ADDRESSING THE INEQUITIES IN ACCESS TO REPRODUCTIVE HEALTHCARE FOR GAY MALE COUPLES

BY

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LIST OF ABBREVIATIONS

ACOG – American College of Obstetricians and Gynecologists

AMA – American Medical Association

ART – Assisted Reproductive Technology

ASRM – American Society for Reproductive Medicine

IVF – In vitro fertilization

USC – United States Constitution

ULC – Uniform Law Commissioners

ABSTRACT

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ADDRESSING THE INEQUITIES IN ACCESS TO REPRODUCTIVE HEALTHCARE FOR GAY MALE COUPLES

Thesis under the direction of Christine Nero Coughlin, J.D., Professor of Legal Writing, Wake Forest University School of Law.

The current system of federalism in the United States that allows individual state control over reproductive healthcare laws creates a discriminatory impact for gay male couples based upon geographic location. Thus, gay male couples who seek to become parents where one of the intended fathers is biologically related to the child, may be unable to do so depending on the laws that govern reproductive technology in the state they live in. In order to remedy this blatant discrimination, the United States Supreme Court should extend the currently recognized constitutional right to reproduce. This extension would allow the current right to reproduce to encompass a negative right to access reproductive healthcare. The Supreme Court should declare that all United States citizens should be able to access the means necessary to reproduce regardless of their classification.

Chapter One: Introduction to the inequities in access to reproductive health care for gay men.

Many individuals who identify as Lesbian, Gay, Bi-sexual, Transgender, Queer, etc. ("LGBTQ+") cannot biologically reproduce without medical intervention. As such, many individuals that make up the population within the LGBTQ+ umbrella must employ alternative methods to become parents.[1] Due to the vast differences in the make-up of the population within the LGBTQ+ community, the following analysis regarding access to reproductive healthcare will focus solely on one letter: the letter G, or gay. While gay can refer to both men and women, the focus will be on gay cisgender[2] men[3] for two reasons. The first is due to the individualized nuances that occur within each classification of person within the LGBTQ+ population. Each class of individuals have different circumstances and situations that need to be addressed separately.[4] The second is that I personally identify as a gay cisgender man; therefore, the content of this paper will affect my life one day as I decide to grow my family.

Due to the inability to biologically "reproduce," gay couples must turn to other methods to reproduce, commonly known as Assisted Reproductive Technologies ("ART" or "reproductive technologies"). The focus here will be on these reproductive

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[1] Gay men can adopt without having to access reproductive healthcare, but adoption falls outside the scope of this thesis and comes with an entirely different set of issues.
[2] "Denoting or relating to a person whose sense of personal identity and gender corresponds with their birth sex." *Cisgender*, ENGLISH OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/us/cisgender (last visited Apr. 2, 2018).
[3] Gay women fall outside the scope of this paper, as they can also fall under the letter L in the LGBTQ+ umbrella. Most gay women, or lesbians, will require a different analysis for equal access to reproductive healthcare. the use of the word gay throughout the remainder of this paper will only refer to gay cisgender men.
[4] Furthermore, an analysis of the entire LGBTQ+ umbrella on this topic would not yield a paper, but an entire book.

technologies and the inequities that occur in accessing them because of legal hurdles and ethical objections health care providers might invoke.

I. Reproduction for Gay Men

The primary method of reproductive technology gay couples use consists of obtaining a donated egg through in-vitro-fertilization ("IVF") to create an embryo that is placed into surrogate mother.[5] Specifically, gay couples first obtain a donated egg from an egg donor, and then use that egg in IVF along with one of the intended father's sperm to create an embryo *in vitro*. The created embryo is transferred into a surrogate mother to carry the child for the gestational period until a live birth occurs. Each of these--a donated egg, IVF, and surrogacy--have unique methods and processes. Furthermore, in order for both intended fathers to be legally designated as the child's fathers, they must obtain a parentage order. A parentage order is a "court order in which the Intended Parents' legal status as the parents of the child being carried by the Gestational Carrier is established."[6]

The first step in a gay male couples' journey to becoming parents is to acquire an egg. The egg can be donated from a compassionate source or the gay couple can use a matching agency to select an egg from a donor.

The second step is to fertilize the egg through IVF, which is a multi-step process whereby an egg is inseminated outside the body creating a fertilized egg that develops into an embryo that is then transferred into a womb.[7] For gay male couples, this process

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[5] These methods do not necessarily have to be performed or acquired in this order; however, for the purpose of this analysis they will be analyzed as listed.
[6] *Parentage Orders*, NICHOLS, DELISLE & LIGHTHOLDER P.C., https://ndllaw.com/parentage-orders/ (last visited Apr. 2, 2018).
[7] *In Vitro Fertilization (IVF),* MEDLINEPLUS https://medlineplus.gov/ency/article/007279.htm (last visited Apr. 2, 2018).

is shorter than for a heterosexual couple undergoing basic fertility treatment because the gay male couple uses a donated egg, not an egg from an intended mother. The typical process consists of four steps: "recovery of mature ova from a woman, fertilization of these ova *in vitro*, culture of the resulting pre-implantation embryos, and placement of these embryos into a woman's uterus for implantation and gestation."[8] For a gay male couple the mature ova is received from a donor, not the surrogate or the intended mother, because there is no intended mother. The eggs are retrieved-–whether from a surrogate or an intended mother--through "[a] minor surgery, called follicular aspiration."[9] The next step is the insemination and fertilization of the egg, which is the step whereby a gay couple will generally start the process.[10] The embryo is cultured and the option for pre-implantation genetic diagnosis (PGD) is available at this stage.[11] Finally, the embryo is transferred into a surrogate by inserting a "catheter containing the embryos into the women's vagina, through the cervix, and up into the womb."[12] While pregnancy will hopefully occur, the process can be completed again in those cases when pregnancy is not achieved.

Biologically, a gay male couple needs a female surrogate to gestate the child to term. A surrogate can be in one of two forms: traditional or gestational.[13] A traditional

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[8] JOHN C. MOSKOP, ETHICS AND HEALTH CARE AN INTRODUCTION 165 (2016).
[9] *In Vitro Fertilization, supra* note 7.
[10] *Id.*
[11] PGD is a process performed prior to implantation of the embryo to "identify genetic defects within embryos." Further analysis of PGD falls outside the scope of this thesis. *Preimplantation Genetic Diagnosis: PGD*, AMERICAN PREGNANCY ASSOCIATION http://americanpregnancy.org/infertility/preimplantation-genetic-diagnosis/ (last visited Apr. 2, 2018).
[12] *In Vitro Fertilization, supra* note 7.
[13] *What are the Different Types of Surrogacy and What are They Called*, MODERN FAMILY SURROGACY CENTERS

surrogate is where the egg donor also acts as the surrogate whereas a gestational surrogate is where the surrogate is not the egg donor.[14] Within these two classifications there is a further distinction. The surrogate can either be a compensated or a compassionate surrogate.[15] A compensated surrogate is one who is paid to carry the child to term whereas a compassionate surrogate is one who is performing the service free of charge as an altruistic measure.[16] The type of surrogate typically used by a gay couple for reproduction is a gestational surrogate--either compensated or compassionate. However, regardless of the type of surrogate used, a surrogacy contract is needed to outline the legal obligations of all parties--the intended parents and the gestational surrogate.[17]

The final step in a gay male couples' journey to fatherhood is to obtain legal parentage of the child that is produced through reproductive technologies. This can be done in one of two ways: a parentage order or adoption.[18] A parentage order allows a court to order that intended parents are a child's legal parents and grants them full parental rights to a child born from surrogacy with their names on the birth certificate.[19]

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http://www.modernfamilysurrogacy.com/page/different_types_of_surrogacy (last visited Apr. 2, 2018).

[14] *Id.*

[15] *Compassionate Surrogacy – Options For Your Family*, TIME FOR FAMILIES http://timeforfamilies.com/compassionate-surrogacy/ (last visited Apr. 2, 2018).

[16] *Id.*

[17] *Surrogacy Contracts Explained*, CONCEIVEABILITIES https://www.conceiveabilities.com/about/blog/surrogacy-contracts-explained (last visited Apr. 2, 2018).

[18] As previously mentioned in footnote 1, there are methods through which gay couples can use adoption to become legal parents of their child; however, adoption lies outside the scope of this thesis and will not be addressed. However, in some states, adoption may be the only way that two fathers can be declared the legal parents of a child.

[19] *Surrogacy Laws*, THE SURROGACY EXPERIENCE http://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html (last visited Apr. 2, 2018).

A parentage order is one of the only ways that the intended fathers can be listed on the child's birth certificate as the child's parents. However, no clear federal law exists concerning the requirements for parentage orders. State laws vary with whether parentage orders are valid pre- or post-birth, and whether they are allowed for heterosexual couples, homosexual couples, or both.

II. Legal Inequities exists

In the United States, a gay couple faces barriers in accessing the necessary reproductive technologies based on a lack of consistency and clarity with laws regulating ART, as well as objections a gay couple may face from providers who assert conscientious objection or otherwise refuse to treat.[20] Each of these issues will be analyzed in depth throughout the following chapters.

A. Inequities in legal access to the ART methods required for a gay male couple to become parents.

The legal problems that occur when gay male couples attempt to access reproductive healthcare come in many forms. Gay male couples face legal hurdles in each of the four aforementioned steps necessary for biological reproduction: egg donation, IVF, gestational surrogacy, and parentage orders. A gay male couples' legal access to the various components needed to reproduce varies from state to state, meaning that a couple living in one state may be able to legally access biological reproduction, while a couple living in another may not.

[20] Financial burdens are also a consideration; however, all couples regardless of sexuality face financial burdens to the exorbitant cost of ART. While financial burdens will not be considered singularly, they will be dispersed and analyzed throughout.

There is no uniform reproductive health care law in the United States. This is important to recognize because this is the reason there is an inequity in access for gay male couples. Due to the lack of a federal regulatory law, gay couples can face discrimination in accessing ART solely based on geographic location. Every state governs reproductive healthcare differently, so a gay couple in California may be able to access all four of the necessary components to reach biologically parenthood, whereas a couple in Louisiana may face discrimination in access and be denied the ability to biologically reproduce.[21] This haphazard patchwork of state reproductive laws creates a discriminatory impact that can and should be remedied.

It is important to note that professional societies, such as the American Society of Reproductive Medicine (ASRM),[22] the American Congress of Obstetricians and Gynecologists(ACOG),[23] and the American Medical Association (AMA)[24] give

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[21] Chapter 2 fully delves into a comparison of these states laws, and highlights why a gay couple in California will be able to become parents, whereas one in Louisiana may not be able to.

[22] "Moral objection to homosexuality is not itself an acceptable basis for limiting childrearing or reproduction." *Access to fertility treatment by gays, lesbians, and unmarried persons: a committee opinion*, THE ETHICS COMMITTEE OF THE AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE http://www.sart.org/globalassets/asrm/asrm-content/news-and-publications/ethics-committee-opinions/access_to_fertility_treatment_by_gays_lesbians_and_unmarried_persons-pdfmembers.pdf (last visited Apr. 2, 2018).

[23] "It is the responsibility, whenever possible, of physicians as advocates for patients' needs and rights not to create or reinforce racial or socioeconomic inequalities in society. Thus, refusals that create or reinforce such inequalities should raise significant caution." *The Limits of Conscientious Refusal in Reproductive Medicine*, ACOG COMMITTEE OPINION, THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Ethics/The-Limits-of-Conscientious-Refusal-in-Reproductive-Medicine (last visited Apr. 2, 2018).

[24] "Physicians who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, *sexual orientation*, gender identity, or any other basis that would constitute invidious discrimination." *The AMA Code of Medical*

professional guidelines and recommendations for ethical practices. However, these guidelines are simply that-–they have no legal repercussions if they are not followed, and therefore fail to offer much protection from discrimination to gay male couples who are attempting to access ART in the United States.

When it comes to egg donation, no uniform federal law or agency provides equality when obtaining a donated egg. In addition, there is a lack of regulation regarding the legality of the practice of in-vitro fertilization. There is currently no national law that regulates "third party reproduction" in the United States.[25]

The ASRM composed recommended guidelines for proper procedure when performing IVF; however, those are not enforceable by law.[26] One of those guidelines is that ART "should be granted to anyone considered fit to be a parent, regardless of their marital status, sexual orientation or gender."[27] Under these guidelines issued by the ASRM, physicians should allow gay couples access to ART. However, individual medical practitioners can vary in their adherence to the ASRM guidelines, which can lead to the disparity in accessing the four-step process of IVF for a gay couple that is further analyzed in Chapter 2.

The laws surrounding surrogates also vary from state to state. When utilizing a surrogate, a surrogacy agreement should be in place. These contractual arrangements can

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Ethics' Opinions on Respect for Civil and Human Right, AMA JOURNAL OF ETHICS ILLUMINATING THE ART OF MEDICINE http://journalofethics.ama-assn.org/2010/08/coet1-1008.html (last visited Apr. 2, 2018).

[25] *Third Party Reproduction*, *adoption and co-parenting legislation in the United States,* COPARENTS.COM, https://www.coparents.com/laws/united-states.php (last visited Apr. 2, 2018).

[26] *Id.*

[27] *Id.*

provide further inequity for gay couples in biologically reproducing because they are governed based on state law. Some states may restrict surrogacy agreements to only heterosexual couples. Additionally, the enforcement of a surrogacy agreement can be questionable, and some state courts may not legally recognize surrogacy contracts at all.[28] The legal barriers in accessing a surrogate and the enforceability of a surrogacy agreement are discussed in Chapter 2.

The discrimination regarding the disparities in legal access for gay couples to use various forms of ART pales in comparison to the blatant discrimination some states practice in determining the legal parentage of a child born from ART. Some states completely bar gay fathers from legal declarations of parentage of their child; whereas other states laws will prevent a gay couple from even being able to reach the point of determining parenthood. The legal and ethical inequalities that occur in the context of parentage orders are discussed in Chapters 2 and 3 respectively.

III. Ethical Issues

Not only do gay male couples face inequities in access based on the law, they must also surmount ethical problems. At every phase of the reproductive process, a gay couple may face conscientious objections or religious freedom claims from physicians based solely on the couple's homosexual status. However, various ethics committees for ASRM,[29] ACOG,[30] and the AMA[31] have proposed limits on conscientious objections in

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[28] Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement* 81 VIRG. L. REV. 8 (1995) http://www.jstor.org/stable/1073580?seq=1#page_scan_tab_contents (last visited Apr. 2, 2018).
[29] *Access to fertility treatment . . . , supra* note 22.
[30] *The limits of . . . , supra* note 23.
[31] *The AMA code of . . . , supra* note 24.

reproductive medicine that make these forms of refusals for prejudicial reasons unethical. An analysis on why conscientious objections and religious freedom claims are unethical in this context is discussed in Chapter 3 and surrounds the issues of professionalism, justice, and autonomy.[32]

IV. Potential Remedies

Four remedies to the inequitable access to reproductive healthcare for gay men in the United States will be proposed in Chapter 4. Those remedies consist of extending the right to reproduce by the United States Supreme Court to include a negative right to access reproductive healthcare regardless of an individual's classification, amending the United States Constitution to provide a general right to healthcare for the American people sufficiently broad to include the right to reproductive healthcare, using another country's reproductive healthcare system as a model for state or federal law regarding reproductive healthcare, or using an individual state's laws with modifications as a model for a new federal law providing access to reproductive healthcare. The most viable of these options is expanding the right to reproduce as recognized by the United States Supreme Court to include a negative right to access reproductive healthcare. Chapter Five discusses why this is the best solution and how to implement it moving forward.

[32] Additional ethical considerations that must be considered when addressing reproductive healthcare are those of autonomy, bodily integrity, and potential exploitation of the women providing donated eggs or surrogacy services. However, since heterosexual couples must also consider these ethical issues in the same way, the discussion lies outside the scope of this thesis.

