# THE EVOLVING LANDSCAPE OF INSURANCE LAW AND ASSISTED REPRODUCTIVE TECHNOLOGY:
## Implications for Gay Parenthood

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ABSTRACT

Starting a family and becoming a parent are major milestones for many people regardless of their sexual orientation. While some people choose not to have children, others face unique challenges in their journey to becoming parents. The legalization of same-sex marriage opened the door for parenthood to many same-sex couples who wished to pursue parenthood; however, that journey would not be easy. The long history of medical institutions pathologizing homosexuality and the legal system's criminalization of same-sex intimacy created a standard of heterosexuality that entrenched itself in the fabric of American society. This standard would eventually be used against same-sex couples in the healthcare system where they would attempt to access assisted reproductive technology. This Article explains how the centuries-long tradition of associating parenthood with heterosexuality had managed to seep into health insurance policies that can serve as gatekeepers—providing different-sex couples with an ability to become parents while withholding the same opportunity from same-sex couples. After *Bostock v. Clayton County* supplied the necessary ammunition and the U.S. Department of Health and Human Services promulgated recent regulatory changes, gay people from multiple states brought lawsuits alleging discrimination based on sexual orientation in their health insurance policies. The Article explores an ongoing slew of court battles and synthesizes legal strategy lessons. The Article concludes with future directions for improving the healthcare system and supporting gay parenthood.

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## I. Introduction

It is hard to overstate the success of the gay rights movement in America. Broadly, gay rights can be conceptualized using the following four-part typology that helps to identify major areas of life that directly affect the lives of gay people: (1) decriminalization of same-sex attraction; (2) legalization of same-sex marriage; (3) anti-discrimination laws that cover areas such as employment, education, and housing; and (4) gay parenthood which includes legal issues that are encountered during the journey to parenthood. The decriminalization of intimacy between two people of the same-sex eventually led to the legal recognition of same-sex marriage and laws that protect gay people from various types of discrimination. Not only did these changes significantly improve their daily lives, but these changes also allowed gay people to pursue parenthood. Over the years, many of them have successfully managed to become parents; however, there are still unique challenges that gay people face when they want to become parents.

There was a long history of treating same-sex attraction as abnormal as compared to different-sex attraction. And future generations adopted this view. It was customary to think that marriage was only a union between one man and one woman. Parenthood was always understood as having children by heterosexual couples. Deviations from these traditions would receive negative treatment from other members of society, especially if those deviations involved gay people. Society continues to view the journey to gay

parenthood through the lens of the tradition of heterosexuality. Thus, exploring the power of tradition and how difficult it is to change tradition helps to understand the current challenges that gay people face on this journey.

The first Part of this Article discusses various social forces that affected how society thought about gay parenthood. This Part specifically explores how the medical institutions pathologizing homosexuality led to seeing gay people as abnormal. The tradition of seeing same-sex attraction as a psychiatric condition that needed treatment, namely conversion therapy, entrenched itself in the fabric of American society and the legal system that, in many ways, treated gay people as second-class citizens. The next Part of this Article delves into the journey to parenthood that many gay people decide to pursue. This Part starts with explaining the present state of assisted reproductive technology that is available for gay people who want to become parents. This Part further explains the complex relationship between this technology and the healthcare system and how this relationship directly disadvantages many gay people. Five case studies are used to show the various challenges that gay people currently face in the healthcare system. In addition to describing the complexity of health insurance policies, each case study shows how the legal system was used to challenge those policies to allow gay people to become parents. The final Part of this Article synthesizes the lessons learned from each case study and proposes a set of solutions that would help gay people in navigating the healthcare system as they contemplate becoming parents.

## II. Social Forces and Gay Parenthood

The surrounding social and legal environment that people live in consists of various forces that can shape how people think about themselves, including their own abilities and future aspirations. While these forces are invisible and often cannot be readily conceptualized or identified, that does not mean that they do not affect how people navigate their lives. Understanding these forces and how they operate is important when discussing people who want to be parents.

There are multiple considerations that can affect someone's decision to have a child, assuming that decision is a deliberate one. Some people do not want to raise a child alone and believe that having a partner who also wants to have a child is necessary. Factors, such as age and health, might affect people's ability to find a partner, which could then result in them not having children. Other people might have had negative experiences with young children,

and those experiences might lead them to not wanting to have children. Financial limitations could also affect how people think about the future, including having children who require significant time and financial investment. All or some of these considerations might be relevant for everyone, but there are also challenges that are unique to gay people who wish to become parents.

The following Part focuses on two major invisible forces that affect how society thought about the notion of gay parenthood and how they also affect the way gay people themselves think about parenthood and their own ability to become parents. The Part first starts with exploring the long history of treating attraction between two people of the same-sex as a mental disorder. The Part shows how widespread pathologization of homosexuality was among multiple medical organizations. After discussing the negative effects this medicalization had on gay people, the Part next explores the relationship between homosexuality and the legal system.

### A. *Medical Institutions and Homosexuality*

Engaging in decision-making about whether to have children was a luxury that was not afforded to most gay people living in the early twentieth century, when homosexuality was considered as a psychiatric disorder. In October 1844, the Association of Medical Superintendents of American Institutions for the Insane was founded in Philadelphia by thirteen hospital superintendents.[1] Their goal was to share experiences, gather statistical data on insanity, and improve treatment.[2] In 1892, the name changed to the American Medico-Psychological Association.[3]

In May 1917, the American Medico-Psychological Association held a meeting in New York, adopting a report from its Committee on Statistics.[4] The report outlined a system for uniform statistics on mental disorders, aimed at nationwide adoption by hospitals.[5] In 1918, the Committee, in collaboration with the National Committee for Mental Health, prepared the *Statistical Manual for Institutions*

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1. Anton Sebastian, A Dictionary of the History of Medicine 40 (1999).

2. Global Psychosomatic Medicine and Consultation-Liaison Psychiatry: Theory, Research, Education, and Practice 102 (Hoyle Leigh ed., Springer 2019).

3. Jan Kirk Carney, A History of Public Health 168–69 (2021).

4. Comm. Stat., Am. Medico-Psych. Assoc. & Bureau Stat., Nat'l Comm. Mental Hygiene, Statistical Manual for the Use of Institutions for the Insane 3 (1918), https://archive.org/details/statisticalmanu00assogoog/page/n4/mode/2up?q=sexual [https://perma.cc/EW6C-GXCX].

5. *Id.*

*of the Insane*.[6] The manual's goal was to help institutions compile annual statistics, which would contribute to a national system of statistics on mental diseases.[7] The manual had a section which briefly discussed sexuality:

> 19. Psychoses with Constitutional Psychopathic Inferiority
>
> Under the designation of constitutional psychopathic inferiority is brought together a large group of pathological personalities whose abnormality of make-up is expressed mainly in the character and intensity of their emotional and volitional reactions. Individuals with an intellectual defect (feeblemindedness) are not to be included in this group.
>
> . . .
>
> It is these less well differentiated types of emotional and volitional deviation which are to be designated, at least for statistical purposes, as constitutional psychopathic inferiority. The type of behavior disorder, the social reactions, the trends of interests, etc., which the psychopathic inferior may show give special features to many cases, e. g., criminal traits, moral deficiency, tramp life, sexual perversions and various temperamental peculiarities.[8]

The inclusion of "sexual perversions" was important because the term needed clear definition. In 1921, the American Medico-Psychological Association became the American Psychiatric Association.[9] At the time, various institutions used their own manuals to diagnose psychiatric disorders, leading to communication issues.[10] Recognizing the need for a uniform manual, the Association decided to collaborate with the New York Academy of Medicine.[11]

On March 28, 1928, a meeting was held in New York, hosted by the New York Academy of Medicine, with invitees from organizations like the American Hospital Association, the Association of American Physicians, the United States Public Health Service, and military representatives.[12] The National Conference on Nomenclature of Disease was formed to create a uniform

6. *Id.* at 1.
7. *Id.* at 3.
8. *Id.* at 27–28.
9. Richard Noll, The Encyclopedia of Schizophrenia and Other Psychotic Disorders 16 (3d ed. 2007).
10. Comm. Nomenclature & Stat., Am. Psych. Assoc., Diagnostic and Statistical Manual: Mental Disorders v (1952), https://www.turkpsikiyatri.org/arsiv/dsm-1952.pdf [https://perma.cc/H33L-D6P8].
11. *Id.*
12. Nat'l Conf. Nomenclature Disease, Standard Classified Nomenclature of Disease xv (H. B. Logie ed., 2d ed., 1935).

nomenclature of diseases for the U.S.[13] At a meeting on November 24, 1930, a plan for classification was adopted, systematically including all clinically recognized diseases.[14] The first complete version of the nomenclature was approved on December 14, 1931.[15] In April 1932, a preliminary trial edition was published and tested at fourteen hospitals for six months to gather feedback.[16]

The National Conference on Nomenclature of Disease aimed to lead an international effort to create a standardized manual of diseases.[17] In 1929, a resolution was presented in Berlin, urging other countries to join.[18] In 1931, a committee was formed in Vienna to implement the resolution globally.[19]

The first official edition of the Standard Classified Nomenclature of Disease was published in January 1933 and quickly gained prominence, being used in nearly 500 American and Canadian hospitals.[20] Representatives from the National Conference of Nomenclature of Disease helped 120 hospitals install the manual.[21] These hospitals, affiliated with medical schools like Harvard, Yale, and Stanford, used the manual in teaching, particularly during clinic clerkships.[22] Hospitals and national associations provided feedback on the first edition, leading to further revisions.[23]

In January 1935, the second edition of the Standard Classified Nomenclature of Disease was published and approved by 27 national organizations, including the American Medical Association, American Hospital Association, and American Psychiatric Association.[24] These organizations encouraged members to adopt the edition in their hospitals and assist in its broader adoption.[25] Medical associations, insurance companies, and the Rockefeller Foundation funded the work.[26] The second edition aimed to establish a common nomenclature for diseases across all U.S. medical

13. *Id.*
14. *Id.* at xvi.
15. *Id.* at xviii.
16. *Id.*
17. *Id.* at xxi.
18. *Id.* at xx.
19. *Id.* at xxi.
20. Comm. Nomenclature & Stat., Am. Psych. Assoc., *supra* note 10.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 8.
25. *Id.* at xii.
26. *Id.* at xiii.

institutions, setting the standard for the country.[27] The second edition classified homosexuality as pathological in the following way:

> 000–8xx Drug addiction (76b)
>
> 000-yxx Mental deficiency (87b). see page 95
>
> 000–163 Disorders of personality due to epidemic encephalitis
>
> 000-x40 Psychopathic personality
>
> > 000-x41 With pathological sexuality. Indicate symptomatic manifestations, e.g.: 991 homosexuality, 992 erotomania, 993 sexual perversion, 994 sexual immaturity
> >
> > 000-x42 With pathological emotionality. Indicate symptomatic manifestations, e.g.: 041 schizoid personality, 042 cyclothymic personality, 913 paranoid personality, 043 emotional instability
> >
> > 000-x43 With asocial or amoral trends. Indicate symptomatic manifestations, e.g.: 044 antisocialism, 047 pathological mendacity, 046 moral deficiency, 048 vagabondage, 987 misanthropy
> >
> > 000-x4x Mixed types. Indicate symptomatic manifestations by using the various symptoms in the categories given above or on pages 488 ff.[28]

While many practitioners adopted the second edition, a need for a separate manual dedicated exclusively to psychiatric disorders became increasingly necessary following the beginning of the Second World War which led to a significant increase in unique psychiatric cases among military members and veterans that were not common among regular civilians.[29] The Standard Classified Nomenclature of Disease was ill-equipped to address these unique cases, and the military psychiatrists as well as Veterans Administration psychiatrists soon found themselves operating outside the Standard and creating their own classifications that were better suited for their unique patients.[30] For example, the Standard was not suited to diagnose patients who suffered from combat-related symptoms.[31]

In 1944, the Navy revised its own manual to address these deficiencies while also trying to utilize the Standard.[32] In 1945, the Army made even larger revisions to its own manual, moving further from the Standard.[33] All Armed forces subsequently accepted this manual, and the Veteran's Administration later used it as an

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27. *Id.* at xiii-xiv.
28. *Id.* at 104.
29. *Id.*at vi.
30. *Id.* at vi-vii.
31. *Id.* at vii.
32. *Id.*
33. *Id.*

example.[34] In 1948, the International Statistical Classification also drew from the Armed Forces manual to categorize certain psychiatric disorders.[35] However, even though there were similarities among all manuals, each manual had multiple differences, making the work of practitioners and teachers more challenging and highlighting a need for one uniform manual.[36]

In 1948, the Committee on Nomenclature and Statistics of the American Psychiatric Association began investigating changes made by the Veterans Administration and the Army to the manual, focusing on their advantages and challenges.[37] Feedback from users of the Standard was collected, revealing issues that suggested major revisions were needed.[38] The Veterans Administration and Army also shared insights into the difficulties they encountered with their revisions.[39] The Committee used this input to draft a new manual.[40] On July 3, 1946, President Truman signed the National Mental Health Act, establishing the National Institute of Mental Health, whose representative later served as a consultant.[41]

In April 1950, the Committee shared proposed changes with select members of the American Psychiatric Association and the Editor of the Standard.[42] They strategically distributed copies across various states and included a nine-page questionnaire to gather feedback.[43] The Committee received over 200 completed questionnaires with suggestions and comments, which were incorporated into the second revision.[44] This updated version was then shared with the Editor of the Standard for further review.[45]

On November 6, 1950, the revisions were presented during the American Psychiatric Association meeting, during which a recommendation was made that the second revision should be accepted as the official manual of the American Psychiatric Association, that the second revision would be included in the 1951 edition of the Standard, and that the publication process should be initiated.[46] The first edition of the Diagnostic and Statistical Manual of Mental

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34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at viii.
39. *Id.*
40. *Id.*
41. *Id.* at x.
42. *Id.* at viii.
43. *Id.* at viii-ix.
44. *Id.*
45. *Id.*
46. *Id.*

Disorders (DSM) was published in 1952.[47] The first edition listed homosexuality under the larger category of "sociopathic" psychiatric disorders:

> 000-x60 Sociopathic Personality Disturbance
>
> Individuals to be placed in this category are ill primarily in terms of society and of conformity with the prevailing cultural milieu, and not only in terms of personal discomfort and relations with other individuals. However, sociopathic reactions are very often symptomatic of severe underlying personality disorder, neurosis, or psychosis, or occur as the result of organic brain injury or disease. Before a definitive diagnosis in this group is employed, strict attention must be paid to the possibility of the presence of a more primary personality disturbance; such underlying disturbance will be diagnosed when recognized. Reactions will be differentiated as defined below.
>
> 000-x61 Antisocial reaction
>
> [ . . . ]
>
> 000-x62 Dyssocial reaction
>
> [ . . . ]
>
> 000-x63 Sexual deviation
>
> This diagnosis is reserved for deviant sexuality which is not symptomatic of more extensive syndromes, such as schizophrenic and obsessional reactions. The term includes most of the cases formerly classed as "psychopathic personality with pathologic sexuality." The diagnosis will specify the type of the pathologic behavior, such as homosexuality, transvestism, pedophilia, fetishism and sexual sadism (including rape, sexual assault, mutilation).[48]

No significant changes were made regarding the classification of homosexuality as a psychiatric disorder in the second edition of the DSM that was published in 1968.[49] In December 1973, the Board of Trustees of the American Psychiatric Association (APA) voted to remove homosexuality as a mental disorder.[50] The APA released a position statement stating the following:

> Whereas homosexuality in and of itself implies no impairment in judgment, stability, reliability, or vocational capabilities, therefore, be it resolved that the American Psychiatric Association deplores all public and private

47. *Id.*

48. *Id.* at 38–39.

49. *See* Comm. Nomenclature & Stat. Am. Psych. Assoc., Diagnostic and Statistical Manual: Mental Disorders (2d ed., Am. Psych. Assoc. 1968), https://www.madinamerica.com/wp-content/uploads/2015/08/DSM-II.pdf [https://perma.cc/F9MT-FLRE].

50. *Id.* at 313.

