbursed at all—and then dividing the resulting $7,500 from the $11,139 discretionary income from footnote 182 to yield a percentage. *Id.*

185. John T. Lutz, *IRS Issues Guidance on the Deductibility of Fertility Treatments For Same-Sex Couples*, MCDERMOTT WILL & EMERY (July 28, 2021), https://www.mwe.com/insights/irs-issues-guidance-on-the-deductibility-of-fertility-treatments-for-same-sex-couples/.

186. *Id.*

187. I.R.S. Priv. Ltr. Rul. 109450-20 (Jan. 12, 2021).

188. *Id.*

189. *Id.*

In *Longino v. Commissioner*, the United States Tax Court held that a taxpayer cannot deduct IVF costs of an unrelated person if the taxpayer does not have a defect that prevents him from naturally conceiving children.[190] Longino could not deduct fees associated with IVF procedures undergone by his former fiancé because couples who have not legally married are considered unrelated persons.[191] However, Longino would have been able to deduct the same expenses if she had been his legal spouse because "fees directly attributable to medical care for . . . the taxpayer, the taxpayer's spouse, or taxpayer's dependent qualify as eligible medical expenses."[192]

The holding in *Morrisey v. United States* is another example of this kind of discrimination for which there is currently no legal remedy.[193] In *Morrisey*, the Eleventh Circuit found that expenses incurred to retain, compensate, and care for the women serving as egg donor and gestational surrogate were not incurred for the purpose of affecting the taxpayer's bodily reproductive function within the meaning of I.R.C. § 213(d), and thus not deductible.[194] The taxpayer, a male in a same-sex union, conceded he was not medically infertile, but characterized himself as "effectively" infertile because he is homosexual.[195] The court:

> applied "the ordinary meaning of the statutory terms 'affect' and 'function' in ultimately finding the IVF costs were not deductible under I.R.C. § 213(d) because the costs were not for purposes of materially influencing or altering an action for which taxpayer's own body was specifically fitted, used, or responsible."[196] The IVF and surrogacy costs were not deductible [under this statutory language] because taxpayer's own function in the reproductive process was to produce healthy sperm, and he remained able to do so without the IVF and surrogacy procedures.[197]

190. Longino v. Comm'r of Internal Revenue, 105 T.C.M. (CCH) 1491 (2013), *aff'd sub nom*. Longino v. Comm'r of IRS, 593 F. App'x 965 (11th Cir. 2014).

191. *See id.*

192. *See* I.R.S. Priv. Ltr. Rul. 109450-20 (Jan. 12, 2021).

193. Morrissey v. United States, 871 F.3d 1260 (11th Cir. 2017).

194. Maria Morales, *Male couple cannot deduct medical expenses related to having a baby*, THE TAX ADVISOR (Nov. 1, 2021), https://www.thetaxadviser.com/issues/2021/nov/male-couple-cannot-deduct-medical-expenses-baby.html; *see also Morrisey*, 871 F.3d at 1267, 1272.

195. *Morrisey*, 871 F.3d at 1263.

196. Morales, *supra* note 194; *see also Morrisey*, 871 F.3d at 1265.

197. Morales, *supra* note 194.

c. Due Process Offers No Protection

The *Morissey* Court also held that denial of IVF-related tax deductions related to third-party medical expenses was not an infringement of the taxpayer's Due Process rights under the Fourteenth Amendment. In his appeal, Morrissey contended that by denying deduction of his third-party expenses, the IRS illegally disadvantaged him on the basis of his sexual orientation [198] and thereby violated his right to Equal Protection of the Laws.[199] The court disagreed.[200]

First, the court refused to extend *Skinner*'s holding—where the court invalidated a state statute that required the sterilization of certain criminal offenders—to encompass the circumstance in which a man asserts a fundamental right to father a child through the use of advanced IVF procedures.[201] The Eleventh Circuit was concerned that "were we to confer 'fundamental' status on Mr. Morrissey's asserted right to IVF-and-surrogacy-assisted reproduction, we would 'to a great extent, place the matter outside the arena of public debate and legislative action.' " [202]