Chapter Two:
The Haphazard Patchwork of Discriminatory State Reproduction Laws

The current model of United States laws governing reproductive healthcare creates a haphazard patchwork of discriminatory state laws. Based on their geographic location within the United States, a gay male couple could face state laws that would prohibit access to reproductive healthcare and create a discriminatory impact simply by crossing a state line. This discriminatory impact, however, could be resolved using a single federal standard.

In order to understand how and why a federal standard would be advantageous, this chapter first analyzes the problems created under the United States' current haphazard patchwork of state laws by examining the individual state laws gay couples need to access to biologically reproduce: egg donation, IVF and embryonic transfer, gestational surrogacy, and a parentage order. This chapter show how "leaving it up to the states" creates a discriminatory impact. It then concludes by examining how and why a federal solution is needed, and the corresponding positive and negative implications of a federal solution.

I. The discriminatory impact our current system of state laws creates for gay male couples seeking reproductive healthcare.

The United States operates under a system of federalism—a concept whereby two entities of governance control the same geographic area.[33] In the United States, the Tenth Amendment to the United States Constitution provides as follows: "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are

[33] Robert Longley, *Federalism and How it Works*, THOUGHTCO. (Mar. 17, 2018) https://www.thoughtco.com/what-is-federalism-3321880 (last visited Apr. 2, 2018).

reserved to the states respectively, or to the people."[34] This, in essence, allows states to maintain control of their own governance, while also subjecting the states to federal law. The control delegated to the states is collectively referred to as "police powers" which allow states "to enact measures to preserve and protect the safety, health, welfare, and morals of the community."[35] As a result, many bioethics issues, including reproductive technologies involving egg donation, IVF, embryonic transfer, gestational surrogacy, and parentage orders, have traditionally fallen into the states' realm of control because the issues can be categorized as ones of "safety, health, welfare, and morals."

Some bioethics scholars believe that a federalist system where states have control over bioethical issues is a "good thing" because it allows "decisions about controversial bioethical issues" to reach "different outcomes that reflect the underlying diversity of public views."[36] A *Hastings Center Report* published in 2007 provides examples like, "Louisiana [which] prohibits the destruction of human embryos, Massachusetts [which] has passed it innovative health reform laws, and Oregon [which] legalized physician-assisted suicide."[37] The article further states that "[n]one of these innovations seems politically feasible at a federal level;"[38] and attempting to create a federal law may in fact impede progress in equity for reproductive laws because a conclusion may never be reached.[39]

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[34] U.S. Const. amend. X.
[35] *Police Power*, THEFREEDICTIONARY https://legal-dictionary.thefreedictionary.com/Police+Power (last visited Apr. 2, 2018).
[36] James W. Fossett et al, *Federalism & Bioethics States and Moral Pluralism*, HASTINGS CENTER REPORT (2007).
[37] *Id.*
[38] I*d.*
[39] Additionally, a consensus may be reached that leads to an unfavorable conclusion. In the current political climate, a federal law could easily restrict reproductive healthcare.

While it claims that federalism allows for innovation and progress, the article fails to take into consideration the rampant discrimination that is currently a consequence of the patchwork of differing laws across the county. Thus, while it is true that Louisiana prohibits the destruction of human embryos, Louisiana also restricts the usage of a gestational surrogate to a heterosexual married couple.[40] Massachusetts fails to make any mention of sperm or egg donation in their state code, and Oregon has no state law regarding surrogacy, so agreements are left up to individual courts and judge's discretion.[41] While these three states have made progress in some areas, they still represent the underlying problems with this haphazard nature of rolling the legal dice and allowing them to fall on whatever law that state feels represents their individual majority. As shown below, simply because a state has made progress in one area does not mean it has prevented discrimination from occurring in another.

Each of the areas of ART needed for a gay male couple to become parents (egg donation, IVF and embryo transfer, gestational surrogacy, and parentage orders) are governed by individual states with differing or no state law. The very language of some states laws can be discriminatory on its face for gay male couples, while the lack of a law in other areas can lead to discrimination through individual discretion. Thus, depending on individual state legislation a gay couple may be able to access all necessary components to achieve parenthood, only a few components, or none because each of these ART areas have their own legal requirements per state. Furthermore, interstate

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laws more so than they already are. Furthermore, the national law could explicitly exclude sexual orientation from protection against discrimination in access the very thing that I argue a federal law should resolve.

[40] H.B. 1102, 2016 La. Sess. Law Serv. (La. 2016).

[41] See Appendices A & B.

recognition of parentage for gay couples is questionable at best. If one state does not have laws in place that would recognize the gay couple as the legal parents of their children, their rights as parents may be affected during interstate travel.

A. The lack of uniform federal law creates a discriminatory impact on gay male couples seeking egg donation.

There are no federal laws regulating egg donation. However, the ASRM establishes recommendations or guidelines that are in place to protect egg donors. These guidelines include psychological evaluations of a potential donor, age of the donor, and sexual and physical health of donors.[42] Furthermore, compensation for donation as well as potential risks or complications that can be incurred from donating are outlined.[43] However, while "adherence is necessary for membership in ASRM,"[44] these are merely guidelines, not laws with legal repercussions. Failure to follow these guidelines can lead to a revocation of membership in the ASRM and a potential review of a practicing physicians medical license by state medical boards where the actions are egregious enough to be considered violations of the standard of practice.

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[42] *Recommendations for gamete and embryo donation: a committee opinion*, FERTILITY AND STERILITY: ASRM Jan. 2013 http://www.fertstert.org/article/S0015-0282(12)02256-X/fulltext (last visited Apr. 2, 2018).

[43] *Interests, obligations, and rights in gamete donation: a committee opinion*, ETHICS COMMITTEE OF THE AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE 2014 https://ac.els-cdn.com/S0015028214005342/1-s2.0-S0015028214005342-main.pdf?_tid=beaeecb7-961b-48e7-948a-fcc1d18bd3b6&acdnat=1522700986_e03e4f3d00b70c35fd1e777cf174f5c8 (last visited Apr. 2, 2018).

[44] Alisa Von Hagel, *Women's health and the regulation of oocyte donation, federalism and bioethics* 33 POLITICS AND LIFE SCIENCES 1 (2014).

To illustrate, in 2009, Nadya Suleman gave birth to eight children and was thus dubbed "octomom."[45] This was only possible because Dr. Michael Kamrava violated ASRM regulations by transferring six embryos, where two split to create two sets of twins, instead of the recommended two.[46] As a result, Dr. Kamrava was expelled from membership in the ASRM. While there was some consequence for his violation of the guidelines, it had no real "bite," at least at first, in terms of affecting his ability to practice medicine. However, due to the nature and severity of Dr. Kamrava's deviation from guideline, the Medical Board of California reviewed the case, and ultimately determined that he "was grossly negligent in transferring twelve [sic] embryos . . . because of the foreseeable consequence of a high-order multiple pregnancy."[47] This resulted in the loss of Dr. Kamrava's medical license. While, this was a dire consequence of Dr. Kamrava's actions, had he simply refused to provide IVF services to a gay couple it is unlikely that his medical license would have been reviewed. Therefore, since the only national standards regarding reproduction are societal guidelines, and in light of the case of Dr. Kamrava, a need is illustrated for a federal law that would impose proper regulation across the country for egg donation to protect the interests of both donors and recipients.

In 1973, the National Conference of Commissioners on Uniform State Laws (the "Commissioners") attempted to remedy this lack of uniformity in protection for donors,

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[45] *8 facts about "Octomom' Nadya Suleman*, USA TODAY Jan. 24, 2014 https://www.usatoday.com/story/news/nation/2014/01/24/8-facts-octomom/4816235/ (last visited Apr. 2, 2018).

[46] Antony Blackburn-Starza, *'Octomum's' IVF doctor expelled from ASRM* BIONEWS Oct. 20, 2009 https://www.bionews.org.uk/page_91929 (last visited Apr. 2, 2018).

[47] John C. Moskop, *supra* note 8 at 170 (citing Medical board of California. 2010. In the matter of Michael Kamrava, M.D. Available at: http://documents.latimes.com/michael-kamrava-disciplinary-decision/). (last visited Apr. 2, 2018).

through the creation of the Uniform Parentage Act (UPA),[48] which is a model law that the states may adopt.[49] In 2002 the Commissioners revisited the UPA[50] to modify it to include egg donation and extend protections to cases where egg donation is involved.[51] The act itself "addresses all forms of assisted reproduction: egg donation, sperm donation, and embryo donation."[52]

While the UPA is broken down into nine articles,[53] this analysis will focus on the sections of the UPA relating to egg donation and the way states have adopted those sections as it affects gay couples seeking an egg for procreation. Article 7, or "Child of Assisted Reproduction," includes section 702, which focuses on the parental status of a donor, and section 703, which focuses on the Paternity of a child of assisted reproduction.[54] Both of these sections largely focus on the donated egg.

Article 7 of the UPA is focused on heterosexual couples; however, an analysis of section 702 and 703 provides the donating father (one of the two fathers in the gay married couple) parental rights to his biological child. To that end, Article 7, Section 702 of the act states that "a donor is not a parent of a child conceived by means of assisted

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[48] Alisa Von Hagel, *supra* note 44, at 87.
[49] *Egg Donation Laws*, CREATIVE LOVE http://cledp.com/for-recipients/egg-donor-program/egg-donation-laws/ (last visited Apr. 2, 2018).
[50] UNIFORM PARENTAGE ACT (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2002) http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf (last visited Apr. 2, 2018).
[51] *Id.*; *See* Von Hagel, *supra* note 44, at 87 (discussing that prior to 2002, the UPA only covered sperm donation, because the technology had not developed to allow for egg donations.)
[52] *Id.*
[53] Each section addresses an aspect of assisted reproduction: general provisions, parent-child relationship, voluntary acknowledgment of paternity, registry of paternity, genetic testing, proceeding to adjudicate parentage, child of assisted reproduction, gestational agreement, and miscellaneous.
[54] UNIFORM, *supra* note 49.

reproduction."[55] Section 702 goes further to claim that "the donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation."[56] Moreover, under section 702, the donor's parental rights are removed, therefore allowing both of the fathers of the produced child to potentially claim parenthood according to individual state statute. Article 7 section 703 does provide that "[a] man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child."[57] Therefore one of the two fathers--the father whose sperm will be used--should have legal rights to that child so long as he intends to be the father of the produced child.[58]

However, states have discretion to adopt the UPA, in whole, in part, or not at all. Therefore, since the UPA is not uniform law, this leads to a variance in egg donation laws throughout the country. Some states follow the UPA exactly, while others use part of it and others ignore it completely. Appendix A and B sets forth tables showing the variances in states' laws regarding egg donation.

Despite variations in the states, all 50 states, as well as Washington D.C., allow for some form of egg donation. Louisiana, however, is an outlier because it allows for egg donation, but does not allow compensation for those donated eggs.[59] Furthermore, access to a donated egg in Oklahoma for gay couples may be questionable as Oklahoma's

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[55] UNIFORM, *supra* note 49 at §702.
[56] *Id*.
[57] *Id.*
[58] The issue surrounding the non-sperm providing fathers parentage is not addressed in this section of the UPA.
[59] *Egg Donation Laws*, *supra* note 48.

laws include heteronormative language through all sections of the law regarding egg donation and reproductive treatment.[60] Oklahoma's code states "any child or children born as a result of heterologous oocyte donation shall be considered for all legal intents and purposes, the same as a naturally conceived legitimate child of the husband and wife which consent to and receive an oocyte pursuant to the use of the technique of heterologous oocyte donation."[61] This explicit language may have the potential to bar gay couples from having access to a donated egg in the state of Oklahoma because it refers only to husband and wife. Although the law in Oklahoma on its face may seem discriminatory due to the heteronormative language, it does not appear to be so in practice, as clinics in the state of Oklahoma allow gay couples to have access to donated eggs.[62]

In comparison, Florida state law regarding egg donation states: "The donor of any egg, sperm, or pre-embryo, other than the *commissioning couple* . . . shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children."[63] Therefore, the commissioning couple maintains parentage rights. Here, the language of commissioning couple is not defined or restricted to heteronormative language. Thus, the Florida egg donation statute on its face does not bar a gay male couple from commissioning a donated egg (or other biological reproductive material) and being able to maintain parentage rights to that donated egg.

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[60] OKLA. STAT. tit. 10, § 551-556 (2018).
[61] *Id*. at §554
[62] *Using an Egg Donor in Oklahoma*, FERTILITY AUTHORITY, https://www.fertilityauthority.com/articles/using-egg-donor-oklahoma (last visited Apr. 2, 2018).
[63] FLA. STAT. § 742.14 (2018) (emphasis added).

This means that facially a gay couple in the United States has access to a donated egg so that they can become parents. However, while there are currently no states that prohibit egg donation to gay couples, no state explicitly allows for it in the law either. This means that a law could be passed in any of the fifty states that could take away a gay couple's ability to have access to a donated egg. Furthermore, as Oklahoma state law shows, current laws could be outdated and only explicitly allow access to donated eggs for heterosexual couples, and therefore a gay couple using a donated egg could be prohibited from accessing it.

Just because the law currently "allows" for the access to these donated eggs, this does not mean they are still truly accessible for a successful live birth to a gay couple. The law surrounding IVF, surrogacy, and parentage orders may also have a discriminatory impact on gay couples as discussed in the following subchapters, thus yielding a false sense of accessibility to a donated egg under current state laws. Although facially a gay couple can access a donated egg, in some states they may be unable to use them in further ART treatments, or may be denied access depending on interpretation of the heteronormative language of the law. Appendix A shows the disparities amongst the laws regarding egg donation.

B. Gay male couples seeking IVF face discrimination due to the lack of a national federal standard.

There is currently no national law that regulates the practice of IVF in the United States.[64] There is a further lack of regulation amongst the states regarding the legality of

[64] *Third Party Reproduction*, *adoption and co-parenting legislation in the United States,* COPARENTS.COM, https://www.coparents.com/laws/united-states.php (last visited Apr. 2, 2018).

the practice of IVF. While the ASRM composed recommended guidelines for proper procedures when performing IVF, these guidelines are only that—they are not enforceable by law.[65] One of those guidelines is that IVF "should be granted to anyone considered fit to be a parent, regardless of their marital status, sexual orientation or gender."[66] This would lead one to believe that gay couples should have access to use IVF in order to become parents.

While access to IVF may not be barred under the ASRM guidelines, a barrier can occur in the form of a conscientious objection or religious freedom argument used by a doctor who refuses to provide the service to a gay couple or because a physician simply chooses not to follow the guidelines. For example, in 2001 the North Coast Women's Medical Group in Vista, California refused to provide IVF to Guadalupe Benitez and Joanne Clark, a lesbian couple, based on religious reasons.[67] This refusal to provide IVF based on sexual orientation led to an eight-year lawsuit, culminating in a decision that barred doctors from discriminating on the basis of sexual orientation on the grounds of religious freedom and free speech.[68] In the eight-year period, the couple found another doctor willing to provide IVF, and have since had three children.[69] Yet the fact that a physician was able to refuse to provide professional services in the first place claiming that someone's sexual orientation violated their religion is unacceptable.

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[65] *Id*.
[66] *Id.*
[67] Nisha Satkunarajah, *8-year lawsuit settled over US lesbians denied IVF* BIONEWS Oct. 5, 2009 https://www.bionews.org.uk/page_91893 (last visited Apr. 2, 2018).
[68] *See North Coast Women's Care Medical Group v. San Diego County Superior Court*, 189 P.3d 959 (Cal. App. 2008)
[69] Nisha Satkunarajah, *supra* note 67.

While it is a huge step forward that a gay couple cannot be discriminated against when using IVF in California based on religious freedoms, other states have different court systems that could come to very different conclusions on the subject. If there existed a national law regarding IVF that would make it clear that discrimination due to sexual orientation in reproductive healthcare is illegal, then Benitez and Clark would have never endured the eight-year legal battle to ensure other gay couples in their state would have equitable access to IVF.