> discrimination against homosexuals in such areas as employment, housing, public accommodations, and licensing, and declares that no burden of proof of such judgment, capacity, or reliability shall be placed on homosexuals greater than that imposed on any other persons. Further, the APA supports and urges the enactment of civil rights legislation at local, state, and federal levels that would insure homosexual citizens the same protections now guaranteed to others. Further, the APA supports and urges the repeal of all legislation making criminal offenses of sexual acts performed by consenting adults in private.[51]

The APA acknowledged that many homosexual people appeared to be "satisfied with their sexual orientation" and that they were able to function in society just like their heterosexual counterparts.[52] However, a new category was created for people who were "disturbed by, in conflict with, or wish to change their sexual orientation."[53] The category was named "Sexual Orientation Disturbance."[54] Following the removal of homosexuality as a mental disorder, the National Gay Task Force released the following statement:

> The diagnosis of homosexuality as an illness has been the cornerstone of oppression for a tenth of our population . . . . [The classification] has forced many gay women and men to think of themselves as freaks . . . . It has been used as a tool of discrimination in the private sector, and in the civil service, military, Immigration and Naturalization Service, health services, adoption and child custody courts.[55]

It would be naïve to argue that declassifying homosexuality as a mental disorder immediately changed the general public's beliefs about homosexual people. By that time, the century-old practice of seeing these people as mentally unwell had entrenched itself into the fabric of American society. Thus, it is unsurprising that it would require many decades to fully understand this fabric and then start to make changes.

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51. Jack Drescher, *Queer Diagnoses Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual (DSM) Review and Recommendations Prepared for the DSM-V Sexual and Gender Identity Disorders Work Group*, 18 Focus 308, 314 (2020).

52. Am. Psych. Assoc., Diagnostic and Statistical Manual: Mental Disorders DSM-III 380 (3d ed., 1952), https://aditpsiquiatriaypsicologia.es/images/CLASIFICACION%20DE%20ENFERMEDADES/DSM-III.pdf [https://perma.cc/3YTD-7A96].

53. *Id.*

54. *Id.*

55. Dwight Cathcart, Race Point Light 237 (2017).

While the removal of homosexuality from a list of mental disorders outlined in the DSM did not suddenly change everyone's minds, the removal did have some immediate tangible benefits to homosexual people. Many psychiatrists across the country were trained pursuant to the DSM guidance and recommendations. Since homosexuality was classified as a mental disorder, the patients diagnosed with this disorder would not only be labeled as having a disorder but would also be prescribed treatment, which in many cases included conversion therapy that aimed to "convert" homosexual behavior to heterosexual behavior.[56] The removal of homosexuality as a mental disorder meant that psychiatrists would not be officially recommended to prescribe such treatment. The removal also meant that homosexual people who were satisfied with their sexual orientation but perhaps were facing some other mental health issues were able to seek mental health treatment without worrying that their psychiatrist would attempt to prescribe treatment for their homosexuality.

Exploring the history of how medical institutions viewed same-sex intimacy is crucial because it reveals how they pathologized homosexuality and the process they used to reach that conclusion. It shows the feedback gathered from medical practitioners, organizations, and governmental bodies. Once homosexuality was deemed pathological, medical associations endorsed this view, and professionals were trained to see gay people as mentally ill. This belief spread through society, influencing public perceptions of homosexuality

The Board of Trustees of the American Psychiatric Association recognized the widespread negative effects labeling homosexual people as mentally ill had on American society. Thus, a call for action accompanied the decision to remove homosexuality from a list of mental disorders. At that time, the long-standing tradition of considering homosexuality to be abnormal perhaps most visibly affected the legal system. Thus, the Board urged for various legal changes that would protect homosexual people from discrimination and grant them the same legal protections that were enjoyed by heterosexual people.[57] But it would take five decades to change how the legal system treated homosexuality and homosexual people.

56. Richard D. Lyons, *Psychiatrists, in a Shift, Declare Homosexuality No Mental Illness*, N.Y. Times, Dec. 16, 1973, https://www.nytimes.com/1973/12/16/archives/psychiatrists-in-a-shift-declare-homosexuality-no-mental-illness.html [https://perma.cc/JB9W-7FXG].

57. *Id.*

### B. *Homosexuality in the Legal System*

As shown in the previous Subpart, the medical community had a long history of treating homosexual people as mentally ill. Being attracted to a person of the same-sex meant that other people would have legitimate grounds for believing that the homosexual person had an impairment, which would lead some people to treat homosexual people differently and engage in possible discrimination. And in many parts of the nation, it was not only people that engaged in discrimination, but also the state as well.

Outlawing the very act of intimacy between two people of the same-sex has a long history. In 1791, at the time of the ratification of the Bill of Rights, all original thirteen states criminalized sodomy.[58] In 1868, at the time of the ratification of the Fourteenth Amendment, thirty-two out of thirty-seven states had criminalized sodomy.[59] Until the early 1960s, all fifty states and the District of Columbia criminalized sodomy.[60] In 1955, the American Law Institute voted to remove consensual sodomy as a crime from the Model Penal Code.[61] The Institute reasoned that other countries such as Canada, Italy, Mexico, Great Britain, France, Sweden, and Denmark had removed sodomy statutes from their criminal codes.[62] The Institute also argued that homosexual behavior was neither socially harmful nor "unnatural."[63] In 1961, Illinois was the first state to follow the Model Penal Code and remove sodomy from its criminal statutes.[64] In 1969, Connecticut became the second state to decriminalize sodomy.[65] It took many years for the states to start changing their views on the intimacy between two people of the same-sex. By 1986, twenty-four states and the District of Columbia still provided criminal punishment for sodomy.[66] The next case shows just the deeply ingrained perception of homosexual people

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58. Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

59. *Id.* at 192–93.

60. Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. Miami L. Rev. 521, 526 (1986).

61. Richard Weinmeyer, *The Decriminalization of Sodomy in the United States*, 16 Health Law 916, 916 (2014).

62. Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 Univ. Mia. L. Rev. 521, 526 (1986) (citing Model Penal Code § 207.5 comment 276, at 278 (Tent. Draft No. 9, 1955)).

63. Yao Apasu-Gbotsu, *supra* note 60, at 60.

64. *Id.* at 40.

65. *Id.*

66. *Id.* at 193–94.

as mentally unwell in the legal system, necessitating that the state outlaw homosexual intimate relationships.

On August 3, 1982, Michael Hardwick, a twenty-nine-year-old man, was charged with violating a Georgia sodomy statute, which imposed a potential prison sentence of up to twenty years.[67] The statute provided that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."[68] Hardwick subsequently challenged the constitutionality of the criminal statute, and the case ultimately reached the U.S. Supreme Court.

In defending the statute, the State of Georgia argued that homosexual activity had "been uniformly condemned" for "hundreds of years."[69] The State argued that Judeo-Christian values proscribed outlawing homosexual sodomy and that no morality principles taught that homosexuality was acceptable, referencing Aristotle and Plato.[70] The State further explained that Ancient Rome punished sodomy by death and various ecclesiastical courts from other eras also prosecuted sodomy.[71] The State wrote that criminalization of sodomy in England could be dated back to 1533.[72] On February 25, 1784, the State of Georgia adopted English common law, and in 1816, the State punished sodomy with imprisonment at hard labor for life.[73] Relying on tradition to defend the statute's constitutionality, the State argued the following: "Tradition provides no basis for protecting this activity under the guise of a right of privacy."[74] The State further explained the following: "[H]omosexual sodomy as an act of sexual deviancy expresses no ideas. It is purely an unnatural means of satisfying an unnatural lust, which has been declared by Georgia to be morally wrong."[75] The State wrote that the legislature was the appropriate means of addressing moral issues, such as criminalizing homosexuality.[76] The State explained that the legislature had an interest in doing so because "homosexual sodomy leads to other deviate practices such as sado-masochism,

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67. Brief for Respondent at *1, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85–140).

68. Brief for Petitioner at 2, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85–140) (citing Georgia Code Ann. § 16–6–2 (1984)).

69. *Id.* at 19.

70. *Id.* at 20

71. *Id.* at 21.

72. *Id.* (citing 25 Hen. VIII, c.6 (1533)).

73. *Id.* at 22–23

74. *Id.* at 23.

75. *Id.* at 27

76. *Id.* at 36

group orgies, or transvestism."[77] Homosexual sodomy, the State argued, was also closely related to various diseases, which posed public health concerns, including sexually transmitted diseases.[78] The State concluded its defense of the statute with the following:

> But perhaps the most profound legislative finding that can be made is that homosexual sodomy is the anathema of the basic units of our society—-marriage and the family. To decriminalize or artificially withdraw the public's expression of its disdain for this conduct does not uplift sodomy, but rather demotes these sacred institutions to merely other alternative lifestyles.[79]

On June 30, 1986, the U.S. Supreme Court, in a 5–4 decision, upheld the Georgia sodomy statute.[80] The Court wrote, "[p]roscriptions against [homosexual] conduct ha[d] ancient roots."[81] It cannot be denied that prohibition of homosexual behavior had a long history, as evidenced by the State. That history can be dated back to the English statutes, and so prohibiting such behavior was not a novel idea at the time the State of Georgia passed its own criminal statute. In addition to noting this history to support the criminal statute, the State also used words such as "unnatural" and "immoral" to described intimate behavior between two people of the same-sex.[82] The same sentiment was echoed in the DSM, in which homosexual behavior was described as "pathological" and "deviant."[83] The legal system had a long history of criminalizing same-sex intimate interactions just as the medical system had a long history of treating such people as mentally ill. Further, both the legal and medical systems required taking actions against those who went against the status quo of heterosexuality. Further, the State of Georgia used the word "tradition" to describe the fact that homosexuality had been outlawed for a long time, and conventional norms are largely based on longstanding tradition. The necessity to preserve tradition resonated with the *Bowers* majority. However, this argument eventually needed to be strengthened in a way that would warrant criminalizing homosexual behavior in the twenty-first century.

On September 17, 1998, Texas law enforcement officers entered John Lawrence's residence where the officers observed Lawrence engaging in intimate conduct with another man.[84] Just like the State

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77. *Id.*
78. *Id.* at 37.
79. *Id.* at 37–38.
80. Bowers v. Hardwick, 478 U.S. 186, 196 (1986).
81. *Id.* at 192.
82. Brief for Petitioner, Bowers v. Hardwick, *supra* note 68, at *27.
83. Comm. Nomenclature & Stat., Am. Psych. Assoc., *supra* note 10.
84. Brief for Petitioners at *2, Lawrence v. Texas, 539 U.S. 558 (2003) (No.

of Georgia, the State of Texas also had a long history of criminalizing homosexuality. In 1854, the Texas legislature passed a law that imposed hard labor on those violating the statute:

> Sec. 40. If any person shall commit the abominable and detestable crime against nature, either with mankind or with any beast, he shall be punished by confinement to hard labor in the Penitentiary not exceeding five years.[85]

The legislature passed another law six years later deciding to increase the punishment for homosexual behavior:

> Art. 399c. If any person shall commit with mankind or beast the abominable and detestable crime against nature, he shall be deemed guilty of sodomy, and on conviction thereof, he shall be punished by confinement in the penitentiary for not less than five nor more than fifteen years.[86]

In 1943, the Texas legislature amended the statute, which now stated the following:

> Article 524. Sodomy.
>
> Whoever has carnal copulation with a beast, or in an opening of the body, except sexual parts, with another human being, or whoever shall use *38 his mouth on the sexual parts of another human being for the purpose of having carnal copulation, or who shall voluntarily permit the use of his own sexual parts in a lewd and lascivious manner by any minor, shall be guilty of sodomy, and upon conviction thereof shall be deemed guilty of a felony, and shall be confined in the penitentiary not less than two (2) nor more than fifteen (15) years.[87]

In 1973, the statute was again amended, now stating the following: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."[88] Under the statute, this conduct was a Class C misdemeanor, for which the person could be fined up to $500.[89] Lawrence was charged with violating this statute and subsequently was fined $200.[90] Lawrence

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02–102).

85. Brief for Respondent at *37, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02–102) (citing Act of February 9, 1854, 5th Leg., R.S., ch. XLIX, § 40, 1854 Tex. Gen. Laws 58, 66).

86. *Id.* (citing Act of February 11, 1860, 8th Leg., R.S., ch. 74, 1860 Tex. Gen. Laws 95, 97).

87. *Id.* at *38 (citing Act of April 5, 1943, 48th Leg., R.S., ch. 112, § 1, 1943 Tex. Gen. Laws 194).

88. *Id.* at *1 (citing Tex. Penal Code Ann. § 21.06 (1973), *amended by* Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994).

89. *Id.* at *1 (citing Tex. Pen. Code §§ 21.06(b), 12.23).

90. Brief for Petitioners at *2–3, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02–102).

subsequently challenged the constitutionality of the statute, and the case eventually reached the U.S. Supreme Court.

In defending the statute, the State of Texas explained that upon entering Lawrence's home, the officers observed Lawrence "engaged in deviate sexual conduct, anal sex, with another man," which subjected Lawrence to criminal punishment.[91] The State argued that this criminal statute was a form of proscription that was meant to control "extramarital sexual misconduct" and that this proscription was rationally related to "the worthy governmental goals of implementation of public morality and promotion of family values."[92] In addressing the fact that, at that time, the State of Texas was one of thirteen remaining States that had a statute imposing criminal penalties for homosexual behavior, the State wrote that some other states decriminalizing homosexual behavior "d[id] not erase a history of one hundred and fifty years of universal reprobation."[93] The intimate conduct between two people of the same-sex, the State argued, "ha[d] nothing to do with marriage or conception or parenthood and it [wa]s not on a part with those sacred choices."[94] Further, the State wrote that such intimate conduct could not "occur within or lead to a marital relationship," and it had "nothing to do with families or children."[95] In its concluding remarks, the State wrote the following: "The prohibition of homosexual conduct in [the statute] represents the reasoned judgment of the Texas Legislature that such conduct is immoral and should be deterred."[96]

On June 26, 2003, in a 6–3 decision, the U.S. Supreme Court held that the statute was unconstitutional.[97] Justice Scalia dissented, joined by Justice Thomas and then-Chief Justice Rehnquist. The dissent stated:

> It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home.[98]

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91. Brief for Respondent at *2, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02–102).
92. *Id.* at *4.
93. *Id.* at *14.
94. *Id.* at *22.
95. *Id.*
96. *Id.* at *48.
97. Lawrence v. Texas, 539 U.S. 558, 579 (2003).
98. Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

Just like the State of Georgia, the State of Texas invoked the sentiment about the long history of criminalizing intimate conduct between two people of the same-sex. However, the State of Texas also attempted to spend more time explaining how this tradition of criminalizing homosexuality was intricately tied to values, such as marriage, family, parenthood, procreation, and children. Thus, the State highlighted not only that homosexual behavior itself had been traditionally criminalized, but also that its criminalization had a strong "moral" connection to purported public values. The State referred to these values as "sacred choices" that were incompatible with "extramarital conduct" between two people of the same-sex. On the surface, the argument was persuasive in several ways. Homosexual people could not get married; thus, by definition the intimate behavior between two people of the same-sex was always "extramarital conduct." Further, homosexual people could not procreate, and if they wanted to become parents, they faced significant legal and societal barriers. Thus, the State was correct to suggest that homosexual behavior and homosexual relationships were not associated with the "sacred choices" of marriage and procreation. However, homosexual people could not do anything about the lack of association; it was the legal system and the medical community that created that disassociation between homosexual relationships and society's most "sacred choices." This disassociation led to the "culture war" that Justice Scalia discussed in his dissenting opinion.

By that time, the criminalization of intimate conduct between two people of the same-sex and the labeling of homosexual people as mentally ill had seeped into American society, and it would take a long time to undo. Thus, Justice Scalia's observation about the culture war was quite astute. He further stated that many members of the public did not want to associate with homosexual people in various social environments.[99] It is challenging to criticize the public when the entire legal system as well as medical organizations dictated societal beliefs about homosexuality. The labeling of homosexual behavior as criminal and the labeling of the very experience of same-sex attraction as a mental disorder made it especially difficult to see homosexuality as a normal variation of human behavior. Moving away from these labels would eventually allow for the reexamination of the institution of marriage and why homosexual people had to be excluded from this institution.