Second, because section 213 is neutral on its face the plaintiff "must demonstrate that (1) he is similarly situated to other[s] . . . who received more favorable treatment; and (2) the state engaged in invidious discrimination against him based on race, religion, national origin, or some other constitutionally protected basis."[203] The court found that "Mr. Morrissey can't demonstrate that the IRS has treated him differently from similarly situated heterosexual taxpayers."[204] Afterall, the agency's refusal to allow Mr. Morrissey's claimed deduction was consistent with longstanding IRS guidance and Tax Court precedent in cases where heterosexual taxpayers sought deductions for analogous IVF-related expenses.[205] And "[e]ven if Mr. Morrissey could show that he had been treated differently from similarly situated heterosexual taxpayers, he hasn't shown that any difference was motivated by an intent to discriminate against him on the basis of his sexual orientation."[206] As a result, the court held that the IRS's disallowance of Morrissey's claimed deduction neither violates any fundamental right

198. *Morrisey*, 871 F.3d at 1264.
199. *Id.* at 1270.
200. *Id.* at 1272
201. *Id.* at 1269.
202. *Id.* at 1270.
203. *Id.* (quoting Sweet v. Sec'y Dep't of Corr., 467 F.3d 1311, 1318-19 (11th Cir. 2006)).
204. *Morrisey*, 871 F.3d at 1270.
205. *Id.*
206. *Id.* at 1271.

nor discriminates on the basis of any suspect (or quasi-suspect) characteristic.[207]

IV. IDENTIFICATION OF THE LEGAL PROBLEM

No Supreme Court case currently addresses whether the right to infertility treatment or ART exists.[208] The lack of judicial support for infertile couples and individuals persists despite precedent that recognizes the right to procreate as a fundamental liberty interest under the Fourteenth Amendment.[209] The fundamental right to procreate must include access to infertility treatment for prospective parents of any background who are medically or circumstantially infertile.[210] To achieve this result, the right to procreate should be reimagined and restructured from a negative right that prohibits government regulation of time and manner of procreation (limited so far to the right to contraception or abortion), to a positive individual entitlement to bear or beget children and found a family.[211]

Even if the right to choose infertility treatment was guaranteed as a fundamental liberty interest, couples and individuals may still struggle to access financial support. The current tax deduction system, allowing for a return of medical expenses exceeding 7.5% of adjusted gross income, does not offer enough financial support to make infertility treatment a viable option for couples or individuals.[212] This tax scheme is also discriminatory because it prevents taxpayers from deducting expenses incurred on behalf of unrelated third-parties, such as gestational carriers and eggs donors.[213] The exclusion of IVF-related expenses for unrelated third-parties should be revised by the federal legislature. The *Morrisey* court seemed uncomfortable with revising the policy by juridical fiat and argued that lawmakers should remedy the

207. *Id.* at 1272.

208. *See* ROSENBERG, *supra* note 15.

209. *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (acknowledging that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance [and that] Various guarantees create zones of privacy.") The penumbra of privacy expanded in the following cases. *Id.*; *see* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); *see* Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972); *see* Roe v. Wade, 410 U.S. 113, 152 (1973).

210. *See* ROSENBERG, *supra* note 15.

211. *See* Shauuer, *supra* note 71, at 826.

212. 26 U.S.C. § 213(a) (2018).

213. *See Topic No. 502 Medical and Dental Expenses*, *supra* note 10. Despite the fact that the list of deductible medical expenses is non-exhaustive, tax court precedent has established that the exemption cannot be applied to medical expenses incurred by a third-party unless they are for the purpose of ". . .materially influencing or altering an action for which taxpayer's own body was specifically fitted, used, or responsible." Morales, *supra* note 194; *see also Morrisey*, 871 F.3d at 1265.

inequity.[214] The current constitutional protections, such as Due Process, do not apply to offer relief to taxpayers who incur third-party expenses.[215]

Despite its discrimination, the current medical expenses tax deduction system is the only financial support many would-be-parents receive, because employer-based insurance plans are not federally required to cover the cost of infertility treatment.[216] Currently, state lawmakers determine whether employer-provided infertility coverage is required, and if so, which types of infertility treatment are required to be included in their insurance plans.[217] Even in states that require at least some type of infertility treatment coverage, access can be limited by discriminatory statutory definitions of infertility—including states that define infertility solely in the context of marriage.[218] Guaranteeing the right to procreate to infertile couples or individuals requires financial access to infertility treatment, vis-a'-vis employer-based and government-based insurance plans nationwide to ensure this right is equitably realized.[219]