Another instance of discrimination occurred in North Carolina with the passage of House Bill 2 (HB2). Beverly Newell and Kelly Trent, a lesbian couple, had a scheduled appointment with a fertility clinic. Upon passage of HB2, the clinic cancelled the appointment allegedly stating they do not serve gay couples.[70] HB2 was originally signed into law on March 23, 2016 under the guise of providing "single-sex multiple occupancy bathroom[s] and changing facilities in schools and public agencies."[71] However, the bill also included a provision defining classes that were protected against discrimination. While sex was included, sexual orientation was not,[72] and this left gay individuals open to discrimination without any recourse at the state level in places of public accommodation.[73] Ms. Trent and Ms. Newell were unable to "file a public accommodations discrimination complaint . . . or [] having their complaint investigated

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[70] *ACLU and Lamda Legal add transgender high school student and lesbian couple to lawsuit to fight HB 2* ACLU Apr. 21, 2016 https://www.aclu.org/news/three-more-plaintiffs-join-lawsuit-against-north-carolinas-discriminatory-anti-lgbt-law (last visited Apr. 2, 2018).
[71] H.B. 2, 2016 Leg., 2d Spec. Sess. (N.C. 2016) *repealed in part by* H.B. 142, 2017 Leg., Spec. Sess. (NC 2017).
[72] *Id*.
[73] First Amended Complaint For Declaratory and Injunctive Relief at 26, *Carcano v. McCrory*, 315 F.R.D. 176 (M.D.N.C. June 6, 2016) (No. 1:16-cv-00236-TDS-JEP).

or conciliated."[74] Fortunately, HB2 was "repealed" in that state legislatures are left in "charge of policy over multi-stall bathrooms" and the compromise put a "temporary halt on local governments passing nondiscrimination ordinances until 2020."[75] As a result of the compromise, individual North Carolina cities cannot pass laws protecting their LGBT population until 2020, so that current court cases can "play out."[76]

The passage of a law such as HB2 left many gay North Carolinians in a state of vulnerability. If a federal law existed that would prohibit reproductive discrimination, Ms. Newell and Ms. Trent would have never been placed in such a position that they could be legally discriminated against. Therefore, while HB2 has been modified, the potential for other laws in other states, or even a similar law in North Carolina, still exists and leaves gay couples in North Carolina (and other states) open to rampant discrimination at the whims of their state legislatures.

Even if a gay male couple can access IVF, they may be unable to properly implement IVF. The final step for IVF requires the implantation of the embryo into a gestational surrogate; however, if the state where the gay couple can access IVF does not allow surrogacy contracts for gay couples, then the ability to use IVF is meaningless. Without being able to access or use a gestational surrogate, there is no point in pursuing IVF because the end result--an embryo–would not be able to gestate to term. The legal disparities in access to a surrogate are discussed in the next section.

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[74] *Id*. at 27.
[75] Daniella Silva, *HB2 Repeal: North Carolina Overturns Controversial 'Bathroom Bill'* NBC NEWS Mar. 30, 2017 https://www.nbcnews.com/news/us-news/hb2-repeal-north-carolina-legislature-votes-overturn-controversial-bathroom-bill-n740546 (last visited Apr. 2, 2018).
[76] *Id*.

C. The lack of national law protecting from discrimination against gay male couples creates a negative impact when those couples seek gestational surrogates.

Like the questions of egg donations and IVF, no federal mandate or law requires or allows for access to a gestational surrogate, whether the couple needing the surrogate is gay or straight. However, the UPA does address surrogacy to provide guidance for states to apply their own surrogacy laws.[77] Article 8 Section 801(a)(3) provides that where "a prospective gestational mother, her husband if she is married, a donor or the donors, and the *intended parents* may enter into a written agreement providing that the intended parents become the parents of the child."[78] (emphasis added). The term "intended parents" is not limited to heterosexual couples; therefore, if a gay couple desires to be the intended parents, and a written agreement is signed by all parties involved (egg donor, sperm donor-–one of the gay fathers, and the surrogate) then the intended parents presumably will be the child's fathers (the two individuals making up the gay couple) under the terms of the UPA. One concern, however, is that Article 8, section 801(b) refers to the intended parents as the "man and the woman" and that they "must both be parties to the gestational agreement."[79] Although this language implies that the UPA will only apply to heterosexual couples, the UPA was written in 2002. Both federal and state laws have evolved since that time, and arguably would include both heterosexual and homosexual couples since the enactment of the UPA.[80] However, these

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[77] UNIFORM, *supra* note 49.
[78] *Id*. at §801.
[79] *Id.*
[80] For example, the case law on gay marriage has evolved to allow homosexual couples to enter into marriage relationships throughout the country. "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether

laws vary from state to state, and further vary on access for both heterosexual and homosexual couples. [81]

Only eight states allow for unrestricted access to a gestational surrogate: California,[82] Connecticut, Delaware,[83] New Hampshire,[84] Nevada,[85] Oregon, and Rhode

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biological or adopted. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples." *Obergefell v. Hodges*, 576 US __ (2015). This transition into allowing gay couples the right to marry can and should be reasonable extended to the right to gay couples to procreate, thus extending the UPA beyond the heteronormative language currently included and allow for homosexual couples to also be considered within the provisions included even if the law is not written as such now.

[81] *Gestational Surrogacy Laws Across the United States*, CREATIVE FAMILY CONNECTIONS http://www.creativefamilyconnections.com/us-surrogacy-law-map (last visited Apr. 2, 2018).

[82] "An assisted reproduction agreement for gestational carriers shall contain, but shall not be limited to, all of the following information: the identity of the intended parent or parents." CAL. FAM. CODE § 7962(a)(3) (2018)(The language of the California statute uses the term intended parents, which can be interpreted broadly to include homosexual individuals, therefore there is no heteronormative language that could bar a gay couple from using a gestational surrogate.)

[83] "Eligibility: 'a person or persons intended to become a parent or parents, whether genetically related to the child or not, must meet the following requirements at the time the gestational carrier agreement is executed: (1) He, she or they . . .; and (2) He, she or they . . . .'" DEL. CODE ANN. tit. 13, § 8-806(b)(1)-(2)(2018); "Requirements for a gestational carrier agreement: 'a gestational carrier agreement shall meet the following requirements: . . . ." DEL. CODE ANN. tit. 13, § 8-807(b)(1)-(6)(2018)(Each portion of the Delaware state code uses inclusive terms with no heteronormative language that could potentially render a homosexual couple unable to enter into a surrogacy agreement.)

[84] "'Intended parent' means a person who intends to become a parent of any child that results from a gestational carrier agreement. This term shall include intended mothers, intended fathers, or a combination of both. In the case of a married couple, any reference to an intended parent shall include both spouses for all purposes of this chapter." N.H. REV. STAT. ANN. § 168-B:1(XIII)(LexisNexis 2018). (This language is especially clear with the terminology of "combination of both" that would allow for a gay couple to enter into a gestational surrogacy agreement).

[85] "'Intended parent' means a person, married or unmarried who manifests the intent as provided in NRS 126.500 to 126.810, inclusive to be legally bound as the parent of a

Island.[86] Six of these eight states have statutory law at the state level that allow for any form of surrogacy agreement to be recognized, while Oregon and Rhode Island allow unrestricted surrogacy because no statute or case prohibits allowing surrogacy.[87] Therefore, these eight states allow gay married couples to enter into surrogacy agreements either through allowance of surrogacy agreements, or lack of prohibition of entering a surrogacy agreement.

Twenty-six states permit surrogacy but the "results may be dependent on various factors or venue" These states include:[88]

Alabama[89]	Kansas	New Mexico	Utah[90]
Arkansas	Kentucky	Ohio	Vermont
Colorado	Massachusetts	Oklahoma	Wisconsin

child resulting from assisted reproduction." NEV. REV. STAT. ANN. §126.590 (LexisNexis 2017). (The language of this statute, and the use of the term intended parent does not insinuate or imply heteronormativity in the definition of intended parent, thus allowing a gay couple to be able to enter into a gestational surrogacy agreement.)

[86] *Id*.; *Gestational Surrogacy Laws, supra* note 81.

[87] *Id*.

[88] *Id*.

[89] "'Intended Parents' means husbands and wives who enter into an agreement providing that they will be the parents of a child born to a gestational mother by means of assisted reproduction, whether or not either of them has a genetic relationship with the child." ALA. CODE § 26-17-102(12)(LexisNexis 2018). The terminology of husband and wife could potentially be interpreted to exclude gay couples from being able to enter into a gestational surrogacy agreement, thus creating a potential discriminatory barrier based on the language of the law).

[90] "The tribunal may issue an order under subsection (1) only on finding that: (b) medical evidence shows that the intended mother is unable to bear a child or is unable to do so without unreasonable risk to her physical or mental health or to the unborn child." UTAH CODE ANN. §78B-15-803(2)(b)(LexisNexis 2018)(The use of the term mother and the need for a medical necessity could bar a gay couple from executing a gestational surrogacy agreement. See body of subchapter for a negative application of this law to a gay couple in Utah).

Florida[91]	Maryland	Pennsylvania	West Virginia
Georgia	Maine[92]	South Carolina	
Hawaii	North Carolina	South Dakota	
Illinois[93]	North Dakota[94]	Texas[95]	

Florida is an example of a state where the results may vary, as Florida allows for gestational surrogacy but only for married couples that can file a petition for affirmation of parental status.[96] Now that gay men can marry in Florida, this requirement can be met.

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[91] "The commissioning couple shall enter into a contract with a gestational surrogate only when, within reasonable medical certainty as determined by a physician licensed under chapter 458 or chapter 459: (a) the commissioning mother cannot physically gestate a pregnancy to term; (b) the gestation will cause a risk to the physical health of the commissioning mother; or (c) the gestation will cause a risk to the health of the fetus." FLA. STAT. §742.15(2)(1)-(3)(2018)(The language of the law requires a mother to show medical need in order to enter into a valid gestational surrogacy agreement; this forced requirement to show a physically inability to gestate can create a legal barrier for a gay couple attempting to reproduce via a surrogate as they will be unable to show the medically necessary requirements).

[92] "Prior to executing a gestational carrier agreement, a person or persons intending to become a parent or parents, whether genetically related to the child or not . . . ." ME. REV. STAT. ANN. tit. 19-A §1931(2)(2018)(The language here is not heteronormative and can allow gay couples to enter into a gestational surrogacy agreement).

[93] "A gestational surrogacy contract shall meet the following requirements . . . by the intended parent or parents meeting the eligibility requirements of subsection (b) of Section 20 of this Act [750 ILCS 47/20]. In the event an intended parent is married, both husband and wife must execute the gestational surrogacy contract." 750 ILL. COMP. STAT. ANN. 47/25 (LexisNexis 2018). (The language of the statute restricts gestational surrogacy contracts to explicitly heterosexual couples).

[94] "A child born to a gestational carrier is a child of the intended parents for all purposes and is not a child of the gestational carrier and the gestational carrier's husband, if any." N.D. CENT. CODE §14-18-08 (2017)(The language of intended parent does not imply a heteronormative interpretation, thus there is no potential statutory interpretation barrier to bar a gay couple from entering into a gestational surrogacy agreement).

[95] "The intended parents must be married to each other. Each intended parent must be a party to the gestational agreement." TEX. FAM. CODE ANN. §160-754(2017)(There is no heteronormative language regarding the intended parents, they must simply be married – which is legal for gay couples).

[96] *Gestational Surrogacy Law, supra* note 81.

Yet, Florida requires a "medical certainty" that the "mother" is unable to gestate, suggesting gay men may be excluded.[97]

In January 2017, a judge in Utah attempted to prohibit a gay couple from accessing a surrogate due to interpretation of heteronormative language within the Utah state statute. The statute allowing for surrogacy required "medical evidence shows that the intended *mother* is unable to bear a child or is unable to do so without unreasonable risk to her physical or mental health or to the unborn child."[98] The judge denied the gay couple's petition to enter into a surrogacy agreement because no intended mother was present in this case. Thus, the contractual surrogacy agreement was unenforceable and void.[99] Luckily, on appeal, lawyers for the State failed to appear before the State high court and "said in court documents that the law should be read as gender-neutral."[100]

Eleven states practice surrogacy but have potential legal hurdles or inconsistent results. These states include: [101]

Arkansas[102] Arizona Iowa Idaho

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[97] FLA. STAT. §742.15(2)(1)-(3)(2018).
[98] UTAH CODE ANN. § 78B-15-803(LexisNexis 2017), *emphasis added.*
[99] Jennifer Dobner, *Utah couple heads to state Supreme Court over law that prevents married gay men from having biological children through surrogacy,* THE SALT LAKE TRIBUNE (Sept. 12, 2017), http://www.sltrib.com/news/2017/09/12/married-gay-couple-challenges-utahs-surrogacy-law-after-court-denies-petition/ (last visited Apr. 2, 2018).
[100] Lindsay Whitehurst, *Gay Couple Denied Baby Through Surrogate Challenges Utah Law*, US NEWS, (Sept. 12, 2017), https://www.usnews.com/news/best-states/utah/articles/2017-09-12/gay-couple-denied-baby-via-surrogate-challenging-utah-law (last visited Apr. 2, 2018).
[101] *Id*.
[102] "Except in the case of a surrogate mother, in which event the child shall be that of: (1) the biological father and the woman intended to be the mother if the biological father is married; (2) the biological father only if unmarried; or (3) the woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination." ARK. CODE ANN. § 9-10-201(b)(1)-(3) (2017). (The usage of the language "mother" and "father" throughout the statute could create an interpretation that

Indiana Mississippi Montana Nebraska

Tennessee Virginia[103] Wyoming

Both Arizona and Indiana have provisions that prohibit any surrogacy and deem such agreements to be unenforceable. However, surrogacy is still practiced in those states because courts allow parents to rebut the statutory presumption and grant the intended parents pre-birth parental orders, naming them the parents of the child before it is born.[104] Furthermore, Tennessee neither allows nor prohibits surrogacy, but simply defines surrogacy.[105] Additionally, Wyoming statutory law "does not authorize or prohibit an agreement between a woman and a man and another woman in which the woman relinquishes all rights as a parent of a child conceived by means of assisted reproduction."[106] The statute goes further to state that any agreement to such is unenforceable under Wyoming law.[107]

Of the forty-five states that allow for recognition of gestational surrogacy, twenty-three of them only do so because there is no statute or case law strictly prohibiting it:[108]

Kansas Kentucky Montana Wyoming

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only heterosexual individuals are able to enter into a valid gestational surrogacy agreement for the purposes of parenthood, thus leaving the potential for a discriminatory non-inclusive interpretation of the law).

[103] "'Intended parents' means a man and a woman, married to each other, who enter into an agreement with a surrogate under the terms of which they will be the parents of any child born to the surrogate through assisted conception regardless of the genetic relationships between the intended parents, the surrogate, and the child." VA. CODE ANN. §20-156(2018). (This strict definition of man and woman can be interpreted as limiting and create a barrier for a gay couple intending to enter into a gestational surrogacy agreement).

[104] *Gestational Surrogacy Law, supra* note 81.

[105] *Id*.

[106] WYO. STAT. ANN. § 14-2-403(d)(2018).

[107] *Id*.

[108] *Gestational Surrogacy Law, supra* note 81.

Wisconsin	Alaska	Colorado	Connecticut
Georgia	Hawaii	Idaho	Iowa
Maryland	Massachusetts	Minnesota	Mississippi
Missouri	North Carolina	Ohio	Oklahoma
Oregon	Pennsylvania	Rhode Island	South Carolina
Vermont	South Dakota	West Virginia	

Therefore, these twenty-three states could see a change in legislation or judicial proceedings that can either explicitly allow for or prohibit surrogacy agreements.