In *Obergefell v. Hodges*, Richard Hodges, who was the respondent acting in his official capacity as the Ohio Department of Health director, argued against a constitutional recognition of same-sex

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99. *Id.*

marriage.[100] In his brief, he cited an Ohio law from 1803 and further wrote that, in Ohio, marriage was defined as a union between one man and one woman following the long-standing tradition.[101] Hodges noted that no state allowed same-sex couples to get married until 2004.[102] Thus, he argued that this "novelty show[ed] there could be no tradition compelling one State to recognize same-sex marriages performed elsewhere despite the longstanding public-policy exception."[103]

On June 26, 2015, the U.S. Supreme Court, in a 5–4 decision, held that the Fourteenth Amendment required the states to recognize same-sex marriages.[104] There were four dissenting opinions in *Obergefell*. Chief Justice authored one joined by Justices Scalia and Thomas.[105] Justice Scalia, joined by Justice Thomas, authored another.[106] Justice Thomas authored another joined by Justice Scalia.[107] Justice Alito authored the remaining dissent joined by Justices Scalia and Thomas.[108]

Chief Justice Roberts wrote that, among other things, marriage had been always seen as a union between one man and one woman.[109] He explained that this definition relied on the idea of procreation and the ideal that children should grow up in stable households.[110] Similarly, Justice Scalia wrote that, at the time of the Fourteenth Amendment's ratification in 1868, marriage in every state was limited to one man and one woman.[111] He further wrote that the Court had no basis for redefining marriage that had "the endorsement of a long tradition of open, widespread, and unchallenged use."[112]

In his dissent joined by Justice Scalia, Justice Thomas wrote that, among other things, "marriage [wa]s not simply a governmental institution; it [wa]s a religious institution as well."[113] Lastly,

100. *See* Brief for Respondent, Obergefell v. Hodges, 576 U.S. 644 (2015) (No. 14–556), http://sblog.s3.amazonaws.com/wp-content/uploads/2015/03/14–556bs.pdf [https://perma.cc/N4F4–5PYC].

101. *Id.* at 1.

102. *Id.* at 37.

103. *Id.*

104. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

105. *Id.* at 688 (Roberts, J., dissenting).

106. *Id.* at 715 (Scalia, J., dissenting).

107. *Id.* at 734 (Thomas, J., dissenting).

108. *Id.* at 738 (Alito, J., dissenting).

109. *Id.* at 688 (Roberts, J., dissenting).

110. *Id.*

111. *Id.* at 715 (Scalia, J., dissenting).

112. *Id.* at 716.

113. *Id.* at 734 (Thomas, J., dissenting).

Justice Alito's dissent stated that the traditional understanding of "marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate."[114]

Just like the State of Georgia and the State of Texas, the representative of the State of Ohio also relied on the notion of tradition under which marriage was defined as a union between one man and one woman. The representative was correct in asserting that same-sex marriage was a "novelty," especially considering the fact that just a little over a decade ago, some states imposed criminal punishment for engaging in homosexual behavior.[115] The dissenting Justices echoed similar sentiments about tradition and marriage. However, the legal system sanctioned that tradition that disallowed homosexual people from marrying. Further, the same system, together with medical institutions, portrayed homosexual people as abnormal, which further affected how gay people thought about themselves and their ability to have relationships and even families. Chief Justice Roberts also mentioned that the institution of marriage was linked to a need for children to have stability, reflecting the existing association between family formation and heterosexual relationships and the correlative lack of association between family formation and homosexual relationships.

In many ways, the long-standing history of criminalizing homosexuality resembles the history of pathologizing same-sex attraction. Not only were gay people seen as mentally ill for being gay, but the state could also impose criminal penalties for their sexuality. Medical institutions deemed same-sex intimacy as abnormal, and statutes passed by the people themselves criminalized such behavior. The statutes that criminalized this behavior not only sent a message that such behavior was abnormal, but they also had the power to label people who engage in this behavior as criminals. Thus, at that time, gay people had to defend themselves from medical institutions that labeled them mentally ill, and they also had to challenge the public perception that intimate relations between two consenting people of the same sex were criminal.

Gay people had to overcome many barriers until their relationships could slowly start being associated with family formation just like heterosexual relationships had been for centuries. At the time of same-sex marriage's legalization, there had been many homosexual people who were not able to take advantage of the right to get married and subsequently start thinking about parenthood because of their age or other common issues that are not unique to

114. *Id.* at 738 (Alito, J., dissenting).
115. Brief for Respondent, *supra* note 100, at 37.

homosexual people. In addition, while *Obergefell* was monumental for how society at large would eventually see homosexuality and same-sex relationships, it would take time for the long-standing norms and traditions to change.

However, it would not be the last time gay people would be confronted with the notion of tradition. As many gay people started thinking about parenthood, they would again encounter the norm of heterosexuality in the healthcare system. The next Part discusses various types of assisted reproductive technology gay people use to become biological parents. Part II also discusses the biological processes and costs associated with these procedures. The procedures are discussed in detail because understanding how they are conducted will become necessary when exploring the laws and regulations dealing with these procedures and the following case studies in which gay people had to challenge their access to these procedures.

## III. Assisted Reproductive Technology for Gay People

Becoming a parent and starting a family are significant milestones for many people, irrespective of their sexual orientation. While some people choose not to become parents, there are others who face unique barriers in their parenthood journey. One of these challenges might be difficulty conceiving a biological child. Assisted reproductive technology is an umbrella term that represents various medical interventions that help to achieve pregnancy.[116] Some reasons why someone might need such assistance include advanced age, damaged fallopian tubes, endometriosis, uterine fibroids, polycystic ovarian syndrome, recurring miscarriage, compromised sperm or egg quality, and inability to access sperm or eggs.[117] Normally, during heterosexual intercourse, sperm must go through the vagina and cervix before the sperm reaches the uterus and subsequently goes into the fallopian tubes.[118] For those who want to carry a pregnancy, such as heterosexual women with partners or single women, intrauterine insemination is one option that can be considered. During this process, a provider uses tools with which the sperm is

116. LaQuita Martinez, *In vitro fertilization (IVF)*, Medline Plus Med. Encyclopedia (Mar. 31, 2024) https://medlineplus.gov/ency/article/007279.htm [https://perma.cc/848L-KUQF].

117. *Id.*; Monash IVF Group, *IVF and the IVF Process*, https://monashivf.com/services/fertility-treatment-options/the-ivf-process/ [https://perma.cc/LP4T-Z84T].

118. Utah Ctr. for Reprod. Med., *Intrauterine Insemination (IUI)/(AI)*, Univ. of Utah Health, https://healthcare.utah.edu/fertility/treatments/iui-intrauterine-insemination [https://perma.cc/F85N-2W2S].

placed directly inside the uterus.[119] The provider can recommend medications that induce ovulation or increase the number of eggs that are released during ovulation.[120] A vaginal ultrasound can help the provider to evaluate how well the ovaries are responding to the medication.[121] Both fresh sperm or sperm that has been previously frozen can be used during intrauterine insemination, and the sperm can also be from a known person, such as a partner or a friend, or an anonymous donor.[122] The cost of a single cycle of intrauterine insemination varies significantly and depends on a multitude of factors, but it can go as high as $4,700.[123] The price includes components like the required or recommended need for ovulation predictor kits, blood and ultrasound monitoring, provider visits, medications, sperm acquisition, and sperm preparation and insemination.[124] While infections are rare, some estimates suggest that 1 in 1000 cycles of intrauterine insemination leads to infection that can cause pain and can create damage to the fallopian tubes, requiring medical attention.[125] The success rate is generally around five percent to twenty percent per one cycle.[126] Thus, the number

119. Gynecology & Obstetrics Fertility Ctr., *Intrauterine Insemination (IUI) Treatment*, John Hopkins Med., https://www.hopkinsmedicine.org/gynecology-obstetrics/specialty-areas/fertility-center/infertility-services/intrauterine-insemination [https://perma.cc/K6AW-YGPD].

120. Utah Ctr. for Reprod. Med., *Intrauterine Insemination*, *surpa* note 118.

121. *Id.*

122. Panagiotis Cherouveim et al., The impact of cryopreserved sperm on intrauterine insemination outcomes: is frozen as good as fresh? 5 (Bianca Bianco et al. eds., Frontiers in Reprod. Health 2023).

123. CNY Fertility, *How Much Does an IUI (Artificial Insemination) Really Cost?* (Oct. 12, 2020), https://www.cnyfertility.com/iui-cost/ [https://perma.cc/33MY-9ANU]; Fertility IQ by inflection, *IUI or "Artificial Insemination" The Cost Of IUI,* https://www.fertilityiq.com/fertilityiq/iui-or-artificial-insemination/the-cost-of-iui#components-of-iui-cycle-cost [https://perma.cc/NM9U-DUVS]; Planned Parenthood Fed'n of Am. Inc., *What is IUI?*, https://www.plannedparenthood.org/learn/pregnancy/fertility-treatments/what-iui#:~:text=The%20cost%20of%20IUI%20varies,%24300%2D%241%2C000%20without%20insurance [https://perma.cc/MG8M-F6W5]; Utah Ctr. for Reprod. Med., *Pricing Guidelines*, Univ. of Utah Health, https://healthcare.utah.edu/fertility/pricing-guidelines [https://perma.cc/U5QV-E9QK].

124. CNY Fertility, *How Much Does an IUI (Artificial Insemination) Really Cost?*, *supra* note 123.

125. Utah Ctr. for Reprod. Med., *Intrauterine Insemination*, *surpa* note 118.

126. CNY Fertility, *IUI vs. IVF: Comparing the Procedures, Risks, Benefits, Costs, and Success* (Nov. 21, 2024), https://www.cnyfertility.com/iui-vs-ivf/#:~:text=IVF%20has%20a%20much%20faster,three%20or%20four%20treatment%20cycles%20 [https://perma.cc/U2F9-LS7H].

of intrauterine insemination cycles also varies, but some providers recommend three to six cycles before considering other options, such as in vitro fertilization.[127]

In vitro fertilization is manually fertilizing an egg with sperm in a laboratory setting.[128] As part of this process, mature eggs are retrieved from ovaries.[129] The number of eggs that should be retrieved varies based on age, but generally it is not unusual to retrieve ten or more eggs.[130] Retrieving multiple eggs is recommended because it is rare for all eggs to be successfully fertilized.[131] Normally, one dominant follicle produces only one egg during a menstrual cycle because the dominant follicle produces hormones preventing other follicles from developing eggs. Daily injectable hormone medication disrupts that process and allows more follicles to continue developing so more eggs can be harvested.[132] Additionally, medications can assist in more reliably inducing ovulation for those with irregular menstrual cycles.[133]

Before beginning to take medications that make ovaries produce multiple eggs, it is common to have an appointment measuring the uterine lining, doing other tests such as an ultrasound, and reviewing menstrual history to ensure the best results.[134] It can take eight to fourteen days from when the medication is started until the eggs become mature and are ready to be retrieved.[135] During that time, frequent blood tests are conducted to ensure the hormone medication is working.[136] Vaginal ultrasound to monitor eggs as they mature is also needed.[137] After the provider determines the

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127. Utah Ctr. for Reprod. Med., *Intrauterine Insemination*, *surpa* note 118.

128. Cleveland Clinic, *IVF (In Vitro Fertilization)* (Mar. 2, 2022), https://my.clevelandclinic.org/health/treatments/22457-ivf [https://perma.cc/9MVN-BJPY].

129. *Id.*

130. S. Ouhilal et al., *What Is the Optimal Number of Eggs at Oocyte Retrieval?*, 100 Fertility and Sterility (No. 3 Supplement) S262 (2013).

131. Utah Ctr. for Reprod. Med., *IVF Step by Step*, Uni. of Utah Health, https://healthcare.utah.edu/fertility/treatments/in-vitro-fertilization/step-by-step#:~:text=the%20blood%20supply.-,IVF%20Egg%20Retrieval%20Process,your%20eggs%20to%20final%20maturity [https://perma.cc/CC5Y-C5QV].

132. Monash IVF Group, *IVF and the IVF Process*, *supra* note 117.

133. Monash IVF Group, *Ovulation Induction*, https://monashivf.com/services/early-intervention/ovulation-induction/ [https://perma.cc/TGZ8–5UTZ].

134. Utah Ctr. for Reprod. Med., *IVF Step by Step*, *supra* note 131.

135. *Id.*

136. *Id.*

137. *Id.*

eggs are ready to be retrieved, another medication, such as Lupron or hCG, is commonly given thirty-six hours before the egg retrieval procedure.[138] The medication helps the eggs to reach final maturity.[139] The actual procedure is done under sedation and usually takes fifteen to thirty minutes in the provider's office.[140] Follicles in the ovaries, which are filled with fluid, contain the eggs.[141] The provider removes the fluid together with the eggs.[142] The fluid is then transferred into the lab, where the provider extracts the eggs.[143] The eggs can then be fertilized or frozen. Fertility declines with age, becoming significantly lower by the early forties, which is an important consideration when thinking about future pregnancy.[144] Other considerations that might affect fertility, such as medical conditions, might also be relevant when thinking about possibly wanting to freeze eggs.[145]

For in vitro fertilization, fresh or frozen eggs as well as fresh or frozen sperm can be used.[146] The best quality eggs are placed together with the best quality sperm, and it takes a few hours for the sperm to enter (fertilize) an egg.[147] For a higher chance of fertilization success, an egg can also be directly injected with sperm, which is called intracytoplasmic sperm injection.[148] Once the fertilized egg divides, it is called an embryo, but not all eggs will be able to be fertilized and turn into embryos.[149] After the eggs have been fertilized, the provider transfers the embryos to a growth dish to see how the embryos are developing.[150] They will continue to be cultured and observed for the next few days.[151] The embryos can be transferred when they reach the blastocyst stage, which is

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138. *Id.*
139. *Id.*
140. *Id.*
141. Monash IVF Group, *IVF and the IVF Process*, *supra* note 117.
142. *Id.*
143. Utah Ctr. for Reprod. Med., *IVF Step by Step*, *supra* note 131.
144. Utah Ctr. for Reprod. Med., *Egg Freezing*, Univ. of Utah Health, https://healthcare.utah.edu/fertility/treatments/fertility-preservation/egg-freezing [https://perma.cc/SSE7–7ZMC].
145. *Id.*
146. Rosh Maternal & Fetal Med., *Choosing Between Fresh vs. Frozen Donor Eggs* (Jan. 27, 2023), https://roshmfm.com/choosing-between-fresh-vs-frozen-donor-eggs/ [https://perma.cc/9FJY-W2NV].
147. LaQuita Martinez, *supra* note 116 .
148. *Id.*
149. Utah Ctr. for Reprod. Med., *Egg Freezing*, *supra* note 144 ; LaQuita Martinez, *supra* note 116 .
150. Monash IVF Group, *IVF and the IVF Process*, *supra* note 117.
151. *Id.*

usually reached five days after fertilization.[152] By that stage, the has about 100 cells.[153] The provider can then remove some cells from the embryo for testing of genetic disorders.[154] The provider will discuss how many embryos should be implanted, but some providers recommend implanting only one embryo at a time.[155]

The embryo can be transferred into the uterus of the same egg donor or a gestational carrier who carries the pregnancy if successful.[156] Sometimes a gestational carrier different from the egg donor is either the recommended or only option. Certain situations require gestational carriers, including a poor-functioning uterus, compromising medical conditions, a previous history of recurrent pregnancy loss, or single or gay men who wish to have children and do not have anyone to carry the pregnancy.

The fresh embryo is transferred into the uterus under ultrasound guidance.[157] The process is similar to a pap smear, and sedatives are rarely needed.[158] The unused embryos can be frozen (a process also known as cryopreservation) and stored for future use.[159] A successful implantation requires conducting multiple other pregnancy-related tests and exams.[160] After the embryo transfer, hormone medication has to be continued for about ten more weeks.[161]

In vitro fertilization also carries some risks. The medication can cause abdominal pain, bloating, headaches, mood swings, and in rare cases – ovarian hyperstimulation syndrome, a condition defined by fluid accumulation around the ovaries and abdomen.[162] Egg retrieval can lead to infection, bleeding, and damage to bladder or bowel.[163] The in vitro insemination success rate is around fifty percent,[164] but it is also much more expensive than intrauterine

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152. *Id.*

153. *Id.*

154. LaQuita Martinez, *supra* note 116.

155. Utah Ctr. for Reprod. Med., *IVF Step by Step*, *supra* note 131.

156. Utah Ctr. for Reprod. Med., *Gestational Surrogacy*, Univ. of Utah Health, https://healthcare.utah.edu/fertility/treatments/gestational-surrogacy [https://perma.cc/7NHL-KKPP].