Unfortunately, the critical right to insurance-based coverage of infertility treatment is not guaranteed even under Title VII of the Civil Rights Act or the Pregnancy Discrimination Act.[220] Title VII already forbids discrimination against "a qualified individual on the basis of disability in regard to … conditions, and privileges of employment."[221] However, the protection does not apply to situations in which the same conditions and privileges are provided, or not provided, to all employees regardless of disability status; even if the limitations common to all employees hits "some harder than others" specifically because of their disability.[222] This means that employers and employer-based insurance

214. *Morrisey*, 871 F.3d at 1270. The Eleventh Circuit was concerned that "were we to confer 'fundamental' status on Mr. Morrissey's asserted right to IVF-and-surrogacy-assisted reproduction, we would 'to a great extent, place the matter outside the arena of public debate and legislative action.' " *Id*.

215. In challenging a law that is neutral on its face, the plaintiff ". . .must demonstrate that (1) he is similarly situated to other[s] . . . who received more favorable treatment; and (2) the state engaged in invidious discrimination against him based on race, religion, national origin, or some other constitutionally protected basis." The court found that "Mr. Morrissey can't demonstrate that the IRS has treated him differently from similarly situated heterosexual taxpayers." *Morrisey*, 871 F.3d at 1270.

216. *See* Curtis, *supra* note 7.

217. *Id.* at 328.

218. *Id.* at 329.

219. *See id.*

220. Saks v. Franklin Covey Co., 316 F.3d 337, 346 (2d Cir. 2003).

221. 42 U.S.C. § 12112 (2018).

222. Saks v. Franklin Covey Co., 117 F. Supp. 2d 318, 327 (S.D.N.Y. 2000), *aff'd in part*, *remanded in part*, 316 F.3d 337 (2d Cir. 2003). The Saks court acknowledged "[t]hat the

plans are not required to provide coverage for infertility treatment so long as the plan offers the "same insurance coverage [or lack of coverage] to all its employees."[223]

V. PROPOSAL

A. Make Access to Infertility Treatment a Fundamental Right

As the United States Supreme Court explained in *Griswold v. Connecticut*, "the First Amendment has a penumbra where privacy is protected from governmental intrusion."[224] As part of the penumbra, the Court clearly recognizes fundamental liberty rights to contraception[225] and abortion[226] because "[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices."[227] The right to seek infertility treatment or other assistance required to start a family is a logical positive extension of these very personal liberties.

The Supreme Court should expand the right to procreate to include the positive individual entitlement to bear or beget children and found a family,[228] ensuring that any attempts by federal or state government to ban or regulate these treatments without Due Process would be met with strict scrutiny.[229] This should include discriminatory definitions of infertility that state legislatures might enact which impact access to insurance coverage of treatment based simply on family composition. This guarantee from the Court is particularly important to guard against discrimination of certain groups of would-be-parents, including

limitation hits infertile employees like Ms. Saks harder than it hits other employees is of course true. . ." *Id.*

223. Roche, *supra* note 152.

224. Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

225. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

226. Roe v. Wade, 410 U.S. 113 (1973).

227. Carey v. Population Servs. Int'l, Inc., 431 U.S. 678, 685 (1977).

228. Shauuer, *supra* note 71, at 826.

229. *See* Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 Fla. L. Rev. 519, 526 (2008). In Griswold v. Connecticut, the Court invalidated a state law that banned the use of contraceptives, finding that the statute impermissibly violated marital privacy. In Eisenstadt v. Baird, it upheld the right to use contraceptives even outside the confines of marriage, and in Roe v. Wade, it held that this privacy right included a woman's decision whether to terminate her pregnancy. In these cases, the Court recognized a fundamental right, even though the right did not exist in the Constitution's text, and the Court subjected all government regulation of the right to strict scrutiny. *Id.*

individuals who plan to parent alone, same-sex couples, and prospective parents with low-income.[230]

B. Greater Equity Through Financial Support

While making infertility treatments a fundamental right would constitute a step in the right direction, reducing the financial burden of such treatments would still be necessary to remedy the financial inequity surrounding infertility treatment.[231] Unless the financial barriers to infertility care are directly and promptly addressed, the fundamental right to procreate will remain under threat and disparities in access will only intensify.[232]