Five states have statutes or case law that prohibit a compensated surrogacy contract—Louisiana, Minnesota, New Jersey, New York, and Washington.[109] Specifically, Louisiana has a bill that "restricts gestational surrogacy to heterosexual married couples using their own gametes and places onerous requirements on such arrangements. If one enters into a surrogacy agreement that is not sanctioned by the new law, anyone involved is subject to civil and criminal penalties."[110] Yet, these five states do allow for a surrogacy agreement in limited circumstances.[111]

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[109] *Id*.
[110] *Id*.; *see* H.B. 1102, *supra* note 40.
[111] Those circumstances being uncompensated compassionate agreements; Michigan law states that "a surrogate parentage contract is void and unenforceable as contrary to public policy." MICH. COMP. LAWS SERV. §722.855 (LexisNexis 2018); New York "surrogate . . . are hereby declared contrary to public policy of this state, and are void and unenforceable." NY DOM. REL. LAW §122 (Consol. 2018); Washington state "no person, organization, or agency shall enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract, written or unwritten, for compensation." WASH. REV. CODE ANN. § 26.26.230 (LexisNexis 2018).

Washington, D.C. prohibited surrogacy until 2017. Washington D.C. did not allow for compensated or uncompensated (compassionate surrogacy) agreements prior to 2017. Under District of Columbia Code § 16-402(a) any agreement is "prohibited and unenforceable," and "anyone who is involved in or assists in the formation of a surrogacy contract receive a fine of up to $10,000 or imprisonment of up to one year, or both."[112] However, on April 7, 2017, section 16-402 was repealed and the D.C. Code, which reads as follows, now allows for surrogacy agreements:[113] "A surrogacy agreement shall be enforceable; provided that all parties to the agreement and the agreement itself meet the requirements of section16-405 and section 16-406."[114] While this is an important step in the right direction in the battle to overcome discrepancies in access to reproductive healthcare for gay men, D.C. is a small portion of the country. This one law does nothing to rectify the disparity in access across state lines.

The law surrounding access to a surrogate varies greatly from state to state. Some states explicitly recognize surrogacy contracts, while others do not. Some states do not recognize compensated surrogacy contracts, but will recognize a compassionate surrogacy.[115] Although all fifty states allow for surrogacy in some form, a gay couple may not have access to a surrogate due to the heteronormative language of the law that could cause a potential restriction in access to only heterosexual couples.[116] For example, Louisiana only allows heterosexual married couples to use a surrogate; Alabama law

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[112] D.C. CODE § 16-402(a) (2018).
[113] *Id*. at § 16-404.
[114] *Id*., the requirements in §16-405 and § 16-406 lay out basic contractual provisions, and requirements for the individual who is going to be the surrogate.
[115] *Gestational Surrogacy Laws, supra* note 81.
[116] See Appendix C for a breakdown of all state laws that do allow for surrogacy and an analysis of whether or not the language of the law is heteronormative.

states that intended parents should be a husband and wife;[117] Arkansas refers to intended parents as mother and father;[118] Florida requires the "mother" to prove inability to physically gestate on her own;[119] Illinois indicates a gestational surrogacy agreement must be include a husband and wife;[120] Utah requires an "intended mother;"[121] and finally Virginia defines intended parents as a man and woman.[122] Only these states have defined surrogacy laws including heteronormative language. Other states have no defined law and leave the decision of whether or not to allow a gay couple to enter into a surrogacy up to the discretion of the judiciary. This creates a puzzling patchwork of laws that leaves the question of access to a surrogate as questionable, at best.

Whether a surrogacy is allowed, those individuals who can be named the parents of a child born from surrogacy also vary from state to state. This variance is due to the allowance of or forbiddance of pre- or post-birth parentage orders. Furthermore, the state laws concerning parentage vary depending on whether the couple is heterosexual, homosexual, or an individual attempting to become a parent. The issue of who can be the legal parent of a child born from assisted reproductive technologies is discussed further in the next section.

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[117] ALA. CODE § 26-17-102(12) (LexisNexis 2018).
[118] ARK. CODE ANN. § 9-10-201(b)(1)-(3) (2017).
[119] FLA. STAT. §742.15(2)(1)-(3) (2018).
[120] 750 ILL. COMP. STAT. ANN. 47/25 (LexisNexis 2018).
[121] UTAH CODE ANN. §78B-15-803(2)(b) (LexisNexis 2018)
[122] VA. CODE ANN. §20-156(2018).

D. Gay male couples face discrimination due to the lack of national federal laws when seeking parentage orders to declare legal fatherhood.

The background information up to this point regarding legal access to the various forms of ART for gay couples was necessary to reach the point of professed parenthood. This information was important because in some states, such as Louisiana, a gay couple may never even reach this point in the process to achieve declared fatherhood of a child that is biologically related to one of the intended fathers. The entire prior discussion regarding the disparities in legal access for gay couples to use various forms of ART pales in comparison to the blatant discrimination some states practice in determining the legal parentage of a child born from ART.

A parentage order allows a court to grant the intended couple full parental rights to a child born from surrogacy with their names on the birth certificate.[123] Like the other legal issues discussed earlier in this chapter, no clear federal law exists on the requirements for parentage orders. Therefore, the law varies from state to state in whether parentage orders are allowed for pre- or post-birth, and whether they are allowed for heterosexual couples, homosexual couples, or both. There are several different requirements per state. Appendix D and E detail the types of parentage orders allowed in each of the 50 states and Washington D.C. (For the purposes of simplifying the tables, only the laws governing homosexual couples in those instances where one of the two intended parents is biologically related to the child are considered.[124])

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[123] *The Declaration of Parentage Order*, THE SURROGACY EXPERIENCE http://www.thesurrogacyexperience.com/intended-parents/the-law/the-pre-birth-parentage-order/ (last visited Apr. 2, 2018).

[124] For the following analysis please refer to Appendix D & E.

Forty-two of the fifty states allow for a parentage order in some form to be enacted for gay male couples.[125] Only thirty-one of those forty-three states allow for both intended fathers to obtain a parentage order:[126]

California	Connecticut	New Hampshire	Maine
Nevada	Oregon	Rhode Island	Georgia
Maryland	Missouri	North Dakota	New Mexico
Vermont	Washington	South Dakota	Delaware
Wisconsin	Alaska	Oklahoma	Florida
Colorado	Kentucky	Massachusetts	Ohio
Texas	Utah	North Carolina	Pennsylvania
Alabama	Arkansas	West Virginia	

Nine states allow for a parentage order for only the father whose sperm is used in the ART process, but allow the other father to become a legal parent through adoption:[127]

Hawaii	Nebraska	New Jersey	Tennessee
Kansas	Minnesota	South Carolina	Arizona
Iowa			

For example, Tennessee requires the second, non-biological, father to adopt. However, despite allowing the second non-biological father's name to be listed on the

[125] *Gestational Surrogacy Laws*, *supra* note 81.
[126] *Id*.
[127] *Id*.

birth certificate, the birth certificate will still show the designation of "mother" instead of "father"; thus the non-biological father will be listed as the child's mother.[128]

Twelve of the states that allow parentage orders for gay couples require the couple to be married:[129]

Florida	Colorado	Kentucky	Massachusetts
Ohio	Texas	Utah	North Carolina
Alabama	Arkansas[130]	Pennsylvania	West Virginia

Texas requires a validated gestational surrogacy agreement–which requires marriage[131] –-in order to grant a parentage order. No later than 300 days from the date of assisted reproduction, the "intended parents shall file a notice of the birth with the court," and the court will render an order confirming that the intended parents are the child's parents.[132] Arkansas only allows gay couples to be listed as legal fathers on birth certificates because the Supreme Court of the United States in *Pavan v. Smith* declared that:

> Arkansas has thus chosen to make its birth certificates more than a mere marker of biological relationships: The State uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents. Having made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition.[133]

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[128] *Gestational Surrogacy in Tennessee,* CREATIVE FAMILY CONNECTIONS https://www.creativefamilyconnections.com/us-surrogacy-law-map/tennessee/ (last visited Apr. 2, 2018).
[129] *Id*.
[130] "If the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child." ARK. CODE ANN. § 20-18-401(f)(1) (2017).
[131] TEX. FAM. CODE ANN. §160-754 (2017).
[132] TEX. FAM. CODE ANN. § 160-760(a)-(b) (2017).
[133] *Pavan v. Smith*, 528 U.S. ____ (2017).

Therefore, because Arkansas allows married heterosexual couples to both be listed on their child's birth certificate--whether the relationship is biological or not, they must also extend that same marital right to gay couples. The future application of *Pavan* could potentially resolve any issues surround gay male couples being listed as the father on their child's birth certificate so long as they are married. As a declaration from the Supreme Court, it should apply to any State that allows married heterosexual couples to use their child's birth certificate-–whether they are the biological parents or not–-as a form for recognition of legal parentage.[134]

Seven states and Washington D.C. do not allow for a parentage order for homosexual couples at all:[135]

Montana	Wyoming	Washington D.C.	Idaho
Michigan	Indiana	Mississippi	Louisiana

Wyoming has had no case law to date regarding a request for a homosexual couple (or heterosexual couple) seeking a parentage order; therefore, no case law exists to suggest whether or not it would be allowed.[136] However, Wyoming statue provides that the man who provides sperm "with the intent to be the parent . . . is the parent of the resulting child."[137]

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[134] *See Pavan v. Smith: The Supreme Court's Ruling & What it Means For You*, REPRODUCTIVE FAMILY LAW CENTER June 27, 2017 https://www.kcbabylaw.com/single-post/2017/06/27/Pavan-v-Smith-The-Supreme-Courts-Ruling-What-It-Means-For-You (last visited Apr. 2, 2018).
[135] *Pavan, supra* note 133.
[136] *Gestational Surrogacy in Wyoming*, CREATIVE FAMILY CONNECTIONS https://www.creativefamilyconnections.com/us-surrogacy-law-map/wyoming/ (last visited Apr. 2, 2018).
[137] WYO. STAT. ANN § 14-2-903(2018).

Finally, one state prohibits gay male couples from seeking a parentage order, yet allows female gay couples to do so. That state is New York, which allows for a lesbian couple to seek a post-birth parentage order, yet requires gay male couples to adopt the child.[138]

As is evident, individual states vary greatly on who they allow to be a legal parent of a child. Gay male couples may be unable to have their names listed on the child's birth certificate as the father because they are unmarried, or because they live in a state that simply does not allow for a parentage order for homosexual couples.

II. A federal standard could prevent blatantly discriminatory laws and heteronormative interpretations of ambiguous language that limit access to ART for gay male couples.

In each of the ART areas analyzed: egg donation, IVF, gestational surrogacy, and parentage orders, a patchwork of individual state laws paints a discriminatory picture across the United States that could bar gay couple from having one father biologically related to their child at any stage in the reproductive process, depending on where that gay couple lives.

While a centralized federal law governing reproductive technologies has both positive and negative implications when compared to a patchwork of fifty different state laws, the positive aspects far outweigh any negative impact. A federal law or agency applicable to all states would eliminate the patchwork of differing state laws that currently exists. The federal law or agency would implement one rule or governing body that would eliminate any form of discrimination on the basis of sexual orientation.

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[138] *Gestational Surrogacy in New York*, CREATIVE FAMILY CONNECTIONS https://www.creativefamilyconnections.com/us-surrogacy-law-map/new-york/ (last visited Apr. 2, 2018).

For example, with respect to egg donation, a national standard would provide non-discriminatory guidelines for who is allowed to use a donated egg as well as a national list explicitly outlining who is allowed to donate. This simple solution would prevent discrimination, while at the same time enforcing safe standards for donors. Further, the instances of blatant discrimination in California and North Carolina reinforce the need for a federal level law that prohibits discrimination based on sexual orientation for IVF. With respect to surrogacy, absent a federal rule that requires access for all, those who are explicitly excluded by a law or those who do not meet the standard of traditional family may be prohibited from accessing a surrogate as was the case in Utah. And, finally, a federal rule could ensure that the gay male couples designations on the birth certificate would both be father. This would avoid heteronormative gender markers such as the term "mother" when in fact it is the father's name on the document, and prevent instances like those in Arkansas from occurring.

If we go the route of creating a federal agency governing reproductive services that agency would also be able to create specific regulations that would require enforcement, in contrast to the current system where professional organizations such as the AMA or ASRM issue guidelines that have no bite. A federal agency would also be able to impose safe and inclusive reproductive practices that would ensure the recommendations of the government are followed and guarantee equal access to reproductive technologies.

For example, the United Kingdom has a national solution to govern assisted reproductive technologies via the Human Fertilisation and Embryology Authority (HEFA), which is a national government agency enacted by the United Kingdom's

Parliament in 1990.[139] This national organization "inspects and licenses all fertility clinics and issues and enforces human reproductive research and treatment regulations to which all British clinics and individual professionals must adhere."[140] This appears to be a simple solution to a large problem, and as evidenced by the United Kingdom is possible.[141] Gladys White, a professor of global bioethics at Georgetown University,[142] agrees that the United States should adopt a similar system of government agency with teeth to impose laws and enforce regulations. This approach would avoid the current legal framework of a haphazard patchwork of state laws that can lead to discrimination.[143]

On the downside, a national agency, because it would be part of the Executive Branch, would be subject to political change and may ultimately create more burdensome regulations and bureaucracy when accessing reproductive technologies. For example, the agency may implement specific testing requirements, similar to those of the Food and Drug Administration,[144] for new reproductive technologies. However, while this may

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[139] *How we regulate*, HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY https://www.hfea.gov.uk/about-us/how-we-regulate/ (last visited Apr. 2, 2018).

[140] John C. Moskop, *supra* note 8 at 174-75; *citing* Gladys B. White 1998. *Crisis in assisted conception: the British approach to an American dilemma*. 7 JOURNAL OF WOMEN'S HEALTH (1998).

[141] It should be noted that an agency such as HEFA may be easier to implement in the UK due to differences in UK and US health systems, however, that analysis lies outside the scope of this thesis.

[142] Gladys B. White, *Bachelor of Arts in Liberal Studies*, GEORGETOWN UNIVERSITY https://scs.georgetown.edu/programs/4/bachelor-of-arts-in-liberal-studies/faculty-bio/3596/gladys-b-white (last visited Apr. 2, 2018).

[143] Moskop, *supra* note 8, at 175-76.

[144] For example, the implementation of the FDA and subsequent amendments have led to an extensive testing procedure for new drugs, which includes multiple phases and regulatory red tape before a new drug can be marketed. *How Drugs are Developed and Approved*, U.S. FOOD & DRUG ADMINISTRATION https://www.fda.gov/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ (last visited Apr. 2, 2018).

mean that it may take longer for a gay couple to achieve their end goal--a child that is biologically related to one of the fathers--it would also ensure they are able to reach that goal in a safe and secure manner. So, while the implementation of a national agency governing reproductive technologies may bring new and unforeseen obstacles into the equation, it would safeguard a gay male couple's ability to use ART, which far outweighs any obstacles that may arise.

A single federal law could rectify the problem of blatantly discriminatory laws and heteronormative interpretations of ambiguous language; yet the United States has failed to act. This has led to the inability for some United States citizens to reproduce because they are not allowed access to ART simply based on their geographic location.

Unfortunately, there exists yet another barrier to equity in reproductive healthcare for gay men. Chapter 3 examines the current political climate. Conscientious refusal and religious freedom claims create a barrier not only with potentially legal ramifications, but also with issues of morality and ethics in determining whether or not gay male couples have access to ART.

Chapter Three: Ethical Considerations

Even if a gay male couple can overcome the seemingly insurmountable battle to legally become parents, they may still face discrimination in the guise of an ethical conscientious objection or religious freedom claim. A health care provider can at times make a valid conscientious objection or a religious freedom under state law; however, claims of conscientious objection and religious freedom cannot be allowed to move forward at an unbridled discriminatory rate. As the saying goes, "your right to swing your arms ends just where the other man's nose begins."[145] Thus, just because one person has the right to conscientiously object or make a religious freedom claim, he or she does not have an unequivocal right to discriminate against a gay couple solely based on their sexuality.[146]

Conscientious objections based on discriminatory intent are an unprofessional method of practice for physicians and violate the bioethical principle of justice. Religious freedom claims may or may not create legal liability for physicians who use them, and violate the bioethical principle of autonomy. The following analysis discusses each of these issues.