157. LaQuita Martinez, *supra* note 116.

158. Utah Ctr. for Reprod. Med., *Egg Freezing*, *supra* note 144 ; LaQuita Martinez, *supra* note 116.

159. Cleveland Clinic, *Embryo Freezing (Cryopreservation)*, https://my.clevelandclinic.org/health/treatments/15464-embryo-freezing-cryopreservation [https://perma.cc/73VW-D6L2].

160. LaQuita Martinez, *supra* note 116.

161. *Id.*

162. *Id.*

163. *Id.*

164. Stephanie Watson, *Infertility and In Vitro Fertilization*, WebMD

insemination. The average cost of a single cycle of in vitro fertilization is about $15,000, but it can go to as high as $30,000.[165] This cost includes medications, egg retrieval, provider visits, exams, lab tests, handling of embryos, and sperm acquisition.[166] The cost does not include donor eggs, possible sperm, egg, or embryo preservation. The cost of a gestational carrier can reach $100,000 and more if possible third-party agency fees, gestational carrier compensation, legal and other fees are needed.[167]

Assisted reproductive technology covers a wide range of options and procedures that can help people become parents. Discussing these procedures together with various biological processes is important because it helps to better understand the healthcare system as it pertains to gay people who wish to become parents. Insurance companies, as part of that system, can play a crucial role in people's ability to access assisted reproductive technology. The next Part discusses the healthcare system in more detail with specific focus on various laws and regulations that prohibit discrimination.

## IV. Anti-Discrimination Clauses in U.S. Healthcare Legislation

People who wish to seek infertility treatment because they have difficulty conceiving biological children have to take part in the healthcare system, which has a complicated history in the United States. Insurance companies that provide health plans covering medical services are integral to the United States healthcare system. Because of the way the United States is structured, specifically the relationship between the states and the federal government and the unique two-party system, passing major pieces of reform has always been a challenge, and healthcare is no exception.

During the 2008 general election, then-candidate Barack Obama ran on a platform promising to improve the healthcare

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(Jabeen Begum ed., Jul. 2, 2024), https://www.webmd.com/infertility-and-reproduction/in-vitro-fertilization [https://perma.cc/CG7E-SLA2].

165. *Id.*; Marissa Conrad & James Grifo, *How Much Does IVF Cost?*, Forbes (Aug. 14, 2023), https://www.forbes.com/health/womens-health/how-much-does-ivf-cost/ [https://perma.cc/D98A-8RTX]; Fertility IQ by inflection, *The Cost of IVF By City*, https://www.fertilityiq.com/fertilityiq/articles/the-cost-of-ivf-by-city [https://perma.cc/MA23-GYQP].

166. Fertility IQ by inflection, *The Cost of IVF By City*, *supra* note 165.

167. Carrot Fertility, *Funding the cost of gestational surrogacy* (Sept. 1, 2024), https://www.get-carrot.com/blog/funding-your-gestational-carrier-journey [https://perma.cc/UP8S-BQHL].

system.[168] After winning the presidential election, it took Obama two years of cooperation with the legislative branch to pass a major healthcare reform, and on March 23, 2010, Obama signed the Affordable Care Act into law.[169] The law's main goal was insuring more people and making the entire healthcare system more affordable.[170] Additionally, the law had a section that made it illegal for insurance companies to engage in various forms of discrimination:

> Section 1557. Nondiscrimination.
>
> (a) In general. Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of Title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.
>
> (b) Continued application of laws. Nothing in this title (or an amendment made by this title) shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 794 of Title 29, or the Age Discrimination Act of 1975, or to supersede State laws that provide additional protections against discrimination on any basis described in subsection (a).

168. Amy Goldstein & Juliet Eilperin, *HealthCare.gov: How Political Fear Was Pitted Against Technical Needs*, WASHINGTON POST (Nov. 2, 2013), https://www.washingtonpost.com/politics/challenges-have-dogged-obamas-health-plan-since-2010/2013/11/02/453fba42–426b-11e3-a624–41d661b0bb78_story.html [https://perma.cc/YCL2–3EZP].

169. Patient Protection and Affordable Act, Pub. L. 111–148, title I, § 1557; 42 U.S.C. 18116.

170. HEALTH INS. MARKETPLACE, DEP. OF HEALTH & HUM. SERV., *Affordable Care Act (ACA)*, U.S. CTR. FOR MEDICARE & MEDICAID SERV., https://www.healthcare.gov/glossary/affordable-care-act/ [https://perma.cc/AP6G-XDT4].

> (c) Regulations. The Secretary may promulgate regulations to implement this section.[171]

If people wanted to sue their health insurance companies under Section 1557, certain elements had to be met. First, the company had be "a health program or activity."[172] Next, the health program or activity must receive federal financial assistance.[173] For example, health insurance companies might provide medical service coverage and then receive payments through Medicaid, a federally funded program. If these elements are met, then a health insurance company is subject to Section 1557 and cannot engage in discrimination prohibited by Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Age Discrimination Act of 1975.[174] Title VII of the Civil Rights Act of 1964 prohibited employment discrimination based on, among other things, an individual's sex.[175] Thus, if a health insurance company that was a health program or activity that received federal financial assistance and discriminated against an individual based on that individual's sex, the company can be sued under Section 1557. Under Section 1557(c), the U.S. Department of Health and Human Services (HHS) has the authority to promulgate regulations implementing the Section.[176]

On September 8, 2015, under the Obama administration, HSS proposed a rule affecting Section 1557.[177] After the notice and comment period ended, the final rule was published on May 18, 2016.[178] Among other things, the new rule expanded discrimination "on the basis of sex" to also include "gender identity."[179] Private healthcare providers and several states subsequently sued HHS and HHS Secretary, challenging the new rule.[180] On December 31, 2016, the U.S. District Court for the Northern District of Texas granted the plaintiffs' motion for preliminary injunction and enjoined the defendants from enforcing the new rule as it pertained to the

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171. Patient Protection and Affordable Act, Pub. L. 111–148, title I, § 1557; 42 U.S.C. 18116.

172. Patient Protection and Affordable Act, Pub. L. 111–148, title I, § 1557; 42 U.S.C. 18116(a).

173. *Id.*

174. *Id.*

175. Title VII of the Civil Rights Act of 1964 (Pub. L. 88–352).

176. Patient Protection and Affordable Act, Pub. L. 111–148, title I, § 1557; 42 U.S.C. 18116(c).

177. Nondiscrimination in Health Programs & Activities, 81 Fed. Reg. 31376–31473 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92).

178. *Id.*

179. *Id.*

180. Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 669 (N.D. Tex. 2016).

discrimination on the basis of gender identity.[181] Since the federal district court decision, every new administration continued to issue rules interpreting Section 1557 in a way that fit that administration's beliefs.

On June 15, 2020, the U.S. Supreme Court in *Bostock v. Clayton County* held that an employer who fired an employee for that employee's gender identity or sexual orientation violated Title VII of the Civil Rights Act of 1964.[182] Title VII prohibited discrimination based on sex, and the Court held that discrimination based on sex includes discrimination based on sexual orientation and gender identity.[183] A few days after *Bostock* was decided, on June 19, 2020, under the Trump administration, HHS issued a new rule repealing the definition of "on the basis of sex" in its Section 1557 interpretation.[184] That rule did not last long. On May 6, 2024, under the Biden administration, HSS published a new rule, reversing the previous rule issued under the Trump administration.[185] The new rule stated that discrimination based on sex includes discrimination based on gender identity and sexual orientation, consistent with the central holding of *Bostock*.[186]

Understanding Section 1557 and discrimination based on sex would soon become critical for gay people who wish to become parents. As shown in Part IV, assisted reproductive technology covers a wide range of procedures. These procedures have to fit within the healthcare model, specifically insurance companies providing coverage technology and also must specify which procedures they will cover and what requirements must be met before people are eligible for coverage. The next Part discusses five separate case studies of gay people who had to challenge these requirements navigating the healthcare system while pursuing parenthood. Each case demonstrates how the healthcare system heavily relies on the tradition of equating parenthood with heterosexuality. The case studies show how this system, together with insurance companies, treats gay people differently from heterosexual people seeking parenthood. The next Part discusses the legal arguments and strategies

181. *Id.*

182. Bostock v. Clayton Cnty., 590 U.S. 644, 683, 140 S. Ct. 1731 (2020).

183. *Id.*

184. Nondiscrimination in Health and Health Education Programs or Activities, 85 Fed. Reg. 37,160, 31,621–62 (June 19, 2020) (to be codified at 42 C.R.F. pts. 438, 440, 460, 45 C.F.R. pts. 86, 92, 147, 155, 156).

185. Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37522 (May 6, 2024) (to be codified at 42 C.F.R. pts. 438, 440, 457, 460, 45 C.R.F. pts. 80, 84, 92, 147, 155, 156).

186. *Id.*

that gay people used in each case study and provides key takeaways summarizing the main issues.

## V. Challenges of Gay Parenthood

### A. Goidel v. Aetna

In 2020, Emma Goidel and her wife decided to have a child.[187] At that time, for the year 2020–2021, Columbia University provided Goidel an Aetna-administered health insurance plan.[188] Goidel had access to the "Plan Design and Benefits Summary," which was a forty-one-page description of her benefits; however, the "Certificate" controlled the entirety of her benefits and was available to view online.[189] The plan provided coverage for treatment of "infertility," which plan defined in the following way:

> ”Infertility" is a disease or condition characterized by the incapacity to impregnate another person or to conceive, defined by the failure to establish a clinical pregnancy after 12 months of regular, unprotected sexual intercourse or therapeutic donor insemination, or after six (6) months of regular, unprotected sexual intercourse or therapeutic donor insemination for a female 35 years of age or older. Earlier evaluation and treatment may be warranted based on a Member's medical history or physical findings.[190]

The plan provided coverage for a variety of different treatments. In order to receive "basic infertility services," the member had to be "an appropriate candidate" for treatment of infertility.[191] In order to receive coverage, the members had to be at least twenty-one years old and no older than forty-four years old.[192] The plan stated the American Society for Reproductive Medicine, the American College of Obstetricians and Gynecologists, and the State of New York established guidelines would be consulted when determining eligibility.[193] Basic infertility services included initial evaluation, laboratory evaluation, semen analysis, evaluation of

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187. Class Action Complaint at 7, Goidel v. Aetna Life Ins. Co., (No. 1:21-cv-07619 (VSB)), 2024 U.S. Dist. LEXIS 185040 (S.D.N.Y. Oct. 8, 2024) (No. 1), https://nwlc.org/wp-content/uploads/2021/09/2021.09.13-Complaint.pdf [https://perma.cc/EU34-SWET].

188. *Id.* at 4.

189. Aetna Student Health Plan Design and Benefits Summary: Columbia University 2 (2020–2021), https://www.aetnastudenthealth.com/schools/columbia/pdbs2021.pdf [https://perma.cc/Y9UX-BVE8].

190. *Id.* at 18.

191. *Id.*

192. *Id.*

193. *Id.*

ovulatory function, endometrial biopsy, postcoital test, pelvic ultrasound, sono-hystogram, hysterosalpingogram, blood tests, testis biopsy, certain treatment of ovulatory dysfunction, and other medically necessary tests.[194]

If basic infertility services failed to increase fertility, the plan covered "comprehensive infertility services," including pelvic ultrasound, ovulation induction, hysteroscopy, artificial insemination, laparotomy, and laparoscopy.[195] It also covered "advanced infertility services," such as three cycles of in vitro fertilization, ovum or sperm donor costs, zygote or gamete intrafallopian tube transfers, and embryo or sperm storage.[196]

In September 2020, Goidel's infertility treatment provider submitted a prior authorization request to her insurance company for six cycles of intrauterine insemination.[197] Aetna subsequently denied that request, citing its Clinical Policy Bulletin Criteria for Infertility, which stated the following:

> [A] member is considered infertile if he or she is unable to conceive or produce conception after 1 year of frequent, unprotected heterosexual sexual intercourse, or 6 months of frequent, unprotected heterosexual sexual intercourse if the female partner is 35 years of age or older. Alternately, a woman without a male partner may be considered infertile if she is unable to conceive or produce conception after at least 12 cycles of donor insemination (6 cycles for women 35 years of age or older).[198]

Despite the insurance company's denial to cover infertility treatment, Goidel and her wife still pursued treatment.[199] In the fall of 2020, Goidel paid $8,939 out of pocket for two cycles of intrauterine insemination.[200] The first cycle was done in September, and it failed.[201] The second cycle was done in October; while Goidel achieved pregnancy, she subsequently suffered from a miscarriage.[202] In February 2021, Goidel paid $5,169 out of pocket for a third cycle of intrauterine insemination, which again failed.[203] In

194. *Id.* at 18–19.

195. *Id.* at 19.

196. *Id.*

197. Class Action Complaint, Goidel v. Aetna Life Ins. Co., *supra* note 187.

198. *Id.* at 8 (quoting Aetna, Infertility, Clinical Policy Bulletin No. 0237, http://www.aetna.com/cpb/medical/data/300_399/0327.html [https://perma.cc/9M56-5WFR]) (emphasis omitted).

199. *Id.* at 8.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 9.

March 2021, she appealed the insurance company's denial arguing that the insurance company had engaged in discrimination based on sexual orientation.[204] She also referenced relevant New York insurance law.[205]

On April 19, 2017, the New York Department of Financial Services issued Insurance Circular Letter No. 7 (2017).[206] Under New York Insurance Law, the Superintendent of Financial Services, along with the Commissioner of Health, was required to provide guidance on infertility treatment coverage consistent with the American Society for Reproductive Medicine (ASRM) and the American College of Obstetricians and Gynecologists.[207] The Circular stated that issuers must set guidelines for determining "infertility" that are no less favorable than ASRM's standards.[208] At that time, ASRM defined "infertility" in the following way:

> Infertility is a disease, defined by the failure to achieve a successful pregnancy after 12 months or more of appropriate, timed unprotected intercourse or therapeutic donor insemination. Earlier evaluation and treatment may be justified based on medical history and physical findings and is warranted after 6 months for women over age 35 years.[209]

The Circular Letter stated that the definition of infertility did not distinguish based on sexual orientation, gender identity, or marital status.[210] It also acknowledged the unique challenges faced by same-sex couples and single individuals, suggesting earlier treatment may be justified for them.[211] In 2019, New York Insurance Law was amended to prevent discrimination in infertility treatment coverage based on sex, sexual orientation, and gender identity.[212] The law also required coverage of three cycles of in vitro fertilization under certain circumstances, effective January 1, 2020.[213]

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204. *Id.*

205. *Id.*

206. Lisette Johnson, *Insurance Circular Letter No. 7*, N.Y. Dep't Fin. Servs. (2017), https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2017_07 [https://perma.cc/AT4F-RHWP].

207. *Id.*

208. *Id.*

209. *Id.* (quoting Prac. Comm., Am. Soc'y Reprod. Med., Definitions *of Infertility and Recurrent Pregnancy Loss: A Committee Opinion*, 99 Fertility & Sterility 63 (2013)).

210. *Id.*

211. *Id.*

212. Lisette Johnson, *Insurance Circular Letter No. 3*, N.Y. Dep't Fin. Servs. (2021), https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2021_03 [https://perma.cc/JUT9-HHK3] (citing N.Y. Ins. Law §§ 3221(k)(6)(C)(viii) & 4303(s)(3)(H)).