Reducing the financial burden associated with infertility treatment would lead to greater equity among would-be-parents of all backgrounds, as well increased identification of medical and environmental conditions that may affect infertility and cause the need for more extensive treatment.[233] Granting access to fertility screening and treatment through employer-based health insurance plans will allow individuals and couples to pursue all manner of infertility screening and treatment at a younger age.[234] This would lead to several positive outcomes, such as: (1) greater access to screening; (2) more potential to engage with less invasive and inexpensive measures before ART; (3) greater ART success rates for couples that need it[235] and (4) ultimately fewer repeat expensive treatment cycles of ART. This yields medical, psychological, and financial benefits to all parties involved.[236] These outcomes could be achieved by: (1) requiring employer-based insurance programs to cover infertility treatment under federal law; or (2) changing the tax code to permit deductions for the expenses of pursuing fertility treatments.

C. Federal Requirement for Insurance Coverage of Infertility Treatment

The power to require existing employer-based insurance programs to cover infertility treatment, regardless of marital status or sexual orientation, rests with the legislative branch of the federal government

230. *See* Davis & Khosla, *supra* note 2, at 12-13.
231. *See* Insogna & Ginsburg, *supra* note 79, at 1156.
232. *Id.*
233. *See* Curtis, *supra* note 7, at 333.
234. *See id.*
235. *See* Rachel Gurevich, *The Chances for IVF Pregnancy Success*, VERYWELL FAMILY, https://www.verywellfamily.com/what-are-the-chances-for-ivf-success-1960213 (last updated Apr. 20, 2020).
236. *Id.*

through its enumerated commerce power.[237] Allowing would-be-parents of all backgrounds to have financial access to infertility treatment through employer-based health care plans is critical to ensure the right to procreate exists equitably in practice rather than just on the pages of a court decision.[238] Congressional approval of a unique anti-discrimination legislation and protection of employee rights, in the spirit of Title VII of the Civil Rights Act[239] and the Pregnancy Discrimination Act,[240] is a necessary step to ensure that everyone is able to access their constitutional right to procreate through employer-based health insurance.

Because of the diversity in the infertility community, any attempt to include infertile employees or their covered infertile partners within the scope of the existing Pregnancy Discrimination Act would likely address medical infertility solely in women at best and leave countless other individuals and couples suffering from infertility out in the cold.[241] Infertility in its many forms deserves its own protection calibrated to fit the broad range of medical diagnosis and other circumstances that might cause infertility and necessitate clinical fertility treatment.[242] The diverse community afflicted by infertility deserves recognition and protection as a unique class under Title VII along with "race, color, religion, sex, or national origin."[243]

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237. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012). As the Supreme Court of the United States opined in Sebelius, "The Constitution authorizes Congress to 'regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.' Art. I, § 8, cl. 3. Our precedents read that to mean that Congress may regulate 'the channels of interstate commerce,' 'persons or things in interstate commerce,' and 'those activities that substantially affect interstate commerce.'. . .The power over activities that substantially affect interstate commerce can be expansive." *Id.* at 536. While the Sebelius court held that the commerce power could not be used to compel individuals to purchase new insurance policies, the opinion suggests that Congress could constitutionally regulate existing policies. *Id.* at 551-552. The court opined, "As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching 'activity'. . .The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce." *Id.*

238. *See* Insogna & Ginsburg, *supra* note 79, at 1156.

239. *See* 42 U.S.C. § 2000e–2(a)(1) (2018).

240. *See* 42 U.S.C. § 2000e(k) (2018); 42 U.S.C. § 2000e–2(a)(1) (2018).

241. *See* Saks v. Franklin Covey Co., 316 F.3d 337, 345-46 (2d Cir. 2003). The Saks court acknowledged that. . ." approximately one third of infertility problems are due to male factors, one third due to female factors, and one third due to couple factors." *Id.* As a result, "[i]ncluding infertility within the PDA's protection as a ''related medical condition[ ]'' would result in the anomaly of defining a class that simultaneously includes equal numbers of both sexes and yet is somehow vulnerable to sex discrimination." *Id.*

242. *See id.*

243. 42 U.S.C. § 2000e–2(a)(1) (2018).