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[145] *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751 (2014).(Ginsburg, J., dissenting.)

[146] Additionally, a gay male couple cannot fail to consider the autonomy, informed consent, and potential exploitation of the women who provide both donated eggs, as well as gestational surrogacy services. However, since those ethical considerations must also be considered for heterosexual couples, the ethical discussion lies outside the scope of this thesis. However, it should be noted that a woman's right to her own autonomy does in fact outweigh a gay couples desire for a donated egg or gestational surrogacy services.

I. Conscientious Objections

Conscientious objections in health care are defined as "the refusal to perform a legal role or responsibility because of moral or other personal beliefs."[147] Here, conscientious objections will be analyzed in the context of physicians refusing to provide fertility services to a gay couple because they are "morally opposed" to homosexuality.

Most states have some form of legal conscience clause,[148] which allow health care providers to opt out of performing certain procedures such as abortion and physician assisted suicide.[149] "[P]ermitting conscientious objection in reproductive health care respects the status of health care professionals as independent moral agents and enables them to protect their professional and moral integrity."[150] The purpose of a conscientious objection is so that doctors do not have to leave their own moral compass at the door to their medical practices. This allows physicians to enter the workforce knowing they will not be forced to perform actions that violate their moral code.[151]

These legal conscience clauses raise several ethical issues. First, conscientious objections raise issues of professionalism within the healthcare profession. Second, conscience clauses can, and have been, abused. An example of this abuse would be a

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[147] Nancy Berlinger, *Conscience Clauses, Health Care Providers, and Parents, From Birth to Death and Bench to Clinic: The Hastings Center Bioethics Briefing Book for Journalists, Policymakers, and Campaigns*, ed. Mary Crowley (Garrison, NY: The Hastings Center, 2008), 35-40. https://www.thehastingscenter.org/briefingbook/conscience-clauses-health-care-providers-and-parents/

[148] Conscience clause refers to the portion of a legal document that allows for conscientious objections.

[149] *Id*. While the law surrounding conscience clauses is important, it largely falls outside the scope of my thesis. The issue I address with conscience clauses is not the law itself, but where the power to object is improperly used in a discriminatory manner.

[150] John C. Moskop, *supra* note 8, at 172.

[151] *Id.*

physician who has no objection to performing the procedure itself, but is morally opposed to providing the service to someone solely based on a discriminatory reason. In his book, Dr. John Moskop asks, "[s]hould the physician be permitted to refuse this request based on his belief that gay people should not be permitted to reproduce or raise children?"[152]

The answer is absolutely not for two reasons. One, "[a]n unlimited professional right to conscientious refusals may . . . impose an unjustified kind of paternalism on patients."[153] Two, allowing conscientious objections to be used for prejudicial reasons creates a pattern of discrimination that can "open the door to unjustified refusals based on . . . racism and sexism as well as homophobia."[154] Ultimately, conscientious objections constitute an unprofessional violation of a physician's duty of care to their patients. Additionally, they are unethical when used in this context because they lead to the potential for abuse and unbridled discrimination by violating the bioethical principle of justice.

A. Conscientious objections based on prejudice are unprofessional violations of the duty of care doctors vow to provide when entering the medical profession.

Professionalism is defined as "the conduct, aims, or qualities that characterize or mark a profession or a professional person."[155] Upon graduation from medical school, physicians recite some form of the Hippocratic Oath. While the actual Oath recited varies across the medical profession and on the medical school, it generally outlines the

[152] *Id*. at 173.
[153] *Id*.
[154] *Id*.
[155] *Id*. at 127.

"conduct, aims, or qualities" that characterize the medical profession and as such serves as an outline of what a physician's professional practice should aspire to be.

One common oath that is used is the Declaration of Geneva or "The Modern Hippocratic Oath"[156] implemented by the World Medical Association in 2006.[157] This Modern Hippocratic Oath states: "I WILL NOT PERMIT considerations of age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, race, *sexual orientation*, social standing or any other factor to intervene between my duty and my patient."[158] A physician who has recited this oath yet allows a couple's sexual orientation to factor into the decision to provide reproductive healthcare is violating their own practices professional code, as well as the duty he or she owes to their patients.

A doctor's duty is defined as providing the:

> treatment with that degree of skill, care, and diligence as possessed by or expected of a reasonably competent physician under the same or similar circumstances. The 'circumstances' include the area of medicine in which the physician practices, the customary or accepted practices of other physicians in the area (the 'locality rule'), the level of equipment and facilities available at the time and in that locality, and the exigent circumstances, if any, surrounding the treatment or medical service rendered.[159]

In the realm of reproductive healthcare, physicians can join one of the professional associations that provide guidelines for ethical reproductive healthcare practice.

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[156] *Declaration of Geneva*, WORLD MEDICAL ASSOCIATION https://www.wma.net/wp-content/uploads/2016/11/Decl-of-Geneva-v2006.pdf (last visited Apr 2, 2018).
[157] *Id*. It is important to note that this oath is not legally binding, it is a statement some physicians recite with an intention to abide by the words within.
[158] *Id*. (*emphasis added*).
[159] *What is a Doctors Duty of Care*, FINDLAW http://injury.findlaw.com/medical-malpractice/what-is-actionable-medical-malpractice.html (last visited Apr. 2, 2018).

One such society that regulates reproductive physicians is the ASRM, which, as discussed earlier, is a self-regulated society that has no legal backing. However, ASRM states in their ethical guidelines that "moral objection to homosexuality is not itself an acceptable basis for limiting childrearing or reproduction."[160] Therefore, reproduction specialists who claim a conscientious objection based on moral opposition to a couple's sexual orientation is not only violating their Hippocratic Oath but also their professional duty to patients under the locality rule of a physician's duty because the ASRM establishes the "local practices" to which a practicing member is bound to follow.

Professionalism is morally significant in healthcare due to the nature of the relationship between physicians and patients.[161] Physicians are in a position of power over their vulnerable patients, thus creating a relationship where the patients must trust and rely on their physicians to act "for the benefit of their patients and to place patient interests before self-interest."[162] This is especially important in terms of a gay male couple seeking out a reproductive specialist so that they can expand their family. The couple is relying on the physician to provide a service to which the couple themselves have no other access. Therefore, the reproductive specialist has complete control over the couples' ability to become parents where one of the intended fathers is biologically related to the child. Abusing that trust and power in a way that creates a discriminatory impact on a gay couple violates that physician's duty to provide services.

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[160] *Access to fertility treatment . . . supra*, note 22.
[161] John C. Moskop, *supra* note 8.
[162] John C. Moskop, *supra* note 8 at 128.

Yet, both physicians and patients can have their own personal and moral integrity, "and neither has an absolute right to impose his or her will on the other."[163] This raises the question of how to create a compromise that both respects physicians' moral integrity and allows for physicians to professionally practice their own moral integrity, without doing so in a discriminatory manner. One compromise, identified by bioethicists Dan Brock as the "conventional compromise," posits that professionals may refuse to provide a morally controversial service, as long as the exclusion is not based on prejudice.[164] However, this compromise, while promising, still allows for an unprofessional practice of medicine because it enables physicians to violate their professional duty as medical practitioners. Furthermore, this compromise does not solve the problem of reproductive healthcare physicians claiming they are morally opposed to homosexuality, and using a conscientious objection to discriminate. While Brock's compromise would attempt to rectify this situation, it would still allow for conscientious objections in the first place, thus leaving the doorway open for discriminatory situations.

B. Conscientious objections pave the route to unbridled discrimination based on minority status.

Physicians who refuse to provide ART to a gay couple under the guise of a conscientious objection are indulging in seemingly protected discrimination. As previously mentioned, the ASRM states in an ethics committee opinion that "moral objection to homosexuality is not itself an acceptable basis for limiting childrearing or reproduction."[165] Additionally, the AMA states "physicians who offer their services to

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[163] *Id*. at 135.
[164] *Id*. at 135.
[165] *Access to fertility treatment . . .* , *supra* note 22.

the public may not decline to accept patients because of race, color, religion, national origin, *sexual orientation*, gender identity, or any other basis that would constitute invidious discrimination."[166] Furthermore, ACOG states "it is the responsibility, whenever possible, of physicians as advocates for patients' needs and rights not to create or reinforce racial or socioeconomic inequalities in society. Thus, refusals that create or reinforce such inequalities should raise significant caution."[167] ACOG is not as direct in its determination that discrimination veiled as a conscientious refusal is immoral in the context of providing services to homosexuals. Yet, it does highlight that refusals based on inequities should raise caution, thus leaving room to interpret the opinion so that refusal to provide care based on a homosexuality is unethical because it violates the principle of justice.

The bioethical principle of justice is violated when a physician refuses to provide a gay couple with reproductive healthcare based on a conscientious objection. While there are several different theories regarding the bioethical principle of justice, one of the most common is the overall idea of justice developed by bioethicists Tom L. Beauchamp and James F. Childress, described as "a group of norms for fairly distributing benefits, risks, and costs."[168] Physicians who only distribute the benefit of their reproductive health care to heterosexual couples are doing so in a manner that is unfair to gay couples. Both couples exhibit a need or want for the healthcare the physician is providing, yet by only

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[166] *The AMA code of . . .* , *supra* note 24. (*emphasis added*)
[167] *The Limits of . . ., supra* note 23.
[168] Tom L. Beauchamp & James F. Childress, *Principles of Biomedical Ethics* 104 (6th ed. 2009) (Due to the fact that high cost for reproductive healthcare is something that both gay and straight couples face, an in depth analysis of the nuances of the price differences fall outside the scope of this thesis.)

providing the healthcare to the heterosexual couple, the physician is discriminating against the gay couple for reasons that lie outside of their control. The refusal to provide the care creates the risk that a gay couple may never be able to become parents where one father is biologically related to the child-–especially in rural areas where the law allows for no protection, and fertility clinics are separated by hundreds of miles.

Udo Schuklenk, a Canadian bioethicist, claims that "[p]atients are entitled to receive uniform service delivery from healthcare professionals. They ought not to be subjected to today's conscientious objection lottery."[169] This lottery is one that seemingly any gay couple could be subject to when they walk into a fertility clinic hoping to obtain treatment services. A gay couple may walk into a clinic and see Dr. A who has no qualms about providing fertility services to them; whereas, another gay couple could walk in at the same time and see Dr. B who subsequently refuses to provide fertility services because the doctor is morally opposed to homosexuality. On its face, this inconsistency violates the bioethical principle of justice.

Additionally, gay male couples can fall into the classification of a vulnerable group. Justice as a concept is designed to overcome vulnerabilities in healthcare and "focuses on a person's susceptibility, whether as a result of internal or external factors, to inducement or coercion, on the one hand, or to harm, loss, or indignity on the other."[170] A gay couple, due to the nature of their relationship, is susceptible to harm or loss in the realm of reproductive healthcare as they are unable to become parents without access to

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[169] Udo Schuklenk, *Conscientious Objection In Medicine: Private Ideological Convictions Must Not Supersede Public Service Obligations,* 29 BIOETHICS 5 (2016). https://onlinelibrary.wiley.com/doi/epdf/10.1111/bioe.12167 (last visited Apr. 2, 2018).
[170] Tom L. Beauchamp, *supra* note 168.

reproductive services. Therefore, a physician refusing to provide those services denies a gay couple the ability to become parents where one father is biologically related to the child.

Overall, conscientious objections violate multiple professional standards implemented by the overall practice of medicine. In doing so objecting based on sexual orientation doctors, violate basic ethical principles which they vowed to uphold.

II. Religious Freedom as a Conscientious Objection

Religious Freedom claims fall within those of conscientious objection. However, they require a distinct analysis because not all conscientious objections are necessarily a religious freedom claim, whereas, all religious freedom claims are conscientious objections. A religious freedom claim is a conscientious objection that is based in one's religion.[171] For example, Krista and Jami Contreras, a lesbian couple, where denied treatment by a pediatrician for their six-day old infant because the intended doctor "prayed on it and she [wouldn't] be able to care for [the child]."[172] While this action by the physician was not illegal because the state of Michigan does not classify sexual orientation as a protected class;[173] the action was unethical and violated the ASRM[174]

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[171] Additionally, religious freedom claims may also trigger protections under the First Amendment to the United States Constitution; thus, making them legally and analytically complex. However, those issues lie outside the scope of this thesis as this chapter is focused on the ethical nature of religious freedom claims.

[172] Abby Phillip, *Pediatrician refuses to treat baby with lesbian parents and there's nothing illegal about it*, THE WASHINGTON POST Feb. 19, 2015 https://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it/?utm_term=.5e2f880a1616 (last visited Apr. 2, 2018).

[173] *Id*.

[174] *Access to fertility treatment . . . , supra* note 22.

and AMA[175] guidelines. Moreover, this example highlights the following analysis: 1) religious freedom claims, depending on the state, may subject the provider to legal liability or, in the alternative, protect the provider from legal liability; and, 2) religious freedom claims based on sexual orientation are unethical because they violate medical associations ethical guidelines and have the potential to lead to discriminatory intent.

It should be noted that religious freedom claims are not always discriminatory, and could, in fact, prevent morally irreprehensible actions. Take, for example, the eugenics movement in the United States in the 1920's and 30's. If a health care provider had refused to medically sterilize a female who may have biologically reproduced in the future in the name of religious freedom, the concept of eugenics may have had more opposition and not become a popular social movement that ultimately forcibly sterilized over 64,000 women, the majority of which were poor people of color.[176] However, in the context of this thesis, where religious freedom claims are based in discriminatory intent based on sexual orientation, they can be illegal and unethical.

A. Religious Freedom claims can be illegal discrimination where they are used for discriminatory purposes.

In specific context where a law has provided protections to individuals in places of public accommodation based on their sexual orientation, a religious freedom claim can be illegal. For example, the California Unruh Civil Rights Act § 51(b) states:

> [a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual

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[175] *The AMA code of . . . , supra* note 24.

[176] Teryn Bouche & Laura Rivard *America's Hidden History: The Eugenics Movement* SCITABLE BY NATURE EDUCATION (Sept. 18, 2014). https://www.nature.com/scitable/forums/genetics-generation/america-s-hidden-history-the-eugenics-movement-123919444 (last visited Apr. 27, 2018).

> orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.[177]

On its face, this law makes sexual orientation a protected class from discrimination in California in places of public accommodation, which includes medical services.

In *North Coast Women's Care Medical Group, Inc. v. Superior Court,* a lesbian woman was denied intrauterine insemination based on her sexual orientation.[178] The court applied § 51(b) and concluded "a religious objector has no federal constitutional right to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector's religious belief."[179] Therefore, declaring that where there is a neutral law such as the California Unruh Civil Rights Act, a religious freedom claim cannot be made to overcome the act and discriminate in a place of public accommodation.[180] Unfortunately, the California Supreme Court ultimately declared that *North Coast* did not violate the California Unruh Act because the petitioner discriminated on marital status rather than sexual orientation. However, in California, places of public accommodation may not discriminate based on sexual orientation, even for the purposes of religious freedom.

Therefore, in those places where a gay couple is regarded as a protected class due to a state law allowing protection based on sexual orientation, the United States Supreme

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[177] CAL. CIV. CODE § 51(b) (2018).
[178] *North Coast Women's Care Medical Group, Inc. v. Superior Court*, 189 P.3d 959 (Ca. 2008).
[179] *See Id. Citing Church of Lukumi Babulu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993).
[180] *See Id.*

Court's decision in *Church of Lukumi Babulu Aye, Inc. v. Hialeah*[181] may offer support. The California Supreme Court relied on this case to reach its holding in *North Coast*— that it is illegal to use a claim of religious freedom to attempt to discriminate against the gay couple. Unfortunately, not all states have laws that protect based on sexual orientation from discrimination in places of public accommodation. Twenty-one states and Washington, D.C. have laws protecting from discrimination in a place of public accommodation based on sexual orientation; whereas, twenty-nine states do not.[182] In the current political climate, it is unlikely that the laws providing for sexual orientation protection in places of public accommodation will be expanded; if anything, the law may be moving away from providing this protections and focusing more on providing religious freedom protections.