213. *Id.*

On February 23, 2021, the New York Department of Financial Services issued Insurance Circular Letter No. 3 (2021), replacing No. 7 (2017).[214] The letter addressed reports that some issuers were requiring non-heterosexual members to incur out-of-pocket costs for infertility treatments, like intrauterine insemination, that heterosexual members did not face.[215] This practice occurred when non-heterosexual members were unable to become pregnant due to their gender identity or sexual orientation, thus being denied basic coverage.[216] The Letter thus stated the following:

> This results in unfair discrimination for individuals due to their sexual orientation or gender identity, which is prohibited by Insurance Law §§ 3221(k)(6)(C)(viii) and 4303(s)(3)(H). Therefore, issuers must provide immediate coverage for basic infertility treatments (e.g., intrauterine insemination procedures) that are provided to individuals covered under an insurance policy or contract who are unable to conceive due to their sexual orientation or gender identity in order to prevent discrimination. Issuers that cover IVF procedures may consider whether basic infertility treatments, such as intrauterine insemination procedures, would be medically appropriate for the individual to attempt prior to covering IVF.[217]

In March 2021, Goidel underwent a fourth cycle of intrauterine insemination, which was again unsuccessful.[218] Her infertility treatment provider subsequently recommended to consider in vitro fertilization, suggesting that this treatment has a higher chance of success.[219] Because of significantly higher costs associated with in vitro fertilization, Goidel decided to try intrauterine insemination one more time; however, it failed.[220] The fourth and fifth cycles of intrauterine insemination cost Goidel a total of $8,454.98 which she had to pay out of pocket.[221]

In April 2021, the insurance company informed Goidel of its decision to uphold the denial issued in September 2020.[222] The letter upholding denial referenced the Aetna's Clinical Policy Bulletin and further stated that Goidel had not met the criteria for infertility, specifically stating that Goidel had not met "the criteria of being

214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. Class Action Complaint, Goidel v. Aetna Life Ins. Co., *supra* note 187, at 10.
219. *Id.*
220. *Id.*
221. *Id.* at 11.
222. *Id.*

'unable to get pregnant after egg and sperm contact by either: (1) frequent, unprotected sex of (2) donor insemination if there is no male partner for at least (a) one year at any age, or (b) six months if older than 35.'"[223] After subsequently consulting with her infertility treatment provider, Goidel decided to try in vitro fertilization.[224] Her provider subsequently submitted a preauthorization request for this treatment to her insurance company, but on May 14, the insurance company denied the request, again stating the same reason.[225] Goidel still decided to pursue in vitro fertilization, which cost her $20,487.75 in out-of-pocket costs.[226] After receiving the treatment, she became pregnant; however, she subsequently suffered from a miscarriage.[227] In July 2021, Goidel underwent a sixth cycle of intrauterine insemination, for which she paid $1,810 out of pocket.[228] The treatment was successful, and she became pregnant.[229]

On September 13, 2021, Goidel, on behalf of herself and similarly situated individuals, filed a class action complaint in the U.S. District Court for the Southern District of New York.[230] At the time of filing of her complaint, she was 31 years old, she was seven weeks pregnant, and she was hoping to have more children.[231] She brought a cause of action under Section 1557, arguing that the insurance company engaged in discrimination based on sex, which, she argued, included discrimination based on gender identity and sexual orientation.[232] She further argued that her insurance company was subject to Section 1557 because it was a health program or activity which received federal financial assistance.[233] Goidel alleged that the insurance company engaged in discrimination by requiring her and similarly situated individuals who could not become pregnant through heterosexual intercourse because of their sexual orientation or gender identity to incur out-of-pocket expenses to be eligible to receive infertility treatment coverage.[234] Individuals in heterosexual relationships, she argued, were able to receive infertility treatment benefits after representing that they had been having unprotected sex for a period of twelve months, whereas the only

223. *Id.*
224. *Id.*
225. *Id.* at 11–12.
226. *Id.* at 12.
227. *Id.*
228. *Id.*
229. *Id.*
230. *See generally*, *id.*
231. *Id.* at 12.
232. *Id.* at 19.
233. *Id.*
234. *Id.*

way for individuals in same-sex relationships to receive infertility treatment benefits was to undergo expensive infertility treatments.[235]

Goidel also alleged a cause of action under N.Y. Exec. Law § 296(2)(a), which prohibited sex discrimination in places of public accommodation.[236] Goidel argued that Aetna and Columbia University (the sponsor of her health insurance) were places of public accommodation.[237] Finally, Goidel alleged a cause of action under N.Y.C. Admin. Code § 8–107(4), which prohibited discrimination based on sexual orientation or gender identity by provider or place of public accommodation.[238] Goidel argued that she had suffered from emotional, physical, and financial injuries, including delays in pregnancy that affected her future chances of getting pregnant.[239] The complaint also listed other New York universities that sponsored health insurance with the same language as Goidel's health insurance.[240]

On May 3, 2024, the parties filed a proposed settlement with the court.[241] Aetna agreed to revise its Clinical Policy Bulletin 0327 to change the definition of "infertility" in such a way that matched the infertility definition the ASRM promulgated.[242] In 2023, the ASRM published a new definition of "infertility":

> "Infertility" is a disease, condition, or status characterized by any of the following:
>
> – The inability to achieve a successful pregnancy based on a patient's medical, sexual, and reproductive history, age, physical findings, diagnostic testing, or any combination of those factors.
> – The need for medical intervention, including, but not limited to, the use of donor gametes or donor embryos in order to achieve a successful pregnancy either as an individual or with a partner.
> – In patients having regular, unprotected intercourse and without any known etiology for either partner suggestive of impaired reproductive ability, evaluation should be initiated

235. *Id.* at 20.
236. *Id.*
237. *Id.*
238. *Id.* at 21.
239. *Id.* at 13.
240. *Id.* at 15.
241. Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval of Settlement, Goidel v. Aetna Life Ins. Co., (No. 1:21-cv-07619 (VSB)), 2024 U.S. Dist. LEXIS 185040 (S.D.N.Y. Oct. 8, 2024), https://www.infertilityinsurancesettlement.com/wp-content/uploads/2024/05/Goidel-MOL-i-s-o-Plaintiffs-Motion-for-Preliminary-Approval-of-Settlement-dkt-93–5.3.24.pdf [https://perma.cc/NSM5–5PBE].
242. *Id.* at 13.

> at 12 months when the female partner is under 35 years of age and at 6 months when the female partner is 35 years of age or older.

> Nothing in this definition shall be used to deny or delay treatment to any individual, regardless of relationship status or sexual orientation.[243]

Aetna agreed to change the definition of "infertility" in such a way that allowed people who needed medical intervention to become pregnant to be considered infertile.[244] This included using donor gametes that would permit "individuals with a uterus in an Eligible LGTBQ+ Relationship" to meet the definition of infertility without needing to pursue artificial insemination.[245] That Relationship was defined in the following way:

> An "Eligible LGBTQ+ Relationship," as used throughout this memorandum and within the Settlement Agreement, is a relationship consisting of two individuals who self-identify as "LGBTQ+," where at least one of whom has a uterus and whose partner was incapable of producing sperm due to having been assigned the female sex at birth, being intersex, or being assigned the male sex at birth and having transitioned or having been in the process of transitioning to the opposite gender. All defined terms have the same meaning as they do in the Settlement Agreement.[246]

Aetna also agreed to revise its policy so that these individuals would not need to undergo a greater number of intrauterine insemination cycles to be eligible for in vitro fertilization than individuals in heterosexual relationships.[247] Further, Aetna agreed to permit treating providers to use peer-to-peer input to determine whether any intrauterine insemination cycles that were needed to receive coverage for in vitro fertilization would need to be medicated.[248] Aetna agreed that on June 1, 2024, it would start a new policy, under which intrauterine insemination would be "a standard medical benefit."[249] Finally, in addition to agreeing to pay $1,625,000 in attorneys' fees and expenses, Aetna agreed to establish a separate

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243. Prac. Comm., Am. Soc'y Reprod. Med., *Definition of Infertility: A Committee Opinion* 113:3 FERTIL STERILity 533, 1 (2023), https://www.asrm.org/globalassets/_asrm/practice-guidance/practice-guidelines/pdf/definition-of-infertility.pdf [https://perma.cc/A6U8-KMG].

244. Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval of Settlement, Goidel v. Aetna Life Ins. Co., *supra* note 241, at 13.

245. *Id.*

246. *Id.* at n.2.

247. *Id.* at 13.

248. *Id.* at 14.

249. *Id.*

compensation fund in the amount of $2,000,000 for eligible class members who had been denied coverage for infertility treatment by Aetna in New York.[250]

*Goidel v. Aetna*, as the first case study, shows in great detail the role insurance policies can play in people's lives when they have difficulty conceiving biological children. First, the case shows how complex insurance policies can be. As shown above, understanding various types of assistive reproductive technology is crucial, but the policyholders need to also understand the language of the policy that can reference other documents that need to be accessed elsewhere. Additionally, there might be certain prerequisites, such as specific medical procedures, that have to be met before coverage is provided for other procedures. The case study also sheds important light on the expenses associated with assisted reproductive technology. According to the complaint, Goidel had to spend "nearly $45,000 for one successful pregnancy."[251] These costs alone could serve as a barrier between parenthood and gay people. In addition to incurring physical challenges of starting various medical treatments, the couple also had to deal with the psychological challenge of termination of pregnancy simultaneous to the insurance company's appeals process.

This case also shows the role that other external actors can play. The medical institutions again became relevant in the lives of gay people. The definition of infertility that certain medical organizations promulgated ended being used as a standard by New York law that required insurance companies to provide coverage for infertility treatment. Originally, the law did not provide explicit protections for gay people in the healthcare system; however, eventually the law was changed to prohibit insurance companies from denying coverage for infertility treatment based on people's sexual orientation and gender identity. After the insurance company refused to provide coverage, Goidel sued her insurance company arguing that the company discriminated against her based on her sexual orientation and gender identity. The plaintiff's arguments demonstrate how the insurance company's infertility treatment coverage was based on the norm of heterosexuality, assuming heterosexual intercourse and the presence of a heterosexual couple.

250. *Id.* at 15, 21.

251. Class Action Complaint, Goidel v. Aetna Life Ins. Co., *supra* note 187, at 2 ("Because of Aetna's Policy, Ms. Goidel and her spouse, and all other similarly situated LGBTQ individuals, have been forced to pay tens of thousands of dollars out of pocket—in Ms. Goidel's case, nearly $45,000 for one successful pregnancy—that others are not required to pay in order to become pregnant.").

Goidel and her partner could not meet that norm, and thus she had to meet a different standard in order to receive coverage for infertility benefits.

The insurance company ended up settling the claim. The company agreed to adopt the newly published definition of infertility by the ASMR, which recognized the unique issues that gay people encountered in the healthcare system. When the claim was filed, the insurance company argued that its definition of infertility applied equally to everyone. After settling the claim, the insurance company agreed to explicitly amend its definition in a way that explicitly and effectively treated gay people the same as heterosexual people. In *Goidel v. Aetna*, the health insurance company was challenged by a gay person who had a partner. The next case discusses the struggles of a single lesbian who attempted to raise similar arguments as she was trying to receive coverage for infertility treatment.

### B. Kulwicki v. Aetna

In 2021, Tara Kulwicki decided to become pregnant and have a child.[252] As a self-identified homosexual woman, she could only achieve this goal through infertility treatment.[253] At that time, Aetna in Georgia administered her health insurance plan.[254] The policy provided some coverage for infertility treatment with the following "infertility" definition:

> For purposes of this policy, a member is considered infertile if he or she is unable to conceive or produce conception after 1 year of frequent, unprotected heterosexual sexual intercourse, or 6 months of frequent, unprotected heterosexual sexual intercourse if the female partner is 35 years of age or older. Alternately, a woman without a male partner may be considered infertile if she is unable to conceive or produce conception after at least 12 cycles of donor insemination (6 cycles for women 35 years of age or older). However, this definition of infertility may vary due to state mandates and plan customization; please check plan documents.[255]

She subsequently submitted a preauthorization request to Aetna for coverage of intrauterine insemination; however, on June 29, the insurance company denied her request stating that she had

252. Class Action Complaint at 8, Kulwicki v. Aetna Life Ins. Co., 720 F. Supp. 3d 108 (D. Conn. 2024) (No. 1), https://www.classaction.org/media/kulwicki-v-aetna-inc-et-al.pdf [https://perma.cc/RK8N-4MN4].

253. *Id.* at 2.

254. *Id.*

255. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss Plaintiff's Amended Complaint at 9, Kulwicki v. Aetna Life Ins. Co., 720 F. Supp. 3d 108 (D. Conn. 2024) (No. 55).

not met the definition of "infertile."[256] On July 15, 2021, Kulwicki appealed the decision, arguing that the insurance company discriminated against her and similarly situated individuals who, due to their sexual orientation, were not able to engage in sexual intercourse for a period of twelve months.[257] On July 27, 2021, the insurance company denied her appeal, citing Aetna's Clinical Policy Bulletin Criteria for Infertility.[258] The insurance company further wrote that it was not discriminating against Kulwicki, and that instead it was "process[ing] claims equitably to all participants, in accordance with [its] claims policies and procedures" and that it was "following the guidelines."[259]

On February 9, 2022, Kulwicki, who was forty years old at the time, on behalf of herself and similarly situated individuals, filed a class action complaint in the U.S. District Court for the District of Connecticut.[260] She brought a cause of action under Section 1557, specifically alleging discrimination based on sex, which she, citing *Bostock*, argued included discrimination based on sexual orientation and gender identity.[261] She argued that her insurance company was subject to Section 1557 because it was a health program or activity which received federal financial assistance.[262] Kulwicki alleged that the insurance company had engaged in intentional discrimination by requiring her and similarly situated individuals to satisfy "stricter prerequisites" before being able to receive coverage for infertility treatment than their heterosexual counterparts.[263] She argued that her sexual orientation disabled her from engaging in heterosexual intercourse, and thus she and other similarly situated individuals effectively did not have the same option as their heterosexual counterparts.[264] The sole way to meet the definition of "infertility" was to incur out-of-pocket costs.[265] Kulwicki put forth three theories of discrimination. She alleged either that insurance company engaged in facial disparate treatment discrimination or that there was evidence for intentional disparate treatment discrimination.[266] And alterna-

256. *Id.* at 9.
257. Class Action Complaint, Kulwicki v. Aetna Life Ins. Co., *supra* note 252.
258. *Id.* at 8–9.
259. *Id.* at 9.
260. *See generally*, *id.*
261. *Id.* at 13–14.
262. *Id.* at 2.
263. *Id.* at 15.
264. *Id.* at 1.
265. *Id.* at 3.
266. *Id.* at 15.

tively, Kulwicki argued that the policy disparately and adversely affected her and similarly situated individuals.[267]

On April 1, 2022, the insurance company filed a motion to dismiss, arguing that Kulwicki had failed to join necessary parties, such as her plan's administrator and sponsor.[268] The insurance company also argued that Kulwicki had lacked standing because she was no longer a member of the plan and that the named party in the complaint was not a proper party that was sued.[269] On May 13, 2022, Kulwicki filed an amended complaint to address some issues.[270] On June 3, 2022, the insurance company filed a motion to dismiss, arguing Kulwicki hadn't addressed all concerns from the first motion.[271] Kulwicki opposed the dismissal on July 1, 2022, and the company replied on July 15, 2022.[272]

On March 12, 2024, the federal district court granted the motion to dismiss in part and denied in part.[273] The court held that Kulwicki had standing to bring a cause of action against the plan's administrator but lacked standing to bring a cause of action for declaratory relief. The court also held that the employer and the employee medical plan were not necessary parties.[274] Since then, the scheduling order dated April 29, 2024, stated that the discovery deadline was January 16, 2026.[275]

*Kulwicki v. Aetna* shows that a win against an insurance company in one state does not mean that there would be a win against the same insurance company in a different state, even if the main issues are arguably the same. Aetna settled in *Goidel v. Aetna* but changing its infertility definition across all insurance policies was not part of the settlement. This case study also shows how many parties are involved in providing an insurance policy. Knowing the

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267. *Id.* at 17.

268. Motion to Dismiss Plaintiff's Amended Complaint, Kulwicki v. Aetna Life Ins. Co., 720 F. Supp. 3d 108 (D. Conn. 2024) (No. 50).

269. *Id.*

270. Amended Complaint, Kulwicki v. Aetna Life Ins. Co., 720 F. Supp. 3d 108 (D. Conn. 2024) (No. 42).

271. Motion to Dismiss Plaintiff's Amended Complaint, Kulwicki v. Aetna Life Ins. Co., *supra* note 268.

272. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss Plaintiff's Amended Complaint, Kulwicki v. Aetna Life Ins. Co., *supra* note 255.

273. Kulwicki v. Aetna Life Ins. Co., 720 F. Supp. 3d 108, 111 (D. Conn. 2024).

274. *Id.* at 6.

275. Scheduling Order, Kulwicki v. Aetna Life Ins. Co., 720 F. Supp. 3d 108 (D. Conn. 2024) (No. 116).

various parties involved is essential because of the different remedies available, or unavailable, based on the parties joined.

For example, suing the employer who was responsible for selecting the plan and possibly negotiating different terms of the plan would not change the way the insurance company defines "infertility" in its own policy documents. While suing the employer might eventually lead to monetary compensation, there are risks and other considerations associated with suing the employer. For example, suing the employer might taint the relationship between the employer and the employee, especially where the employer is not a large company. Further, this case also demonstrates other challenges litigation presents, specifically the length of time it takes to pursue a case. The plaintiff in this case was forty years old at the time she filed her complaint. Fertility decreases with age, and some plaintiffs might not be able to afford to wait until they receive proper relief from a case. Additionally, the plaintiff in this case left her job, which means that she would not be able to directly benefit if the insurance company agreed to change the health insurance policy.