But as *Saks* demonstrates, the inclusion of infertility in Title VII's list of protected classes would not be sufficient to guarantee insurance coverage.[244] To guarantee insurance coverage, the infertility community needs its own accompanying discrimination act. This act could be styled like the PDA and provide that an otherwise inclusive plan that singles out infertility-related benefits for exclusion is discriminatory on its face.[245] An effective Infertility Discrimination Act would need to cover all aspects of infertility and employment, including hiring, firing, promotion, health insurance benefits, and treatment in comparison with fertile persons similar in their ability or inability to work.[246] It would also need to make explicit that "[e]mployers who have health insurance benefit plans must apply the same terms and conditions for [infertility]-related costs as for medical costs unrelated to [infertility]."[247]

D. Tax Code Changes

Internal Revenue Code section 213(a) allows a deduction for expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, spouse, or dependent, to the extent the expenses exceed 7.5% of adjusted gross income.[248] While the law is broad enough to apply to expenses incurred for infertility treatment, it does not allow would-be-parents to deduct infertility-related medical costs for third parties, such as egg donors and gestational carriers. The deduction exception discriminates against many types of would-be-parents, including those in the LBGTQ+ community, individuals pursuing parenthood on their own, as well as prospective parents whose medical infertility necessitates the intervention of a third party. To achieve greater equity, the discriminatory third-party exception to the deduction should be repealed, and the provision modified to allow prospective parent(s) to deduct the costs incurred on behalf of third parties for the purpose of overcoming the medical or circumstantial infertility of an unrelated taxpayer.

244. *See Saks*, 316 F.3d at 346.

245. *Id.* at 343.

246. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC-CVG-2015-1, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (2015), https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#_ftnref.

247. *Id.*

248. *Topic No. 502 Medical and Dental Expenses*, *supra* note 10.

VI. CONCLUSION

The fundamental liberty interest to procreate should include the right for all would-be-parents to found their own families.[249] Because of the civil rights, economic, societal and personal benefits to be gained if infertile couples and individuals had the costs of infertility diagnosis and treatment covered by employer-provided health insurance, Title VII's protections should be expanded to include infertility in addition to "race, color, religion, sex, or national origin."[250] The definition of infertility should include both medical and circumstantial infertility. To guarantee insurance coverage, the infertility community also needs its own accompanying Infertility Discrimination Act, styled like the Pregnancy Discrimination Act. An effective Infertility Discrimination Act should explicitly state that an otherwise inclusive plan that singles out infertility-related benefits for exclusion is discriminatory on its face.[251] It should make it clear that employers who have health insurance benefit plans are required to apply the same terms and conditions for infertility-related costs as for medical costs unrelated to infertility.[252]

Together these efforts would prevent discrimination with respect to compensation, terms, conditions, or privileges of employment on the basis of infertility.[253] They would also ensure equality in employer-based insurance policies between fertile and infertile insured, measured by "the relative comprehensiveness of coverage."[254] As a result, it would require that employer-based health benefits provide for the needs of infertile individuals and couples. This would open the door for many couples and individuals to pursue their dream of starting a family without incurring such a financial burden.[255]

In the absence of employer-based insurance and independent wealth, many would-be-parents must continue to rely solely on Internal Revenue Code section 213(a) for financial relief which is limited to the recovery of medical expenses exceeding 7.5% of the taxpayer's adjusted gross income. Unfortunately, the provision discriminates against many types of would-be-parents by prohibiting the deduction of expenses for unrelated third parties, such as gestational carriers and donors. The

249. *See* ROSENBERG, *supra* note 15.

250. 42 U.S.C. § 2000e–2(a)(1) (2018).

251. Saks v. Franklin Covey Co., 316 F.3d 337, 343 (2d Cir. 2003).

252. *See generally* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 246 (discussing how employers who have health insurance benefit plans must apply the same terms and conditions for pregnancy-related costs as for medical costs unrelated to pregnancy).

253. *See id.*

254. *Saks*, 316 F.3d at 344.

255. *See* Gurevich, *supra* note 5.

support should be expanded to unrelated third parties for purposes of infertility treatment to acknowledge, include, and honor the diverse needs of prospective parent(s) from all backgrounds who share the common goal of building a family while persevering through the grief and loss that often accompany infertility.