To that end, the Department of Health and Human Services (HHS) Office for Civil Rights (OCR), recently announced the creation of a Conscience and Religious Freedom Division.[183] This division allegedly "has been established to restore federal enforcement of our nation's laws that protect the fundamental and unalienable rights of conscience and religious freedom."[184] The HHS claims that this division will be geared

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[181] "[A] religious objector has no federal constitutional right to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector's religious belief." *Church of Lukumi Babulu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993).

[182] *Non-Discrimination Laws*, MAP: MOVEMENT ADVANCEMENT PROJECT http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Apr. 2, 2018) (Additionally, three states - North Carolina, Tennessee, and Arkansas – have laws explicitly prohibiting the passage or enforcement of laws that would provide protections based on sexual orientation).

[183] *HHS Announces New Conscience and Religious Freedom Division*, HHS.GOV Jan 18, 2018 https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html (last visited Apr. 2, 2018).

[184] *Id*.

towards "protect[ing] people from being coerced into participating in activities that violate their consciences, such as abortion, sterilization, or assisted suicide."[185] However, in practice this new "division's loose language could leave room for physicians to provide substandard care to LGBT patients--or abstain from treating them altogether."[186]

Stanley Vance, a pediatrician at the University of California San Francisco fears "that these measures will be an institutionalized form of discrimination against patients who have been identified as a sexual minority. . . ."[187] Since religious freedom claims, as evidenced by *North Coast*, have been used as a form of legal discrimination, his fears are founded. The implementation of a division in the federal government to protect religious freedoms gives a gay couple or individual valid reason to be afraid that they may be discriminated against in a place of public accommodation solely because of who they love.

At its core, "[t]rue religious freedom protects an individual's right to worship—or not—and harms no one. But these new measures are designed so that government employees and healthcare providers can deny service or treatment to LGBT people as a group by claiming that providing such service or treatment would violate their religious beliefs or sincerely held principles."[188] This fear that the division will be used as a mask

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[185] *HHS Takes Major Actions to Protect Conscience Rights and Life*, HHS.GOV Jan. 19, 2018 https://www.hhs.gov/about/news/2018/01/19/hhs-takes-major-actions-protect-conscience-rights-and-life.html (last visited Apr. 2, 2018).

[186] Robbie Gonzalez, *How the 'Religious Freedom Division' Threatens LGBT Health and Science*, WIRED Jan. 23, 2018 https://www.wired.com/story/how-the-religious-freedom-division-threatens-lgbt-healthand-science/ (last visited Apr. 2, 2018).

[187] *Id*.

[188] *Trump Administration's Religious Refusal Actions Threaten Access to Healthcare by LGBT People*, FENWAY HEALTH http://fenwayhealth.org/trump-administrations-religious-refusal-actions-threaten-access-to-healthcare-by-lgbt-people/ (last visited Apr. 2, 2018).

for legal discrimination is one founded in the current makeup and practice of religious freedom claims.[189] In those states where the claims are currently legal, they are certainly used as a veiled attempt to hide discriminatory intent, and in doing so create an unethical practice in the delivery of health care to gay couples.

B. Religious Freedom claims are unethical attempts to protect discrimination.

As previously mentioned, religious freedom claims to withhold reproductive healthcare to a gay couple because it violates a physician's religion is declared unethical by both the AMA and the ASRM. These attempts at veiled discrimination also violate the bioethical principle of autonomy.

The bioethical principle of autonomy or respect for personhood, "is to acknowledge [an autonomous agent's] right to hold views, to make choices, and to take actions based on their personal values and beliefs."[190] This is essential when analyzing a physician-patient relationship where physicians states they do not treat gay people based on a religious freedom claim. One must consider both the physician and the patient's autonomy in analyzing the situation. While the gay couple in this case is exercising their autonomous choice to seek reproductive healthcare so that they can become parents, physicians are exercising their autonomy to honor their religion by not providing healthcare based on religious opposition.

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[189] It is important to note that a decision is currently pending regarding this very issue. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,* No. 16-111 (S. Ct. argued Dec. 5, 2017). This case addresses the issue of whether businesses are able to use religious freedom as a claim to refuse to provide services to gay couples. An in-depth analysis of this case falls outside the scope of this thesis because the Court has not yet declared its opinion.

[190] Tom L. Beauchamp, *supra* note 168.

While neither's autonomy outweighs another's in this situation, Judith Malfrey, MD explains that although "physicians' rights to their own belief systems should be protected, the standards of the medical profession dictate that health care professionals not let discriminatory views interfere with their duty to respond to the needs of their patients."[191] So while physicians maintain the right to their own autonomy, that autonomy is limited in the realm of their profession because the patient's need and the duty to treat or provide care for that need outweighs a physician's discriminatory intent.

In conclusion, conscientious objections in the realm of providing reproductive healthcare to gay male couples are unprofessional and unethical attempts at veiled discrimination. Religious freedom claims based on sexual orientation may be illegal depending on state law, and if they are not, they violate ethical principles. In order to fully ensure ethical compliance in the realm of conscientious objections and religious freedom claims, a singular federal law providing that they cannot be used in a discriminatory manner is needed. Even though several medical societies and associations already make claims within their guidelines that discriminatory intent in conscientious objections is unethical, this is not enough. These guidelines have no legal backing and do not force or require medical professionals to follow them and thus allow unethical practices to continue.

The Supreme Court has already declared that "a religious objector has no federal constitutional right to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector's religious

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[191] Judith Palfrey, MD, *Conscientious Refusal or Discrimination against Gay Parents*, 17 AMA JOURNAL OF ETHICS 10 (2015). http://virtualmentor.ama-assn.org/2015/10/ecas1-1510.html (last visited Apr. 2, 2018).

belief."[192] However, this only applies where a neutral and valid law of generally applicability exists. Unfortunately, there is no such uniform law in existence that provides protection across the entirety of the United States for gay couples from discrimination. Therefore, a law applied equally is needed in order to ensure a uniform professional practice of ethical reproductive healthcare. In the following chapter, I outline four potential remedies that may provide a solution to this problem.

[192] *North Coast*, *supra* note 178.

Chapter Four: Four ways to resolve the discriminatory impact gay couples currently face in accessing reproductive health care

I have identified four potential remedies to resolve the discriminatory impact that the current patchwork of state reproductive laws have on gay male couples seeking reproductive healthcare. These include declaring access to reproductive healthcare as a fundamental right, which would require the Supreme Court of the United States to expand the current recognized right to reproduce. This expansion of the right to reproduce would be a declaration that the right to access reproductive healthcare does exists as a negative right so that individuals cannot be denied access to ART based on their personal classification. A negative right is one where the government ensures that individuals will have access to something without fear of governmental intrusion, whereas, a positive right is the actual governmental provision of that service.[193] An example of the juxtaposition of a negative and positive right in the context of abortion follows: "The legal right to abortion in the United States is a negative right, that is, a right to freedom from interference by others in obtaining an abortion, not an entitlement to receive abortion services on demand, regardless of one's ability to pay for this service or to find a willing provider."[194]

Additionally, a constitutional amendment could be passed that provides a negative right to access healthcare, including reproductive healthcare, regardless of classification.

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[193] A negative right is a right for me to be protected from harm if I try to get something for myself. A positive right would be my right to have something provided for me." – Professor of philosophy J.P. Moreland. *The Difference Between Negative Rights and Positive Rights*, WHAT'S BEST NEXT, Jan 30, 2009. https://www.whatsbestnext.com/2009/01/the-difference-between-negative-rights-and-positive-rights/ (last visited Apr. 2, 2018).

[194] John C. Moskop, *supra* note 8, at 182.

Furthermore, implementing a national agency that governs reproductive healthcare, like that currently in the United Kingdom is discussed. A final potential remedy is to modify an existing states law in one of two ways: 1) modify the law so that it can be proposed as a bill in Congress, or 2) the ULC could use California law as a model for what state law should represent and present a uniform law that states can adopt in whole or in part.

I. Access to reproductive healthcare could be deemed a fundamental right.

Reproductive healthcare could be deemed a fundamental right in the United States system in two ways. 1) an extension of the right to reproduce to include a negative right to access reproductive healthcare, and 2) a constitutional amendment declaring a right to healthcare that would also include the right to reproductive healthcare.

A. The Supreme Court could extend the right to reproduce to include the right to reproductive healthcare regardless of classification of the individual seeking the care.

While the ideal solution would be a declaration by the Court, or a law passed, that declares everyone has the right to access reproductive healthcare, and a mandate that that healthcare be provided–it is highly unlikely. The most logical step towards this is the creation of a negative right to access reproductive healthcare where individuals are guaranteed that there will be no unwarranted governmental intrusion in their attempt to access reproductive healthcare. This would not require states to provide reproductive healthcare, or open businesses that provide it. It would simply ensure that where those services already exist, the government would not be able to infringe on one's attempts at accessing those facilities. For this next step, the Supreme Court would need to declare that the right to reproduce includes access to reproductive healthcare without fear of governmental intrusion.

This negative right would be similar to what the Supreme Court did when extending of the right to marriage to encompass LGBTQ+ individuals in *Obergefell v. Hodges*.[195] In *Obergefell,* the Supreme Court did not create a new right to "gay marriage" but extended the right to marriage to include all individuals regardless of classification. The Court did not create a right guaranteeing that places provide marriage services–the Court simply declared that where the right to marry already exists for heterosexual couples, homosexual couples must be allowed access to those same services without interference from the government. Another example of the Supreme Court creating negative rights where individuals can access a service without fear of governmental intrusion is *Roe v. Wade*.[196] *Roe* held "'the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy."[197] Therefore, women are allowed to access an abortion where those services are available and can do so without fear of the government claiming that an abortion is illegal. However, *Roe* did not hold that the government must provide abortion services or that the government must open clinics where a woman would be able to seek those services.

In light of both *Obergefell* and *Roe*, the logical next step, while not the most ideal solution, would be to implement a right to access reproductive healthcare that is free from

[195] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
[196] *Roe v. Wade*, 410 U.S. 113 (1973).
[197] *Id*. at 169.

governmental intrusion, similar to the rights of gay couples to now marry and women to seek abortions.

The Court's decision in this matter would likely be a two-part decision. However, before analyzing what that potential decision, it is helpful to trace the origins of how the Court recognized the right to reproduce. The right to reproduce was established by the Supreme Court through a series of decisions based on the right to privacy established under the due process clause of the Fourteenth Amendment to the United States Constitution.[198]

The first Supreme Court decision that mentioned procreation as a fundamental right was *Skinner v. Oklahoma,* decided in 1942.[199] In *Skinner*, the Court ruled that sterilization of prison inmates who were deemed habitual criminals was unconstitutional.[200] Justice Douglas reasoned in his opinion that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[201] Therefore, taking away one's ability to procreate was unconstitutional as a violation of the Due Process and Equal Protection clauses of the Fourteen amendment.[202]

In 1972, the Supreme Court again discussed the right to reproduce in the case of *Eisenstadt v. Baird*,[203] which extended the right to obtain contraceptives to single

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[198] *What are Reproductive Rights?,* FINDLAW, http://family.findlaw.com/reproductive-rights/what-are-reproductive-rights-.html (last visited Apr. 2, 2018).
[199] *Skinner v. Oklahoma*, 316 U.S. 535 (1942).
[200] *See Id.*
[201] *Id.* at 541
[202] *See Id.*
[203] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

unmarried individuals,[204] not just married couples.[205] As a further extension to the right of privacy, Justice Brennan stated in his opinion that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[206] This language from the Court is in the context of access to contraceptive care, and the ability to avoid reproduction if wanted; however, the decision creates both the right to reproduce, as well as the right to not reproduce.

In 1998, the Supreme Court declared in *Bragdon v. Abbot*--where a dentist refused to treat an HIV positive patient-–that "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself."[207] While *Bragdon* itself did not focus on the right to reproductive healthcare,[208] the Supreme Court declared that reproduction is central to the process of life itself, and qualifies as a major life activity.[209]

In the above cases, the Supreme Court established a negative right to reproduce or to not reproduce, and that reproduction is a major life activity. Therefore, individuals have the ability to make this choice without fear of governmental interference in their private lives. If reproduction is an important part of one's life, and the right to reproduce has been recognized by the Supreme Court, then the logical next step would be to declare

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[204] *See Id.*
[205] A constitutional right to privacy exists within marital relationships that allows for married couples to use contraceptive care if they so desire. *See Griswold v. Connecticut*, 381 U.S. 479 (1965).
[206] *Id*. at 453.
[207] *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998).
[208] *Bragdon* regarded an HIV positive individual facing discrimination through non-treatment by her dentist. The Supreme Court in this case held that HIV can substantially limit a major life activity, one of which was reproduction. *See Id*.
[209] *Id.*

the right to access reproductive healthcare. However, the current right to reproduce appears to only extend to those individuals who are biologically able to do so. Therefore, the Supreme Court will most likely need to decide that the right to reproduce extends to all individuals--even those who are infertile or dysfertile--regardless of their classification (gay, straight, single, married, etc.).

The inability to reproduce without medical intervention should not equate to an automatic exclusion from the constitutional right to reproduce. A gay couple has the right to become parents, and therefore should also have the right to access the technology and healthcare needed to become parents where one of the intended fathers is biologically related to the child. As evidenced in previous chapters, state laws and ethical problems limit this constitutional right. In order to overcome the disparity gay men and gay couples face when becoming parents through ART, the Supreme Court should create a negative right to access ART.[210] The right itself would simply ensure through its language that a gay couple would be able to use ART where ART is already available. The right would not require that ART be made available or require provision of ART by the government, it would simply not prevent a gay couple from using ART (like many current state laws do) simply because they are gay.

Additionally, there is an argument that since the right to reproduce is constitutional in nature, it falls outside the states' purview of control. Rather, the right to reproduce falls under the penumbra of the right to privacy first established in *Lawrence v. Texas,*[211] where Justice Kennedy stated that the "right to liberty under the Due Process

[210] *The Difference Between, supra* note 193.
[211] *Lawrence v. Texas*, 539 U.S. 558 (2003).

Clause gives them the full right to engage in their conduct without intervention of the government" and that the statute in question "furthers no legitimate state interest which can justify its intrusion in the personal and private life of the individual."[212] The Due Process Clause, which is part of the Fifth Amendment and included in the Fourteenth Amendment through the Equal Protection Clause, was used in *Lawrence* to establish this right to privacy in terms of sexual conduct. This is the same right to privacy that the above line of cases used to establish the right to reproduce as well as the right not to reproduce.

As the above line of cases shows, the United States Supreme Court has recognized an unenumerated right to reproduce. In order to expand this right so that everyone can reproduce if they choose, the Court needs to declare explicitly that the right to reproduce includes the right to access reproductive healthcare. To come to this conclusion, the Court would most likely use a two-part decision. The first part of the decision would be extending the right to reproduce to everyone, not just heterosexual individuals who have the biological capacity to do so. The second part would need to create the right to reproductive healthcare so that those individuals who are infertile or dysfertile may practice the right to reproduce. Without this second part of the opinion, extending the right to reproduce may be ineffective. Extending the right to reproduce so that it encompasses gay individuals would create a negative right[213] to reproduction, and would also need to include a provision for the negative right to access reproductive healthcare. The actual access under this second part of the decision should provide that

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[212] *See Id.*
[213] *The Difference Between, supra* note 193.

everyone can access ART where ART services are available without fear of governmental intrusion, but would yield no requirement for the government to provide those services, or require states to open facilities that provide them.

With the recent decision in *Obergefell*, an extension of the right to reproduce to include reproductive healthcare is a possibility. As more gay couples legally marry and create their own families, the issue of access to reproductive healthcare and the disparities gay men face when compared to their heterosexual counterparts will become more prominent. As such, a Supreme Court case regarding this very issue may arise in the near future. With the current disposition of the court, this may come to pass within the next ten years[214] and would be the ideal solution to the disparity in access that gay men face when attempting to become parents.