However, this case study also shows that it is possible to successfully sue the insurance company without actually undergoing infertility treatment and incurring the associated costs. In *Goidel v. Aetna*, the plaintiff received the denial letter and subsequently underwent the infertility treatment and paid for the treatment out of pocket, but in this case, the plaintiff only received the denial letter. Further, in *Goidel v. Aetna*, the plaintiff was a lesbian who had a partner, whereas in this case the plaintiff was a single lesbian. The plaintiff in the current case managed to overcome the motion-to-dismiss stage; thus, it appears that infertility benefits might be accessible without the necessity of having a partner.

### C. *Murphy v. Health Care Service Corporation*

In the summer of 2020, Kelsey Murphy and her same-sex partner decided to start a family.[276] Murphy first tried to achieve pregnancy by using intra-cervical insemination, but the intervention failed.[277] At that time, Murphy was enrolled in health insurance administered by Blue Cross Blue Shield of Illinois.[278] In the fall of that year, Murphy contacted an infertility treatment provider.[279]

276. Class Action Complaint at 6, Murphy v. Health Care Serv. Corp., No. 22-cv-2656, 2023 U.S. Dist. LEXIS 186107 (N.D. Ill. Oct. 17, 2023) (No. 1), https://www.courthousenews.com/wp-content/uploads/2022/05/murphy-blue-cross-complaint-usdc-illinois.pdf [https://perma.cc/LH6G-H865].

277. *Id.*

278. *Id.* at 3.

279. *Id.* at 6.

However, that November, her health insurance company denied in vitro fertilization coverage, claiming that Murphy had not met the eligibility criteria.[280] One in vitro fertilization cycle would have cost her $10,650 in out-of-pocket costs, and she chose not to pursue that treatment at the time.[281] However, in the summer of 2021, after being again denied coverage for infertility treatment, she decided to undergo in vitro fertilization, paying for the costs out of pocket.[282] The treatment was successful, and in August 2021, she became pregnant.[283] However, she suffered from a miscarriage shortly thereafter.[284] The miscarriage required hospitalization, which included surgical intervention and blood transfusion.[285] In March 2022, her insurance company informed Murphy that policies regarding coverage for infertility treatment had not changed.[286]

Effective January 1, 2016, Illinois Public Act 99–421 covered insurance law relevant to infertility treatments.[287] The law defined "infertility" in the following way:

> For purpose of this Section, "infertility" means the inability to conceive after one year of unprotected sexual intercourse, the inability to conceive after one year of attempts to produce conception, the inability to conceive after an individual is diagnosed with a condition affecting fertility, or the inability to sustain a successful pregnancy.[288]

Effective January 1, 2022, Illinois Public Act 102–170 made several amendments to the previous "infertility" definition, stating the following:

> As used in this Section, "infertility" means a disease, condition, or status characterized by:
>
> (1) a failure to establish a pregnancy or to carry a pregnancy to live birth after 12 months of regular, unprotected sexual intercourse if the woman is 35 years of age or younger, or after 6 months of regular, unprotected sexual intercourse if the woman is over 35 years of age; conceiving but having a miscarriage does not restart the 12–month or 6–month term for determining infertility;
>
> (2) a person's inability to reproduce either as a single individual or with a partner without medical intervention; or

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280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.* at 7.
286. *Id.*
287. S.B. 1764, 99th Gen. Assemb. (Ill. 2015).
288. *Id.*

> (3) a licensed physician's findings based on a patient's medical, sexual, and reproductive history, age, physical findings, or diagnostic testing.[289]

On May 19, 2022, Murphy, on behalf of herself and similarly situated individuals, filed a class action complaint in the U.S. District Court for the Northern District of Illinois.[290] At the time of the filing, she was thirty-two years old.[291] She argued that her 2010 policy provided coverage for infertility treatment:

> Benefits will be provided for Covered Services rendered in connection with the diagnosis and/or treatment of infertility including, but not limited to, in vitro fertilization, uterine embryo lavage, embryo transfer, artificial insemination, gamete intrafallopian tube transfer, zygote intrafallopian tube transfer, low tubal ovum transfer and intracytoplasmic sperm injection.
>
> Infertility means the inability to conceive a child after one year of unprotected sexual intercourse or the inability to sustain a successful pregnancy. The one year requirement will be waived if your Physician determines that a medical condition exists that renders conception impossible through unprotected sexual intercourse, including but not limited to, congenital absence of the uterus or ovaries, absence of the uterus or ovaries due to surgical removal due to a medical condition, involuntary sterilization due to Chemotherapy or radiation treatments; or, efforts to conceive as a result of one year of medically based and supervised methods of conception, including artificial insemination, have failed and are not likely to lead to a successful pregnancy.[292]

Further, she argued that "unprotected sexual intercourse" was defined as "the sexual union between a male and female."[293] She brought a cause of action under Section 1557, arguing that her insurance company discriminated against her based on her sex, which, Murphy argued, also included discrimination based on gender identity and sexual orientation.[294] She argued that her insurance company was subject to Section 1557 because it received federal

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289. Act of January 1, 2022, Pub. Act 102–170, 2022 Ill (H.B. 3709).

290. *See generally*, Class Action Complaint , Murphy v. Health Care Serv. Corp., *supra* note 276.

291. *Id.* at 3.

292. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss Plaintiff's Class Action Complaint at 4, Murphy v. Health Care Serv. Corp., No. 22-cv-2656, 2023 U.S. Dist. LEXIS 186107 (N.D. Ill. Oct. 17, 2023) (No. 19).

293. Class Action Complaint , Murphy v. Health Care Serv. Corp., *supra* note 276, at 4.

294. *Id.* at 10.

financial assistance and because it was a health program or activity.[295] Murphy argued that her insurance company engaged in sex discrimination by requiring her and similarly situated individuals to incur significant costs before being able to receive coverage for infertility treatment given that, due to their sexual orientation or gender identity, they could not get pregnant by having sexual intercourse, while heterosexual individuals did not have to incur the same costs to achieve "infertility."[296]

On August 5, 2022, the insurance company filed a motion to dismiss.[297] The insurance company argued that in her complaint, Murphy had used the wrong policy date.[298] The company argued that effective July 1, 2020, the policy defined "infertility" in the following way:

> Benefits will be provided for Covered Services rendered in connection with the diagnosis and/or treatment of infertility including, but not limited to, in vitro fertilization, uterine embryo lavage, embryo transfer, artificial insemination, gamete intrafallopian tube transfer, zygote intrafallopian tube transfer, low tubal ovum transfer and intracytoplasmic sperm injection.
>
> Infertility means the inability to conceive a child after one year of unprotected sexual intercourse, or the inability to conceive after one year of attempts to produce conception, the inability to conceive after an individual is diagnosed with a condition affecting fertility, or the inability to attain or maintain a viable pregnancy or sustain a successful pregnancy. The one year requirement will be waived if your Physician determines that a medical condition exists that renders conception impossible through unprotected sexual intercourse, including but not limited to, congenital absence of the uterus or ovaries, absence of the uterus or ovaries due to surgical removal due to a medical condition, involuntary sterilization due to Chemotherapy or radiation treatments; or, efforts to conceive as a result of one year of medically based and supervised methods of conception, including artificial insemination, have failed and are not likely to lead to a successful pregnancy.[299]

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295. *Id.*

296. *Id.*

297. Defendant's Memorandum of Law in Support of Its Motion to Dismiss Plaintiff's Class Action Complaint at 3, Murphy v. Health Care Serv. Corp., No. 22-cv-2656, 2023 U.S. Dist. LEXIS 186107 (N.D. Ill. Oct. 17, 2023) (No. 16).

298. *Id.*

299. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss Plaintiff's Class Action Complaint, *supra* note 292.

The insurance company alleged that under this policy, there were several ways to meet the definition of "infertility."[300] Further, the insurance company argued that Murphy could not establish that sex had been a motivating factor when Murphy was denied infertility benefits or that the insurance company engaged in intentional discrimination against people in same-sex relationships.[301] The insurance company argued that under the policy language Murphy would be considered as a person with an "inability to attain a viable pregnancy," would satisfy the "infertility" definition, and would then be eligible to receive coverage for infertility treatment.[302]

On September 2, 2022, Murphy filed a motion in opposition to motion to dismiss.[303] She argued that all relevant policies subjected her to discrimination, as the company's definition of "infertility" excluded a way for same-sex couples to reproduce without medical intervention.[304] She alleged that "infertility" was defined by unsuccessful attempts to conceive after a period of twelve months through unprotected sexual intercourse, which necessarily required sex between a female and a male.[305] As such, Murphy argued that she and similarly situated individuals had to try to become pregnant with costly medical interventions before being eligible to receive coverage for infertility treatment.[306]

Further, she argued the insurance company engaged in intentional discrimination because the policy, on its face, subjected her and similarly situated individuals to unequal access to coverage for infertility treatment.[307] Murphy also wrote that the policy did not provide explanation of what the "inability to attain or maintain a viable pregnancy" meant.[308] She alleged that she had been denied coverage four times, and thus the fact that the insurance company now argued that she would be considered infertile as someone with an "inability to attain a viable pregnancy" was the insurance company's "attempt to avoid liability."[309]

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300. Defendant's Memorandum of Law in Support of Its Motion to Dismiss Plaintiff's Class Action Complaint, *supra* note 297.

301. *Id.*

302. *Id.*

303. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss Plaintiff's Class Action Complaint, *supra* note 292.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

On September 16, 2022, the insurance company filed a reply.[310] The company reiterated that Murphy had failed to allege intentional discrimination.[311] The insurance company further argued that Murphy and similarly situated individuals were not required to use medical intervention to receive coverage for infertility benefits.[312] Finally, the insurance company wrote that Section 1557 did not require an explicit waiver for individuals in same-sex relationships.[313] The company also stated that the fact that the policy was facially neutral undermined any possibility of intentional discrimination and that it would only support an argument for disparate impact, which would not be viable under Section 1557.[314]

On October 17, 2023, the federal district court denied the insurance company's motion to dismiss.[315] The court held that under Section 1557, discrimination based on sex also included discrimination based on sexual orientation and gender identity, citing *Bostock* and the new HHS rule on Section 1557.[316] The court acknowledged that all policies defined "unprotected sexual intercourse" as "sexual union between a male and a female, without the use of any process, device, or method that prevents conception."[317] The court further wrote that the insurance company's argument that the new policy rendered it non-discriminatory was flawed.[318] The court explained its reasoning with a hypothetical example describing two women.[319]

The first woman was previously able to get pregnant and give birth from a prior relationship with a man. Now, this woman is in relationship with another man who is sterile. This woman, the court wrote, could establish infertility under the insurance policy by having unprotected sex with her partner due to his inability to make her pregnant. This woman would also not incur any costs before her coverage is approved.

The second woman was previously able to get pregnant and give birth using IVF. Now, this woman is in a relationship with another woman. The second woman, the court wrote, could not

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310. Defendant's Reply in Support of its Motion to Dismiss Plaintiff's Class Action Complaint, Murphy v. Health Care Serv. Corp., No. 22-cv-2656, 2023 U.S. Dist. LEXIS 186107 (N.D. Ill. Oct. 17, 2023) (No. 20).

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *See* Murphy v. Health Care Serv. Corp., No. 22-cv-2656, 2023 U.S. Dist. LEXIS 186107 (N.D. Ill. Oct. 17, 2023).

316. *Id.* at *6.

317. *Id.* at *5

318. *Id.* at *7.

319. *Id.* at *8–9.

establish infertility under the insurance policy because she would not be able to show that she was unable to become pregnant after twelve months of having unprotected sexual intercourse because the policy defined sexual intercourse as a union between one woman and one man. Further, the second woman was not diagnosed with a medical condition. The court further wrote that, most importantly, the second woman in this hypothetical could "attain or maintain a viable pregnancy or sustain a successful pregnancy."[320] The court further wrote that this woman would need to get a waiver for the twelve-month requirement, which would entail incurring out-of-pocket costs. As such, the court wrote that the first woman would qualify for infertility benefits without having to pay any costs, whereas the second woman would have to be required to undergo twelve months of supervised medical treatment before qualifying for fertility benefits.

Further, the court wrote that the plain language of the "inability to attain a viable pregnancy" clause, by using contractual interpretation, did not support the conclusion that this clause applied to Murphy and considered her infertile because of her sexual orientation.[321] The court wrote that the language did not have qualifiers, such "without medical intervention" or "because of someone's sexual orientation."[322] The court also pointed out that even though the infertility definition did not apply to Murphy, the insurance company still denied the benefits to her without explaining the inconsistency.[323] Finally, the court wrote that Murphy's complaint appropriately alleged intentional discrimination, which was sufficient to survive a motion to dismiss.[324] The court wrote that, for example, the policy defined sexual intercourse as a union between one female and one male.[325] The fact that there were several ways an individual could meet the definition of "infertility," the court wrote, still could mean that Murphy and similarly situated individuals could be effectively excluded from receiving coverage.[326] Since then, on March 8, 2024, the parties agreed to extend discovery to October 31, 2024.[327]

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320. *Id.* at *10.

321. *Id.* at *11.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. Docket Entries, Murphy v. Health Care Serv. Corp., No. 22-cv-2656, 2023 U.S. Dist. LEXIS 186107 (N.D. Ill. Oct. 17, 2023) (No. 63), https://www.courtlistener.com/docket/63323658/murphy-v-health-care-service-corporation/ (last visited Mar. 28, 2025) [https://perma.cc/M9AX-A6QV] (showing March 8,

This case shows how different insurance companies use similar language when defining their policies surrounding infertility benefits. That language is centered around the norm of heterosexuality; thus, policy terms, specifically as they pertain to the definition of "infertility," impose requirements of heterosexual intercourse. The relevance of heterosexuality is also evident when reading the judge's opinion. In explaining his reasoning, the judge used hypothetical scenarios to show how the insurance policy language treated the plaintiff differently from a similarly situated heterosexual person.

Further, in this case, the policy had multiple clauses that, the plaintiff argued, were designed to withhold coverage from the plaintiff. One of these clauses was "inability to attain a viable pregnancy," which carried a level of ambiguity that the insurance company, the plaintiff argued, was able to manipulate. The judge recognized the ambiguity. But the judge also stated that under contractual interpretation the policy language was favorable to the plaintiff and that even under that seemingly ambiguous language, the plaintiff should have received coverage. The judge also emphasized that the insurance company was in charge of drafting its own policy with a strong presumption that the company drafted the policy carefully. The insurance company, the judge explained, could have clarified the language or made it more explicit that policy provided coverage for homosexual people in the same way it provided coverage for heterosexual people. Insurance companies need to make a profit in order to operate, and part of their business plan is to provide benefits only when they should be provided. Thus, if they are able to refuse to provide benefits based on the policy language, they will do that. However, the judge's hypotheticals helped to show that under the policy language, the coverage for infertility treatment was not the same for these two groups, which, the plaintiff argued, was illegal discrimination.

Finally, this case demonstrates other challenges that might arise in pursuing this type of litigation. The plaintiff needs to understand which party should be sued and various legal and strategic considerations that are associated with that decision, and the plaintiff also needs to understand which policy version was in effect. This can be especially challenging because the insured person has to look at multiple documents that have different effective dates. Further, pursuing infertility treatment might also take multiple years during which the policy documents can change. All of these factors have to be constantly evaluated, and that might be challenging especially when, as in this case, the person has to deal with emotional and

2024 minute entry on review of parties' agreed motion to extend fact discovery).

physical issues stemming from a miscarriage and failure of infertility treatment.

D. Berton v. Aetna

In January 2022, Mara G. Berton, who was thirty-years-old, and her wife June R. Higginbotham decided to start a family.[328] Berton was enrolled in a health insurance plan administered by Aetna and sponsored through her wife's employer in California.[329] In 1989, the California legislature passed a law requiring health insurance plans to offer some coverage for infertility treatment.[330] Effective January 1, 1990, the law stated the following:

> For purposes of this section, "infertility" means either (1) the presence of a demonstrated condition recognized by a licensed medical physician as a cause of infertility, or (2) 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. "Treatment for infertility" means procedures consistent with established medical practices in the treatment of infertility by licensed physicians including, but not limited to, diagnosis, diagnostic tests, medication, surgery, and gamete intrafallopian transfer. "In vitro fertilization" means the laboratory medical procedures involving the actual in vitro fertilization process.[331]

The law did not have any qualifiers about discrimination based on sexual orientation.[332] In 2013, the California legislature passed a law amending the previous law by including a non-discrimination clause which stated that coverage for infertility treatment could not be based on, among other things, someone's sex or sexual orientation.[333] At the time, Berton's insurance policy provided some coverage for infertility treatment.[334]

In February 2022, after recommending intrauterine insemination, Berton's infertility treatment provider submitted a

328. Complaint for Damages and Injunctive Relief Class Action at 16, Berton v. Aetna Inc., (No. 23-cv-01849-HSG), 2025 U.S. Dist. LEXIS 38911 (N.D. Cal. Mar. 4, 2025) (No. 1), https://nwlc.org/wp-content/uploads/2023/04/1–2023.04.17-Berton-Complaint-FILED.pdf [https://perma.cc/5UWF-BG9B].

329. *Id.* at 14.

330. A.B. No. 900, 1989–90 Reg. Sess. (Cal. 1989).

331. A.B. 900, 1989 Leg., Reg. Sess. (Cal. 1989) (adding Section 1374.55 to the Health and Safety Code), 1989 Cal Stats. ch. 734.

332. *Id.*

333. A.B. 460, 2013 Leg., Reg. Sess. (Cal. 2013) (amending Section 1374.55 of the Health and Safety Code), 2013 Cal Stats. ch. 644.

334. Complaint for Damages and Injunctive Relief Class Action, Berton v. Aetna Inc., *supra* note 328, at 3.

preauthorization request to Berton's health insurance company.[335] On February 21, the request was denied.[336] The letter stated that Berton did "not meet the plan definition of infertility."[337] On June 11, Berton sent a letter appealing the decision.[338] In the letter, she explained that she was not able to get pregnant through "frequent, unprotected heterosexual sexual intercourse" because she was a lesbian.[339] She also argued that the denial was illegal and caused her emotional injuries.[340] On June 30, the insurance company denied the appeal, explaining that the coverage for infertility treatment was not "medically necessary" because Berton had not met the "infertility" definition.[341] The letter provided the following explanation:

> We consider an individual infertile if the individual is unable to conceive or produce conception after one (1) year of frequent, unprotected heterosexual sexual intercourse, or six (6) months of frequent, unprotected heterosexual sexual intercourse if the female partner is 35 years of age or older. Alternately, a woman without a male partner may be considered infertile if she is unable to conceive or produce conception after at least twelve (12) cycles of donor insemination (six (6) cycles for women 35 years of age or older). Meeting the definition of infertility is a requirement of the member's insurance plan. Our records don't show the member meet [sic] these criteria.[342]

On August 7, 2022, Berton filed a second appeal,[343] but on September 5 it was also denied.[344] Berton subsequently paid out-of-pocket costs associated with four unsuccessful intrauterine

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335. *Id.* at 16.

336. *Id.* at 15; Denial Letter at 6, Berton v. Aetna Inc., (No. 23-cv-01849-HSG), 2025 U.S. Dist. LEXIS 38911 (N.D. Cal. Mar. 4, 2025) (No. 40–3), https://litigationtracker.law.georgetown.edu/wp-content/uploads/2023/04/Berton_20230724_MOTION-TO-DISMISS.pdf [https://perma.cc/DE7P-ETP7].

337. Denial Letter, Berton v. Aetna Inc., *supra* note 336.

338. Letter of Appeal at 19–20, Berton v. Aetna Inc., (No. 23-cv-01849-HSG), 2025 U.S. Dist. LEXIS 38911 (N.D. Cal. Mar. 4, 2025) (No. 40–3), https://litigationtracker.law.georgetown.edu/wp-content/uploads/2023/04/Berton_20230724_MOTION-TO-DISMISS.pdf [https://perma.cc/DE7P-ETP7].

339. *Id.*

340. *Id.*

341. Appeal Denial Letter at 25–27, Berton v. Aetna Inc., (No. 23-cv-01849-HSG), 2025 U.S. Dist. LEXIS 38911 (N.D. Cal. Mar. 4, 2025) (No. 40–3), https://litigationtracker.law.georgetown.edu/wp-content/uploads/2023/04/Berton_20230724_MOTION-TO-DISMISS.pdf [https://perma.cc/DE7P-ETP7].

342. *Id.*

343. Second Appeal Letter at 29–30, Berton v. Aetna Inc., (No. 23-cv-01849-HSG), 2025 U.S. Dist. LEXIS 38911 (N.D. Cal. Mar. 4, 2025) (No. 40–3), https://litigationtracker.law.georgetown.edu/wp-content/uploads/2023/04/Berton_20230724_MOTION-TO-DISMISS.pdf [https://perma.cc/DE7P-ETP7].

344. *Id.*

insemination cycles.[345] On April 17, 2023, Berton, on behalf of herself and similarly situated individuals, filed a class action complaint in the U.S. District Court for the Northern District of California.[346] She argued that the insurance company was subject to Section 1557 because it was a health program or activity that received federal financial assistance.[347] She alleged that the company engaged in sex discrimination, which she argued included discrimination based on sexual orientation and gender identity.[348] Berton argued that the insurance company required her and similarly situated individuals to incur out-of-pocket costs before being able to receive coverage for infertility treatment that their heterosexual counterparts did not have to incur.[349] She also argued that under the policy, heterosexual couples were "taken at their word" that they were unable to achieve pregnancy, whereas the same option was also not available for her and similarly situated individuals.[350] Berton also argued that imposing the requirement to under twelve cycles of intrauterine insemination was often against medical advice.[351] She also alleged that some medication that was used for inducing ovulation was not recommended for more than six intrauterine insemination cycles.[352] In addition, she argued it would often take more than twelve months to undergo that many cycles before being eligible to receive coverage.[353] Thus, Berton alleged that heterosexual couples not only were taken at their word that they had been having prerequisite sexual intercourse, but they would also receive benefits faster because they were required to have sexual intercourse for a period of twelve months. In contrast, Berton and similarly situated individuals would need to undergo twelve cycles of intrauterine insemination which would take longer than twelve months.[354] Berton and her wife wanted to have two children, and she alleged that she would continue to face discrimination in the future.[355] She argued that the insurance company's discrimination was intentional, stating that the company knew that the policy was discriminatory and that it had

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345. Complaint for Damages and Injunctive Relief Class Action, Berton v. Aetna Inc., *supra* note 328, at 17.

346. *See generally*, *id.*

347. *Id.* at 16.

348. *Id.*

349. *Id.* at 18.

350. *Id.* at 3.

351. *Id.*

352. *Id.* at 13.

353. *Id.* at 3.

354. *Id.*

355. *Id.* at 19.

received multiple complaints.[356] Further, Berton argued that the new policy regarding coverage for infertility treatment was effectively the same. The denial letter that Berton received reflected Aetna's policy until January 2023.[357] The new policy defined "infertility" in the following way:

> For purposes of this policy, a person is considered infertile if unable to conceive or produce conception after 1 year of egg-sperm contact when the female attempting conception is under 35 years of age, or after 6 months [of] egg-sperm contact when the female attempting conception is 35 years of age or older. Egg-sperm contact can be achieved by frequent sexual intercourse or through monthly cycles of timed sperm insemination (intrauterine, intracervical, or intravaginal). This definition applies to all individuals regardless of sexual orientation or the presence/availability of a reproductive partner.[358]

Berton argued that switching the language by removing the word "heterosexual" did not change the policy.[359] She and similarly situated individuals were still subjected to barriers that their heterosexual counterparts did not have, and the disclaimer about non-discrimination, she argued, made no difference.[360] Berton argued that the policy did not require heterosexual couples to provide documentation about frequency, timing, or effectiveness of their sexual intercourse or egg-sperm contact which was also sometimes impossible depending on the couple's situation.[361]

On July 24, 2023, the insurance company filed a motion to dismiss.[362] The insurance company raised several points in the motion. First, it wrote that Berton had failed to allege intentional discrimination and that she could not proceed by arguing that there was a disparate impact on a specific group because of a facially neutral policy.[363] The insurance company explained that Berton's insurance plan, together with its fertility policy, was selected by the employer. Additionally, the insurance company argued that that fertility policy covered treatment of "medical infertility," and that this definition

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356. *Id.* at 5.

357. *Id.* at 9.

358. *Id.* at 8.

359. *Id.* at 10.

360. *Id.*

361. *Id.* at 9–10.

362. Defendant's Motion to Dismiss, Berton v. Aetna Inc., (No. 23-cv-01849-HSG), 2025 U.S. Dist. LEXIS 38911 (N.D. Cal. Mar. 4, 2025) (No. 40), https://litigationtracker.law.georgetown.edu/wp-content/uploads/2023/04/Berton_20230724_MOTION-TO-DISMISS.pdf [https://perma.cc/DE7P-ETP11].

363. *Id.* at 9.

applied to all individuals covered by the plan.[364] The insurance company further stated that any woman unable to get pregnant through heterosexual intercourse, just like Berton, would have needed to show "medical infertility" by undergoing donor inseminations.[365] And if the neutral policy affected Berton, the insurance company argued, the complaint did not allege intentional discrimination.[366]

The insurance company explained that in order to provide intentional sex discrimination under Section 1557, there had to be discriminatory animus toward a specific group or deliberate indifference to discriminatory conduct.[367] And the insurance company argued that this showing could not be made because the policy's infertility definition subjected everyone to the same standard, which was to satisfy "medical infertility."[368] As such, the insurance company argued that Berton's complaint was that her plan was limited in that it only covered "medical infertility" and that it did not include "an additional benefit for same-sex couples" who wanted intrauterine insemination treatment without suffering from "medical infertility."[369] The insurance company argued that when Berton's infertility treatment provider submitted a preauthorization request, Berton did not allege that she had been diagnosed with medical infertility, and thus her request was denied.[370]

Further, the insurance company explained that the health insurance plan covered mostly "medically necessary" services and specifically excluded several infertility treatments, such as in vitro fertilization and costs associated with purchasing donor eggs, sperm, and embryos.[371] And the covered benefits for fertility treatments only covered "medical infertility" which had to be diagnosed by a medical provider.[372] The insurance company argued that showing either certain hormonal levels (for females) or unsuccessful attempts of egg/sperm contact, through donor insemination or unprotected sexual intercourse, could meet the definition.[373] Finally, the insurance company argued that Berton had to sue the employer responsible for selecting the health insurance plan and that the

364. *Id.*
365. *Id.*
366. *Id.*
367. *Id.* at 17.
368. *Id.* at 18.
369. *Id.* at 21.
370. *Id.* at 14.
371. *Id.* at 13.
372. *Id.*
373. *Id.*

Employee Retirement Income Security Act of 1974, and not Section 1557, governed the claim.[374]

On September 1, 2023, Berton filed an opposition-to-dismiss motion.[375] Berton argued that the insurance company effectively created different burdens that had to be specified based on whether an individual engaged in heterosexual sexual intercourse, which Berton argued, was "a 'proxy' for sexual orientation."[376] As such, she argued that the policy on its face treated her and other similarly situated individuals differently than individuals who were in heterosexual relationships.[377] Citing *Bostock*, Berton wrote that if her spouse were a man, she would have been able to meet the insurance company's definition of infertility without having to pay any out-of-pocket expenses.[378] Because the policy was discriminatory on its face, Berton argued that she was not required to provide proof of animus.[379] Berton explained that a heterosexual woman in a heterosexual relationship would be simply taken at her word that she was "infertile," whereas Berton and similarly situated individuals who were in same-sex relationships were "automatically deemed ineligible" unless they first incurred out-of-pocket expenses proving that they were infertile to the insurance company.[380] As such, Berton argued that the policy was discriminatory on its face.

Further, Berton argued that the policy's applicability to all members did not shield the insurance company from "proxy discrimination" because engaging in heterosexual intercourse was effectively discrimination based on sexual orientation.[381] Berton wrote that the fact that the policy also negatively affected some heterosexual women did not change the fact that the policy relied on the distinction between people who engaged in heterosexual sexual intercourse with their partners and individuals who did not do that based on their sexual orientation.[382] Berton also argued that single heterosexual women were not relevant to the analysis because the proper inquiry was whether Berton was "treated

374. *Id.* at 9.

375. Plaintiff's Opposition to Defendants' Motion to Dismiss, Berton v. Aetna Inc., (No. 23-cv-01849-HSG), 2025 U.S. Dist. LEXIS 38911 (N.D. Cal. Mar. 4, 2025) (No. 45), https://nwlc.org/wp-content/uploads/2023/04/45–2023.09.01-Plaintiffs-Opposition-to-Defendants-Motion-to-Dismiss.pdf [https://perma.cc/3EZD-575Z].

376. *Id.* at 10.

377. *Id.*

378. *Id.* at 10–11.

379. *Id.* at 11.

380. *Id.* at 18.

381. *Id.* at 19.

382. *Id.* at 20.

differently than similarly situated individuals."[383] Berton wrote that she was subjected to discrimination on the basis of the sex of her partner and her own sexual orientation; as such, the relative comparison was between her and a woman whose partner was a man and not a single woman.[384] Berton explained that the insurance company's refusal to provide fertility benefits for all single women did not "cure its discrimination treatment" of individuals with partners based on their gender identity and sexual orientation.[385]

On September 25, 2023, the insurance company filed a reply.[386] First, the insurance company argued that Berton's discussion of the policy in terms like "heterosexual relationships" mischaracterized the policy.[387] Further, the insurance company wrote that all individuals had to demonstrate medical infertility and that Berton sought "an exemption," which did not amount to facial discrimination.[388] The insurance company also wrote that all individuals had to show unsuccessful egg-sperm contact and the fact that one way of making that contact, such as heterosexual intercourse, was not available to Berton was not "proxy" discrimination.[389] Finally, the insurance company wrote that individuals in heterosexual relationships had to see a medical provider to get a form, just like anyone else who wanted to receive fertility coverage.[390] The insurance company explained that some cancer patients are treated differently based on certain biological factors, such as their age, which leads to different coverage benefits for different people based on their age, and these policy differences were not discriminatory.[391]

On February 29, 2024, the federal district court denied the health insurance company's motion to dismiss.[392] The court held

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383. *Id.*

384. *Id.* at 21.

385. *Id.*

386. Defendant's Reply, Berton v. Aetna Inc., (No. 23-cv-01849-HSG), 2025 U.S. Dist. LEXIS 38911 (N.D. Cal. Mar. 4, 2025) (No. 48), https://litigationtracker.law.georgetown.edu/wp-content/uploads/2023/04/Berton_2023.09.25_REPLY-in-Support-of-Motion-to-Dismiss.pdf [https://perma.cc/UN8R-B9H4].

387. *Id.* at 6.

388. *Id.*

389. *Id.* at 6–7.

390. *Id.* at 7.

391. *Id.* at 11.