B. An amendment could be created to the United States Constitution providing a right to healthcare which would include the right to reproductive healthcare.

A second potential solution to the lack of access to reproductive health care for gay men could include a Constitutional Amendment that provides a right to healthcare for all individuals regardless of classification. This would allow any individual to access any defined form of healthcare. The amendment would have to include reproductive healthcare within the definition of healthcare, as well as the right to access the assisted reproductive technology required to become a parent where one of the fathers is biologically related to the child.

[214] However, it should be noted that the current disposition" of the court is very likely to drastically change. Ideally it would remain the same, however, that is unlikely.

This remedy may be difficult to implement due to the process required for enacting a Constitutional amendment.[215] Article V of the United States Constitution allows for amendments to be made to the constitution through two different processes.[216] However, both are difficult to accomplish.[217] There must either be a two-thirds majority vote in both Houses of Congress that favor the amendment or a constitutional convention called for by two-thirds of the States legislatures.[218] This step alone creates a barrier to ratifying an amendment to the constitution.

Two major hurdles must be overcome for this potential remedy to become a reality. The societal attitudes of the American populace would need to change in the way they view healthcare, as Congress is composed of elected officials, whose views and opinions are supposed to reflect those of their constituents. Therefore, Congress will most likely view the enumerated constitutional right to health care negatively because of the societal attitude that healthcare is a commodity, a fact that is currently represented through the haphazard patchwork of discriminatory state reproductive laws currently in place. Even if those individuals elected to congress were to view healthcare as something that should be declared a right because societal views change, extending that right to include reproductive healthcare for all individuals regardless of classification would

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[215] Additionally, due to the societal view that healthcare is a commodity in the United States, there may be difficulties in enacting a Constitutional Amendment declaring a right to reproduce. However, this view that healthcare is a commodity effects all individuals seeking healthcare, not just gay couples, and therefore lies outside the scope of this thesis. Ben Shapiro, *Health Care is a Commodity, Not a Right*, NATIONAL REVIEW Jan. 11, 2017 https://www.nationalreview.com/2017/01/health-care-markets-government-commodity-human-right/ (last visited Apr. 2, 2018).

[216] U.S. CONST. art. 5

[217] *Constitutional Amendment Process*, NATIONAL ARCHIVES https://www.archives.gov/federal-register/constitution (last visited Apr. 2, 2018).

[218] *Id.*

create yet another problem. Therefore, due to the magnitude of issues surrounding the changing of an entire populace's attitude as well as the difficulties in the creation of an amendment itself, attempting to create a constitutional amendment declaring a right to healthcare that would include a right to reproductive healthcare for all individuals, including gay men who would identify as dysfertile, does not seem likely.

II. Apply the United Kingdom reproductive agency model to the United States.

The United States could implement a system similar to that in the United Kingdom by creating a governmental agency to regulate reproductive healthcare. The United Kingdom implemented an "independent regulator" under statutory law entitled the Human Fertilisation Embryology Authority (HFEA).[219] HFEA regulates fertility treatment in the United Kingdom and has the full power of law behind their regulations. HFEA operates to protect individuals and ensure fair treatment based on nine protected classes under the Equality Act 2010--one of those characteristics being sexual orientation.[220] The Equality Act, enforced by HFEA, applies to both the national health service and private centers who provide "goods, facilities or services" to the public.[221] The law provides protections for people from discrimination in using those goods, facilities or services; thus gay male couples in the United Kingdom cannot be discriminated against when accessing fertility treatment or reproductive healthcare.[222]

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[219] *About us*, HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY https://www.hfea.gov.uk/about-us/ (last visited Apr. 2, 2018).
[220] *Code of Practice*, HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY https://www.hfea.gov.uk/code-of-practice/29#section-header (last visited Apr. 2, 2018).
[221] *Id*.
[222] *Id*.

Additionally, the United Kingdom currently provides free IVF treatment funded by the National Health Service to women if they meet explicit criteria.[223] However, the requirements are made on a local basis per individual National Health Service Clinical Commissioning Groups (NHSCCG), and therefore can change based on which part of the United Kingdom the couple is located. [224] The overarching guidelines for free IVF from the NHS require the woman to be under 40 and prove infertility in the form of attempted pregnancy for two years, or 12 failed cycles of IVF before qualification for free IVF.[225] Women over 40, up to age 42 can receive IVF with stricter guidelines than women under 40.[226]

Due to the ability for individual NHSCCG's to apply their own guidelines, some areas of the country have allowed for gay and lesbian access IVF for free. In the London area in 2013, lesbian women were allowed to undergo free IVF; however, they were still required to have a diagnosed fertility problem.[227] Furthermore, in the North Staffordshire area in 2013, gay couples were offered free NHS IVF treatment for the first time.[228] The new policy allows for gay men to submit an appeal to use a surrogate mother to procreate their own child–-where one of the fathers is biologically related-–so long as they have

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[223] *IVF – Availability*, NHS http://www.nhs.uk/Conditions/IVF/Pages/Availability.aspx (last visited Apr. 2, 2018).
[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] Kounteya Sinhai, *UK to fund IVF for lesbians, HIV patients*, THE TIMES OF INDIA (Mar. 3, 2013 5:14 AM) http://timesofindia.indiatimes.com/world/uk/UK-to-fund-IVF-for-lesbians-HIV-patients/articleshow/18772177.cms?referral=PM
[228] *Free NHS IVF treatment to be offered to gay couples in North Staffordshire*, THE SENTINEL (Dec. 28, 2013) http://www.stokesentinel.co.uk/free-ivf-treatment-offered-gay-couples-north/story-20372381-detail/story.html

"been in a stable sexual relationship for at least two years."[229] Furthermore, the local NHSCCG clinical director, Dr. Steve Fawcett, stated that "this represents the first time we have funded fertility treatment for gay and lesbian couples and it is something we are pleased to be doing."[230]

These local decisions within the United Kingdom to allow for free access to IVF for gay and lesbian couples is promising. Soon the entire NHS system within the United Kingdom might allow for equal access to reproductive healthcare.

While it is important to note that the United Kingdom and the United States have different healthcare models, and that reproductive healthcare law largely falls to the individual states' control due to the Tenth Amendment to the United States Constitution, the federal government has implemented national agencies to govern certain aspects of health and welfare. For example, the Food and Drug Administration was implemented as a way to control the health and welfare of medical devices and drugs through ensuring safety and efficacy of those devices and drugs.[231] Additionally, the implementation of the Office of Conscience and Religious Freedom by the Department of Health and Human Services Office of Civil Rights is another example of a governmental agency that interferes with state police powers in health and welfare. Therefore, the implementation of an agency that regulates an aspect of healthcare is not foreign to the United States, leading one to reasonably conclude that it would in fact be possible to create a federal agency to govern reproductive healthcare.

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[229] *Id.*
[230] *Id.*
[231] *What We Do*, U.S. FOOD & DRUG ADMINISTRATION https://www.fda.gov/AboutFDA/WhatWeDo/ (last visited Apr. 2, 2018).

Adopting an approach similar to the United Kingdom's system could do much to overcome disparities in access to reproductive healthcare in the United States. By allowing a governmental agency to regulate fertility and pass laws guaranteeing protection based on sexual orientation, and the governmental funding of IVF procedures, the unequal access to reproductive healthcare could be overcome. Thus, successful implementation of the United Kingdom's model for access to reproductive healthcare can successfully eliminate the gap in equality to access for gay couples and heterosexual couples.

III. Use California reproductive healthcare laws as a model to create uniform model legislation.

California reproductive healthcare laws can be used in one of two ways; 1) the laws themselves could be modified and introduced as a bill in either the federal Senate or House of Representatives in the hopes of becoming a federal law, or 2) the ULC[232] could adapt the California law to create legislation that sates could adopt in whole or in part into their State code. The following analysis will show why California law is the best model, followed by a brief description of implementation as either a federal bill or a piece of legislation by the ULC.

California provides for the most progressive laws that would enable a gay couple to become parents; therefore, with slight modifications, applying its laws throughout the country can overcome the disparity in access to reproductive healthcare for gay men.

[232] *About the ULC*, UNIFORM LAW COMMISSION http://www.uniformlaws.org (last visited Apr. 2, 2018).

First, California allows for egg donation to gay male couples so long as the donor signs a contract and understands the risk of donation.[233] These requirements are slightly more extensive than some other states, but the requirement for a contract and ensuring that the donor knows the risk of donation are both vital to proper informed consent procedures. Therefore, California's egg donation law will add an extra layer of protection to donors, and should be implemented as is nationally.

Second, California permits gestational surrogacy by statute and has a long-standing support from its case law for gestational surrogacy.[234] California statutory language regarding surrogacy has nothing that can be interpreted as creating a disparity between straight and gay couples for who is allowed access to a surrogate. "An assisted reproduction agreement for gestational carriers shall contain, but shall not be limited to, all of the following information: the identity of the intended parent or parents."[235] This language does not include the heteronormative sexualized terminology like some other states surrogacy statutes; thus, gay couples in California would not face restrictions to using a surrogate or entering into a surrogacy agreement so long as the followed statutory requirements. On its face, California's surrogacy statute appears to be sound in terms of addressing disparity in access to a surrogate for gay men; therefore, no change would be needed prior to federal implementation of California's surrogacy laws.

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[233] *see Egg Donation Laws*, CREATIVE LOVE http://cledp.com/for-recipients/egg-donor-program/egg-donation-laws/, *see also* CAL. HEALTH & SAFETY CODE § 125325(a) (2018).
[234] *Gestational Surrogacy Law*, *supra* note 81.
[235] CAL. FAM. CODE § 7962(a)(3) (2018).

Third, California allows for pre-birth parentage orders providing that both intended fathers be listed on the birth certificate upon the birth of the child.[236] The only change that should be made to this statute is to allow the parentage order to take effect prior to the birth of the child. While this is not a necessity to prevent disparate treatment, it would provide a "peace of mind" to the intended fathers as well as ensure the parentage of children prior to their birth. This may prevent any incidents or complications at the time of birth regarding parentage.

Fourth, California provides protection from discriminatory conscientious objections or religious freedom claims. California law includes the Unruh Civil Rights act which states "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, *sexual orientation*, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."[237] As previously mentioned, this law provides protection to gay male couples from discrimination in areas of business relating to reproductive healthcare. Additionally, the California Supreme Court concluded "a religious objector has no federal constitutional right to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary

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[236] *see Gestational Surrogacy in California*, CREATIVE FAMILY CONNECTIONS https://www.creativefamilyconnections.com/us-surrogacy-law-map/california/ (last visited Apr. 2, 2018), *see also* CAL. FAM. CODE § 7633 (2018).
[237] CAL. CIV. CODE § 51(b) (2018).

to the objector's religious belief."[238] Therefore, California prohibits physicians from making religious freedom claims that prevent full and equal accommodation to a business entity based on discriminatory prejudice.

There are two ways that California law could be used, as previously mentioned. Those are the implementation of the law as a bill to the federal government, or the ULC implementing legislation that states can adopt in full or in part.

First, a congressional representative could sponsor a bill based on California law that would have the opportunity to be ratified as a law. However, due to the nature of a bill and how bills evolve throughout their progression into a law, this option very well may leave the proposed bill based in California law a mockery of what it should be. The bill may evolve in a way that it no longer is able to guarantee the protections sought for gay male couples; therefore, this may not be the best way to implement change in order to prevent discrimination against gay couples seeking reproductive healthcare.

Second, the ULC is a "non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law."[239] The individuals comprising the ULC consist of well-respected attorneys and judges appointed by state governments in order to "draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical."[240] The ULC could use California

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[238] *North Coast Women's Care Medical Group, Inc. v. Superior Court*, 189 P.3d 959 (2008) citing *Church of Lukumi Babulu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993).
[239] *About the ULC, supra* note 232.
[240] *Id*.

law as a model, and draft a "uniform" act to present to state legislatures.[241] State legislatures could then decide whether or not to implement the law in full or in part.

The modifications of California state law discussed above would be needed to alleviate the disparity in access to reproductive healthcare for gay couples. If these laws, with the suggested modifications were made into a universally applied federal law, or a uniform state law that the states adopted, that could successfully allow legal equal access to reproductive healthcare for ALL individuals, not just those who are infertile heterosexuals. Such an approach would also overcome the ethical issues of justice and autonomy that stem from conscientious objections and religious freedom claims. However, this solution maintains the potential for a haphazard patchwork of state laws due to the nature of model legislation and the ULC.

Of the four remedies, one stands out as the most workable, viable option to remedy discrimination against gay male couples seeking reproductive healthcare. That solution is the extension of the right to reproduce by the United States Supreme Court. A constitutional amendment would be nearly impossible; the implementation of an agency governing reproductive healthcare--while promising--is very unlikely due to the nature of the United States healthcare system; and, finally, either form of applying a modified state law at the national level leaves too many avenues to change the law from the original intent. The following and final chapter fully examines why extending the right to reproduce to include access to reproductive healthcare is the most viable, and how implementing that right would occur moving forward.

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[241] *Frequently Asked Questions*, UNIFORM LAW COMMISSION http://www.uniformlaws.org/Narrative.aspx?title=Frequently%20Asked%20Questions (last visited, Apr. 2, 2018).

Chapter Five: Conclusion – Best Solution and Moving Forward

Gay male couples face discrimination when accessing reproductive healthcare. This discrimination stems from both heteronormative state laws as well as conscientious objections and religious freedom claims. The four areas where gay male couples face discrimination are egg donations, IVF, gestational surrogacy, and parentage orders. At the very minimum, these are the four necessary components to achieve parenthood for gay males. Additionally, even if there is no state law that causes a discriminatory impact, a gay male couple may still be refused service from either a conscientious objection or religious freedom claim. A fertility physician can use either of these claims to state that treating homosexual parents is against either their moral code, or their religious beliefs and refuse to provide healthcare. So even if a gay male couple is able to legally access all four of the necessary components, an individual physician may still deny them service.

First, gay couples face discrimination in access to egg donation because many states have no laws regarding donation, or the law a state does have includes heteronormative language that can create a barrier due to gendered terminology.

Second, gay couples may face discrimination when attempting to access IVF because there are little to no laws regarding IVF at the state level. However, professional organizations such as the ASRM, ACOG, and AMA provide guidelines and practice recommendations for physicians conducting IVF. These guidelines are simply guidelines, and have no legal effect; therefore, physicians are not obligated to follow these recommendations. This leaves physicians able to refuse service to gay couples, because there are no laws protecting them from discrimination.

Third, gay couples may be unable to access a surrogate depending on the state in which they live due to individual state laws explicitly stating surrogacy contracts are only enforceable for heterosexual couples, or an overall ban on gestational surrogacy contracts. Additionally, in those states where surrogacy contracts are legal, they may be unable to be enforced for gay couples due to a judge's interpretation of heteronormative language within the statutory code.

Fourth, some individual states do not allow for gay couples to obtain a parentage order-–a declaration of legal parentage of a child born from ART. Some states only allow the biological parent to obtain the order, some states require a second parent adoption. However, with the development of the recent Supreme Court opinion in *Pavan v. Smith*,[242] any state that allows heterosexual couples to use a child's birth certificate as a declaration of legal parentage must also allow homosexual couples the same right.

Fifth, even if a gay couple is able to access all four of the necessities to become parents, a physician can still refuse to provide the service due to a conscientious objection or religious freedom claim. While these claims are unprofessional and unethical when based on a refusal to provide services due to sexual orientation, they are not always necessarily illegal. Therefore, a physician is able to use a "moral" or "religious" reason to veil blatant discrimination.