392. Order Denying Defendants' Motion to Dismiss and Granting In Part and Denying In Part Motions to Seal, Berton v. Aetna Inc., (No. 23-cv-01849-HSG), 2025 U.S. Dist. LEXIS 38911 (N.D. Cal. Mar. 4, 2025) (No. 70), https://litigationtracker.law.georgetown.edu/wp-content/uploads/2023/04/Berton_2.29.24_Order-Denying-Defendants-Motion-to-Dismiss-and-Granting-in-Part-and-Denying-in-Part-Motions-to-Seal.pdf [https://perma.cc/55WS-VBVG].

that Berton stated a viable claim for sex discrimination under Section 1557.[393] The court wrote that Berton plausibly alleged that the insurance company's differential treatment based on sexual orientation was facially discriminatory because the company imposed an unequal burden on Berton, who was in a same-sex relationship, as compared to a heterosexual person, who was in a different-sex relationship.[394] The court explained that the policy allowed people in heterosexual relationships to meet the infertility definition without having to make any out-of-pocket payments because they had an option to engage in unprotected frequent sexual intercourse, and that option was not available to same-sex couples who had only one option to meet the definition, which was to undergo expensive fertility treatments.[395] Further, the court wrote that the fact that the policy did not have terms such as "heterosexual relationships" or "same-sex relationships" did not matter because effectively it still had the same result of treating same-sex couples differently.[396] Since then, on March 19, 2024, there was a case management conference, during which the first court deadline was set for December 13, 2024, by when the motion for class certification had to be filed.[397]

*Berton v. Aetna* shows the ingenuity of some insurance companies. In this case, the company argued that the term "infertility" actually meant "medical infertility," and that every person under the plan, the insurance company argued, had to meet the "medical infertility" standard. The policy further had a clause explicitly stating that the clause applied to everyone "regardless of sexual orientation or the presence/availability of a reproductive partner." However, as the case shows, in practice that standard subjected the plaintiff to more burdensome requirements. For example, under the policy, a different-sex couple could receive coverage after twelve months, whereas a same-sex couple could not because undergoing twelve cycles of intrauterine insemination often takes longer than twelve months. In addition, as explained above, intrauterine insemination also carried some potential risks. In this case, the plaintiff's provider recommended to pursue other treatment modalities, and the plaintiff had to make a choice between following her provider's medical advice or undergoing procedures in a manner that was

393. *Id.* at 5.
394. *Id.* at 6–7.
395. *Id.* at 6.
396. *Id.* at 7.
397. Scheduling Order, Berton v. Aetna Inc., (No. 23-cv-01849-HSG), 2025 U.S. Dist. LEXIS 38911 (N.D. Cal. Mar. 4, 2025) (No. 77), https://litigationtracker.law.georgetown.edu/wp-content/uploads/2023/04/Berton_2024.03.21_SCHEDULING-ORDER.pdf [https://perma.cc/NU7S-7CLU].

required by her insurance company. Further, meeting the requirement of unsuccessful egg/sperm contact was also much easier for a heterosexual couple that could simply state that such contact had occurred without any way of verifying how often such contact had been attempted.

As mentioned above, in this case the insurance company changed its policy to include a clause stating that the standard to meet the definition of infertility was applied regardless of sexual orientation. The company also changed its language from "heterosexual intercourse" to "egg/sperm contact." However, even with these changes, the plaintiff showed that she was effectively subjected to a more burdensome standard, and her requests for coverage were denied. Thus, it is not clear why the company made these changes to the policy language. The plaintiff argued that the company engaged in intentional discrimination and that the company knew about multiple similar complaints of unequal treatment, and perhaps these changes were made to weaken the argument that the discrimination was intentional. If the original standard was inherently based on the norm of heterosexuality, changing the wording, as the case shows, is not enough, especially if the standard is still applied in the same way in practice.

### E. *Briskin v. City of New York*

In 2016, Corey Briskin and Nicholas Maggipinto got married in New York City.[398] In 2017, Briskin started working in the New York County District Attorney's Office as an attorney.[399] The two men subsequently decided to have children.[400] At the time, from 2017 to March 2022, they were both covered by a healthcare plan sponsored by the City of New York.[401] The plan provided coverage for infertility treatment, including in vitro fertilization.[402] Under the policy, such benefits were available to individuals who met the definition of "infertility," which could have been met by demonstrating an inability to have a child after engaging in unprotected heterosexual intercourse for a period of twelve months or by demonstrating an inability to have a child after undergoing twelve cycles

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398. Class Action Complaint at 18, Briskin v. City of Atl. City, 6 N.J. Tax 187 (1983) (No. 1), https://static1.squarespace.com/static/63ffda7f9dcd742dc8620173/t/663ce02e00f36c30d5554115/1715265582271/ECF+1+%28Complaint%2C+Briskin+v.+City+of+New+York%29+.pdf [https://perma.cc/ZFA9-A4EU].

399. *Id.*

400. *Id.* at 19.

401. *Id.* at 18.

402. *Id.* at 14.

of intrauterine insemination.[403] The plan would pay seventy-five percent of the costs of infertility treatment, including in vitro fertilization and related services, such as laboratory procedures and tests, as well as preparation, transfer, and cryo-preservation of embryos.[404]

On June 8, 2021, a few months after the New York Department of Financial Services issued Insurance Circular Letter No. 3 (2021), Briskin contacted the human resources in the District Attorney's Office as well as the Office of Labor Relations to inquire about receiving health insurance coverage for in vitro fertilization.[405] Briskin was informed that, under their plan, he and his husband were not eligible to receive such coverage.[406] On July 12, 2021, Briskin communicated with the New York City Corporation Counsel that was responsible for representing the City of New York.[407] He explained that the City of New York denied his request to receive coverage for in vitro fertilization.[408] He urged the Counsel to make changes so that gay men like him would be able to receive coverage; however, no changes were made.[409] The Counsel informed Briskin that they did not have unilateral authority to make such changes and that the decision would have to come from the mayor.[410] At that time, the mayor of New York City was Bill de Blasio.[411]

On April 12, 2022, Briskin and Maggipinto filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC).[412] They argued that the City of New York denied them and similarly situated gay men equal treatment to receive coverage for in vitro fertilization under the employee health plan.[413] They argued that the denial discriminated against them on the basis of sexual orientation and sex and that such denial violated Title VII

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403. Equal Employment Opportunity Commission Charge of Discrimination at 6, http://guptawessler.com/wp-content/uploads/2022/04/Briskin-EEOC-Charge.pdf [https://perma.cc/7DKK-HZGS].

404. Class Action Complaint at 18, Briskin v. City of Atl. City, *supra* note 398, at 14.

405. Equal Employment Opportunity Commission Charge of Discrimination, *supra* note 403, at 7.

406. *Id.*

407. Class Action Complaint, Briskin v. City of Atl. City, *supra* note 398, at 20.

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. Equal Employment Opportunity Commission Charge of Discrimination, *supra* note 403.

413. *Id.* at 1.

of the Civil Rights Act, the New York City Human Rights Law, and the New York State Human Rights Law.[414]

They alleged that the City engaged in such discrimination by limiting coverage for in vitro fertilization to "infertile" employees or spouses and providing a definition of "infertile" that only included the inability to conceive a child through intrauterine insemination or heterosexual intercourse.[415] They argued that heterosexual couples and lesbian couples were able to receive coverage for in vitro fertilization; however, gay male couples, such as Briskin and Maggipinto, were effectively excluded from receiving this coverage altogether.[416] They argued that such treatment amounted to discrimination in the employment terms and conditions based on sexual orientation and sex.[417] They also wrote that the City could not blame the administrator of the health insurance policy because, they argued, it was the City's choice to deny equal treatment to gay male employees.[418]

The City of New York subsequently filed a response, in which it argued that the gay men were not eligible to receive coverage for in vitro fertilization because the health insurance plan did not provide coverage for surrogacy, even though the discrimination charge only asked for equal coverage related to in vitro fertilization services, such as egg retrieval, that were available to heterosexual individuals and lesbians.[419] The EEOC subsequently learned that the healthcare plan provided by the City did provide coverage for the costs associated with in vitro fertilization even where the fertilized embryos would be carried by a surrogate for lesbians and heterosexual men. Those costs include egg retrieval and fertilization.[420] Thus, the couple argued that under the plan an insured heterosexual male wishing to access in vitro fertilization with an uninsured heterosexual female would have their in vitro fertilization costs covered under the plan by using the sperm collected from the insured male employee, even though the eggs were retrieved from an uninsured female.[421] Thus, even though the surrogacy in this context would not be covered by insurance, the out-of-pocket costs

414. *Id.*
415. *Id.* at 4.
416. *Id.*
417. *Id.*
418. *Id.* at 8.
419. Class Action Complaint, Briskin v. City of Atl. City, *supra* note 398, at 21.
420. *Id.* at 22.
421. *Id.* at 16.

would be less for heterosexual couples compared to their homosexual counterparts.

The couple argued that the same benefits were not available to them.[422] The plan would not cover the costs associated with fertilizing eggs retrieved from a non-plan participating female using Briskin's sperm.[423] Thus, the couple argued that when eggs were obtained from a female who was not insured, the plan would cover the costs associated with fertilizing the eggs for a heterosexual male with a female partner, but the plan would not cover the same costs for gay male with a male partner.[424] Despite being denied coverage for infertility treatment, in December 2023, Briskin and Maggipinto contacted an infertility treatment clinic, where the provider retrieved donor eggs and then used the couple's sperm to fertilize the eggs, which they hoped would be later transferred to a surrogate.[425] Subsequently, on March 7, 2024, the right to sue letter was issued by the U.S. Department of Justice.[426]

On May 9, 2024, Briskin and Maggipinto filed a class action complaint in the U.S. District Court for the Southern District of New York.[427] They sued the City of New York, Eric L. Adams (the current mayor of the City of New York), Bill de Blasio (the former mayor of the City of New York), Renee Campion (the current commissioner of the Office of Labor Relations of the City of New York), and Robert Linn (the previous commissioner of the Office of Labor Relations of the city of New York).[428] They alleged a cause of action under Title VII of the Civil Rights Act of 1964.[429] The statute made it illegal for employers "to limit, segregate, or classify" employees "in any way which would deprive or tend to deprive any individual of employment opportunities" on the basis of sex.[430] Citing *Bostock*, they wrote that discrimination based on sex also included discrimination based on sexual orientation.[431] They argued that the

422. *Id.*

423. *Id.*

424. *Id.* at 16–17.

425. *Id.* at 22.

426. Notice of Right to Sue at 43, Berton v. Aetna Inc., (No. 23-cv-01849-HSG), 2025 U.S. Dist. LEXIS 38911 (N.D. Cal. Mar. 4, 2025) (No. 1), https://static1.squarespace.com/static/63ffda7f9dcd742dc8620173/t/663ce02e00f36c30d5554115/1715265582271/ECF+1+%28Complaint%2C+Briskin+v.+City+of+New+York%29+.pdf [https://perma.cc/ZFA9-A4EU].

427. Class Action Complaint, Briskin v. City of Atl. City, *supra* note 398.

428. *Id.* at 1.

429. *Id.* at 29.

430. 42 U.S.C. § 2000e-2(a)(2).

431. Class Action Complaint, Briskin v. City of Atl. City, *supra* note 398, at

City's policy amounted to intentional discrimination in conditions, terms, compensation, and privileges on the basis of sexual orientation and sex when the policy categorically denied coverage for in vitro fertilization to single gay male employees, gay male employees in same-sex relationships, and the gay male partners of such gay male employees. They argued that it was intentional discrimination because the policy provided that coverage for single heterosexual female employees, single lesbian employees, heterosexual female employees in different-sex relationships and their partners, lesbian employees in same-sex relationships and their partners, employees, lesbian employees in relationships, and the partners of such lesbian employees.[432] They also argued that such treatment constituted intentional discrimination in segregating, classifying, and limiting employees in such a way that deprives these gay men of employment opportunities and further negatively affects their status.[433] They also argued that the policy resulted in illegal disparate impact discrimination based on sexual orientation and sex that disproportionately affected Briskin and Maggipinto.[434]

Further, they argued that the City's policy violated New York State Human Rights Law N.Y. Exec. Law § 296(a) and New York City Human Rights Law N.Y.C. Admin. Code § 8–107, both of which prohibit discrimination based on sex and sexual orientation.[435] They also alleged a cause of action under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the New York Constitution and 42 U.S.C. § 1983.[436] They argued that the City of New York, its current mayor, its former mayor, and the current and previous Office of Labor Relations commissioners together instituted a formal policy and practice to deny coverage for in vitro fertilization to Briskin and Maggipinto and other similarly situated individuals based on their sex and sexual orientation.[437]

The plaintiffs in *Briskin v. City of New York* decided to pick a different route than the plaintiffs in the previous cases analyzed above. This case illustrates that in addition to suing the insurance companies, it is also possible to sue the employers who are responsible for negotiating and purchasing insurance policies for their employees. In all other cases discussed above, none of the plaintiffs pursued their employers even though they did have a say in how

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432. *Id.* at 30.
433. *Id.*
434. *Id.*
435. *Id.* at 31–35.
436. *Id.* at 35–38.
437. *Id.* at 38.

their health insurance was handled. The fact that certain arguments were raised in some cases and not others shows the importance of selecting the correct legal strategy and weighing the benefits and risks associated with pursuing a specific strategy. The plaintiffs in this case pursued not only their employer, who they argued was responsible for selecting the health insurance policy, but also a different legal argument. They argued that the employer engaged in employment discrimination, specifically as it pertained to employment benefits. Using the recent *Bostock* decision, they argued the employer engaged in discrimination based on sex, which included discrimination based on sexual orientation and gender identity. The plaintiffs also argued that this discrimination violated various state and federal laws, including the U.S. Constitution. Because the plaintiffs in the previous case studies only sued their health insurance company, they were not able to make the same legal arguments as the plaintiffs in *Briskin v. City of New York*, which again demonstrates the importance of carefully selecting the legal strategy.

Further, the plaintiffs in this case decided to pursue their employer; however, it was not exactly clear who that employer was. This introduces another layer of complexity. The plaintiffs attempted to navigate their way through the hierarchy that existed, but their request was denied at every level. They ended up suing, among other parties, the mayor. One important consideration that might have been relevant in determining the legal strategy was the public perception of this lawsuit and its framing. If the couple's goal was to change policy in the entire state, then receiving negative backlash from the public regarding alleged discrimination based on sexual orientation in the family formation context might prove to be a hugely motivating factor for the state to change its policy and pass laws explicitly requiring insurance companies to provide coverage to gay men seeking infertility treatment. Finally, as this case demonstrates, it was essential for the plaintiffs to familiarize themselves with different infertility treatment procedures because doing so allowed them to make their arguments more persuasive. For example, they explained how the costs associated with fertilizing an egg would be covered by the insurance plan if the couple were heterosexual. Thus, it was not only important to understand the procedures associated with infertility treatment, but also essential to understand the actual policy that specified which procedures the policy provided and what requirements had to be met to receive that coverage.

## VI. Conclusion

A century ago, the concept of gay parenthood was unfathomable. Same-sex attraction was seen as a mental disorder by all major medical associations, and intimacy between two people of the same-sex was criminal. Challenging the abnormality of homosexuality was difficult because the tradition of viewing society through the lens of heterosexuality had already entrenched itself in the fabric of American society. Over time, medical organizations slowly moved away from treating homosexuality as a mental disorder. A few decades later, same-sex attraction was decriminalized, and gay people were allowed to get married while also being able to enjoy anti-discrimination protections.

However, as many gay people decided to pursue parenthood, they again encounter the standard of heterosexuality. Parenthood has been associated with heterosexuality and different-sex couples for centuries. This standard has also affected the healthcare system together with how insurance policies provided coverage for infertility treatment. The case studies discussed above show how this system is not suited for gay people because it is tailored to heterosexual people. Insurance policies, which on their face apply to everyone, effectively exclude gay people by imposing more burdensome standards on gay people than heterosexual people.

Traditions cannot be changed overnight. It takes time for people to change their views on homosexuality, same-sex marriage, various anti-discrimination laws, and gay parenthood. People's attitudes toward these issues are influenced by various social forces that are often difficult to identify. The association of parenthood with heterosexuality has a long history, but that association is becoming weaker as more gay people are becoming parents. The case studies discussed above not only document the barriers that these people face while navigating the healthcare system, but also show the power that law has in society. If successfully used, the law can serve as a bridge that allows gay people to become parents.

The case studies also demonstrate how important local, state, and federal laws can be in the lives of gay people who wish to become parents. The Affordable Care Act prohibited insurance companies from engaging in discrimination in the healthcare system. However, the law itself only prohibited discrimination based on sex. The *Bostock* decision eventually allowed gay people to argue that discrimination based on sex included discrimination based on sexual orientation and gender identity. Recognizing how different definitions of sex can affect the healthcare system, Republican and Democratic administrations used the power given to them by Section 1557 to provide their own definitions of sex.

However, discrimination on the basis of sexual orientation in the infertility treatment context could not exist if there were not any insurance policies that provided such benefits. The case studies show how some states passed laws requiring insurance companies to provide coverage for infertility treatment and how some employers had some power in negotiating with insurance companies over coverage for infertility treatment.

Understanding these mechanisms is especially important to those who wish to alleviate challenges that gay people face in their journey to parenthood. States differ in their requirements for insurance companies to provide coverage for infertility treatment, and states also differ in their laws that prohibit discrimination based on sexual orientation. Employers could consider negotiating with insurance companies for insurance policies that provide coverage for infertility treatment to both heterosexual people and gay people. If these efforts fail, the legal system could be used to challenge insurance companies by using various legal strategies and lessons learned from each case study discussed in this Article.