In order to resolve this discriminatory impact, I proposed four potential solutions. Those solutions include: 1) extending the right to reproduce as recognized by the United States Supreme Court to include a negative right to accessing reproductive healthcare; 2) an amendment to the United States Constitution recognizing a right to access healthcare

[242] *See Pavan, supra* note 133.

which would be broad enough to include reproductive healthcare; 3) creating a federal agency such as that in the United Kingdom; and 4) using existing California law as a model to create either a federal bill or draft legislation that states could adopt in whole or in part. In the following analysis, I discuss which of these solutions is the best possible solution, and briefly explain why the other three are not viable. For this best solution, I then outline how the process would work moving forward.

I. The Best Solution to resolve the discriminatory impact gay male couples face in reproductive healthcare.

Of the four solutions identified the most workable is extending the right to reproduce outlined by the Supreme Court. This extension would require that the Court explicitly state that the right to reproduce also includes the right to access reproductive healthcare. However, the expansion of the right to include reproductive healthcare would be a negative right, in that the government would not be required to provide reproductive healthcare, but that the government would be unable to pass laws infringing that access based on a discriminatory reason.

A constitutional amendment, while ideal, is impractical. Due to the necessary requirements of either a two thirds majority vote in Congress, or two thirds of state legislatures calling for a constitutional convention it is highly unlikely. Additionally, it has been twenty-eight years since the most recent constitutional amendment occurred in 1992.[243] Due to the current political make up of both the legislative and executive

[243] *Twenty-seventh Amendment*, ENCYLOPAEDIA BRITANNICA https://www.britannica.com/topic/Twenty-seventh-Amendment (last visited Apr. 2, 2018).

branches, a constitutional amendment affording protections against discrimination based on sexual orientation is politically infeasible.

The implementation of a federal agency like that in the United Kingdom is not one that is likely feasible due to the differences in healthcare systems. Additionally, the provision of free IVF treatment to anyone in the United States is unlikely because healthcare is not viewed as a basic right in the United States.

Using California's laws to create a federal bill or as model state legislation may be unable to fully rectify the issue. As a bill moves through congressional proceedings to become a law it changes from what was originally intended. Due to the nature of needing votes, there would be changes made to the bill so that it may not reflect California law at all and would fail to afford the protections provided by the original bill. Additionally, legislation created by the ULC is not binding. It is left up to the individual state whether they wish to adopt the legislation, in whole or in part. Therefore, creating a model law would not solve the problem of discrimination but instead leave the situation largely the same unless states were willing to adopt it. Given current political division, this is unlikely. While some states in recent years have made progressive changes in implementing laws that provide protections to individuals based on sexual orientation, not every state has done so. The introduction of a model law, would be unlikely to change the laws of those states that have yet to pass laws providing these protections.

Therefore, a Supreme Court case is the best option. The case would ensure that the desired effect of rectifying discrimination in access to reproductive healthcare is pushed to the highest level of the judicial system. While the Court's decision is not

guaranteed[244], this solution, at the very least will raise the most awareness of the discriminatory impact that currently exists.

II. Implementing the best solution.

In order for the right to reproduce to be extended to include the negative right to access reproductive healthcare, several things are necessary. The procedure for this solution would be similar to that in *Hollingsworth v. Perry.*[245] The plaintiffs in *Hollingsworth* were denied the right to marry in California after the passage of Proposition 8.[246] The case I propose would be similar in that a gay couple would be denied the right to reproduce by being denied the right to access reproductive healthcare in a situation where heterosexual couples would not be denied the right to reproduce or the right to access reproductive healthcare.

Unfortunately, the first step for this proposed case is that a gay couple must be discriminated against in attempting to access reproductive healthcare. In order to bring a case to court, the plaintiffs must have standing.[247] Therefore, in order to challenge discriminatory laws, an individual or couple must be affected by those laws. Additionally, the couple would need attorneys and a support system made up of civil rights organizations who provide funding so that the case may proceed all the way to the

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[244] The introduction of Justice Gorsuch has changed the makeup of the court since *Hollingsworth*, *Windsor*, and *Obergefell*. However, Justice Gorsuch was on the court at the time of the *Pavan* decision – and although he dissented, his addition to the court did not change the outcome that one would have expected from the *Obergefell, Holingsworth*, and *Windsor* Courts

[245] *See Hollingsworth v. Perry*, 570 U.S. 693 (2013). (Holding that Proposition 8 violated due process and equal protection under the United States Constitution by declaring same-sex marriage illegal in California).

[246] *Id.*

[247] "[C]apacity of a party to bring suit in court." *Standing*, LEGAL INFORMATION INSTITUTE https://www.law.cornell.edu/wex/standing (last visited Apr. 2, 2018).

Supreme Court.[248] These attorneys and civil rights organizations would vet a pool of potential plaintiffs who have been discriminated against in their journey to become parents, and use the "best" plaintiffs as the face of the case.[249] Organizations such as Lambda Legal and local branches of the American Civil Liberties Union would step in and provide funding and elevate the national conversation around the issue.[250] Only once a potential plaintiff has been selected, non-profits and civil rights organizations become involved, and an attorney has agreed to take the case could the legal proceedings commence. Additionally, nonprofits and civil rights group could provide legal backing and eventually write amicus briefs[251] to the court in a show of support for the plaintiffs' position.[252]

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[248] For example, when Propostion 8 was passed in California an "activist Chad Griffin and his colleagues decided they needed to act immediately and formed the American Foundation for Equal Rights." *The case against 8*, HBO.COM https://www.hbo.com/documentaries/the-case-against-8/synopsis (last visited Apr. 2, 2018).

[249] *Id*.; the practice of vetting plaintiffs is not one that is commonly discussed or has many sources on the internet. However, it is a common practice when a law is passed that lawyers or various organizations desire to have struck down. They seek out individuals who the law has negatively impacted in the hopes of finding plaintiffs who represent the issue and the effected population well.

[250] *Hollingswroth v. Perry (formerly known as Perry v. Borwn and Perry v. Schwarzeneggar)* LAMBDA LEGAL https://www.lambdalegal.org/in-court/cases/perry-v-schwarzenegger (last visited Apr. 2, 2018).

[251] "Amicus briefs are legal documents filed in appellate court cases by non-litigants with a strong interest in the subject matter. The briefs advise the court of relevant, additional information or arguments that the court might wish to consider." *Amicus Curiae Briefs*, PUBLIC HEALTH LAW CENTER, http://www.publichealthlawcenter.org/documents/resources/amicus-curiae-briefs (last visited Apr. 2, 2018).

[252] Similar to the *Hollingsworth* case, where Lamda Legal, NCLR, Equality California, and the ACLU of Northern California all filed amicus briefs with the court in support of the plaintiffs. *Hollingsworth, supra* note 245.

Even if all of these steps occur, it is necessary that the case make arguments based on violations of the United States Constitution or Congressional laws. Additionally, the case must proceed through several levels of the court system,[253] which can vary based on where the case is first filed.[254] Only once the case has gone through all the various levels of the court system can a petition be filed for the Supreme Court to hear the case.[255] Getting to this point will take time and may in fact never happen. However, we know it is possible for such a case to make it, because we have seen it happen before in the *Hollingsworth* case as well as *United States v. Windsor,*[256] which followed similar procedural steps.

Finally, if the Supreme Court does agree to hear the proposed case, the outcome may not be in favor of extending the right to reproduce to include a negative right to reproductive healthcare. However, the legal argument outlined in Chapter 4 is strong. Furthermore, the Supreme Court has a recent history of protecting LGBTQ+ individuals from facing different treatment than their heterosexual counterparts as is evident from *Hollingsworth*, *Windsor*, and *Obergefell.* Therefore, where a heterosexual couple has

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[253] The Supreme Court also has original jurisdiction in some areas, however, that lies outside the scope of this thesis. U.S. Const. art. III, § 2.

[254] A case may either start in start court, eventually reaching the State Supreme Court before it can be appealed to the United States Supreme Court, or a case can start in a federal district court, in which case it still must go through rounds of appeals until it is appealed to the Supreme Court from a federal appeals court. *How Do Cases Reach the Supreme Court*, THOUGHTCO. https://www.thoughtco.com/how-do-cases-reach-supreme-court-4113827 (last visited Apr. 2, 2018).

[255] *Id*.

[256] *United States v. Windsor*, 570 U.S. 744 (2013)(Holding that a section of the Defense of Marriage Act violated the fifth amendment by failing to provide married homosexual couples with the same rights as married heterosexual couples).

access to reproductive technologies, I foresee that the Supreme Court will ensure that the right is also extended to homosexual couples.

REFERENCES

Listed in Order of Appearance

Cisgender, ENGLISH OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/us/cisgender (last visited Apr. 2, 2018).

Parentage Orders, NICHOLS, DELISLE & LIGHTHOLDER P.C., https://ndllaw.com/parentage-orders/ (last visited Apr. 2, 2018).

In Vitro Fertilization (IVF), MEDLINEPLUS https://medlineplus.gov/ency/article/007279.htm (last visited Apr. 2, 2018).

JOHN C. MOSKOP, ETHICS AND HEALTH CARE AN INTRODUCTION 165 (2016).

Preimplantation Genetic Diagnosis: PGD, AMERICAN PREGNANCY ASSOCIATION http://americanpregnancy.org/infertility/preimplantation-genetic-diagnosis/ (last visited Apr. 2, 2018).

What are the Different Types of Surrogacy and What are They Called, MODERN FAMILY SURROGACY CENTERS http://www.modernfamilysurrogacy.com/page/different_types_of_surrogacy (last visited Apr. 2, 2018).

Compassionate Surrogacy – Options For Your Family, TIME FOR FAMILIES http://timeforfamilies.com/compassionate-surrogacy/ (last visited Apr. 2, 2018).

Surrogacy Contracts Explained, CONCEIVEABILITIES https://www.conceiveabilities.com/about/blog/surrogacy-contracts-explained (last visited Apr. 2, 2018).

Surrogacy Laws, THE SURROGACY EXPERIENCE http://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html (last visited Apr. 2, 2018).

Access to fertility treatment by gays, lesbians, and unmarried persons: a committee opinion, THE ETHICS COMMITTEE OF THE AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE http://www.sart.org/globalassets/asrm/asrm-content/news-and-publications/ethics-committee-opinions/access_to_fertility_treatment_by_gays_lesbians_and_unmarried_persons-pdfmembers.pdf (last visited Apr. 2, 2018).

The Limits of Conscientious Refusal in Reproductive Medicine, ACOG COMMITTEE OPINION, THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Ethics/The-Limits-of-Conscientious-Refusal-in-Reproductive-Medicine (last visited Apr. 2, 2018).

The AMA Code of Medical Ethics' Opinions on Respect for Civil and Human Right, AMA JOURNAL OF ETHICS ILLUMINATING THE ART OF MEDICINE http://journalofethics.ama-assn.org/2010/08/coet1-1008.html (last visited Apr. 2, 2018).

Third Party Reproduction, *adoption and co-parenting legislation in the United States,* COPARENTS.COM, https://www.coparents.com/laws/united-states.php (last visited Apr. 2, 2018).

Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement* 81 VIRG. L. REV. 8 (1995) http://www.jstor.org/stable/1073580?seq=1#page_scan_tab_contents (last visited Apr. 2, 2018).

Robert Longley, *Federalism and How it Works*, THOUGHTCO. (Mar. 17, 2018) https://www.thoughtco.com/what-is-federalism-3321880 (last visited Apr. 2, 2018).

U.S. Const. amend. X.

Police Power, THEFREEDICTIONARY https://legal-dictionary.thefreedictionary.com/Police+Power (last visited Apr. 2, 2018).

James W. Fossett et al, *Federalism & Bioethics States and Moral Pluralism*, HASTINGS CENTER REPORT (2007).

H.B. 1102, 2016 La. Sess. Law Serv. (La. 2016).

Recommendations for gamete and embryo donation: a committee opinion, FERTILITY AND STERILITY: ASRM Jan. 2013 http://www.fertstert.org/article/S0015-0282(12)02256-X/fulltext (last visited Apr. 2, 2018).

Interests, obligations, and rights in gamete donation: a committee opinion, ETHICS COMMITTEE OF THE AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE 2014 https://ac.els-cdn.com/S0015028214005342/1-s2.0-S0015028214005342-main.pdf?_tid=beaeecb7-961b-48e7-948a-fcc1d18bd3b6&acdnat=1522700986_e03e4f3d00b70c35fd1e777cf174f5c8 (last visited Apr. 2, 2018).

Alisa Von Hagel, *Women's health and the regulation of oocyte donation, federalism and bioethics* 33 POLITICS AND LIFE SCIENCES 1 (2014).

8 facts about "Octomom' Nadya Suleman, USA TODAY Jan. 24, 2014 https://www.usatoday.com/story/news/nation/2014/01/24/8-facts-octomom/4816235/ (last visited Apr. 2, 2018).

Antony Blackburn-Starza, *'Octomum's' IVF doctor expelled from ASRM* BIONEWS Oct. 20, 2009 https://www.bionews.org.uk/page_91929 (last visited Apr. 2, 2018).

Medical board of California. 2010. In the matter of Michael Kamrava, M.D. Available at: http://documents.latimes.com/michael-kamrava-disciplinary-decision/). (last visited Apr. 2, 2018).

Egg Donation Laws, CREATIVE LOVE http://cledp.com/for-recipients/egg-donor-program/egg-donation-laws/ (last visited Apr. 2, 2018).
UNIFORM PARENTAGE ACT (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2002) http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf (last visited Apr. 2, 2018).

OKLA. STAT. tit. 10, § 551-556 (2018).

Using an Egg Donor in Oklahoma, FERTILITY AUTHORITY, https://www.fertilityauthority.com/articles/using-egg-donor-oklahoma (last visited Apr. 2, 2018).

FLA. STAT. § 742.14 (2018) (emphasis added).

Third Party Reproduction, *adoption and co-parenting legislation in the United States,* COPARENTS.COM, https://www.coparents.com/laws/united-states.php (last visited Apr. 2, 2018).

Nisha Satkunarajah, *8-year lawsuit settled over US lesbians denied IVF* BIONEWS Oct. 5, 2009 https://www.bionews.org.uk/page_91893 (last visited Apr. 2, 2018).

North Coast Women's Care Medical Group v. San Diego County Superior Court, 189 P.3d 959 (Cal. App. 2008)

ACLU and Lamda Legal add transgender high school student and lesbian couple to lawsuit to fight HB 2 ACLU Apr. 21, 2016 https://www.aclu.org/news/three-more-plaintiffs-join-lawsuit-against-north-carolinas-discriminatory-anti-lgbt-law (last visited Apr. 2, 2018).

H.B. 2, 2016 Leg., 2d Spec. Sess. (N.C. 2016) *repealed in part by* H.B. 142, 2017 Leg., Spec. Sess. (NC 2017).

First Amended Complaint For Declaratory and Injunctive Relief at 26, *Carcano v. McCrory*, 315 F.R.D. 176 (M.D.N.C. June 6, 2016) (No. 1:16-cv-00236-TDS-JEP).

Daniella Silva, *HB2 Repeal: North Carolina Overturns Controversial 'Bathroom Bill'* NBC NEWS Mar. 30, 2017 https://www.nbcnews.com/news/us-news/hb2-repeal-north-carolina-legislature-votes-overturn-controversial-bathroom-bill-n740546 (last visited Apr. 2, 2018).

Obergefell v. Hodges, 576 US __ (2015).

Gestational Surrogacy Laws Across the United States, CREATIVE FAMILY CONNECTIONS http://www.creativefamilyconnections.com/us-surrogacy-law-map (last visited Apr. 2, 2018).

CAL. FAM. CODE § 7962(a)(3) (2018).

DEL. CODE ANN. tit. 13, § 8-806(b)(1)-(2)(2018).

DEL. CODE ANN. tit. 13, § 8-807(b)(1)-(6)(2018).

N.H. REV. STAT. ANN. § 168-B:1(XIII)(LexisNexis 2018).
NEV. REV. STAT. ANN. §126.590 (LexisNexis 2017).

ALA. CODE § 26-17-102(12)(LexisNexis 2018).

UTAH CODE ANN. §78B-15-803(2)(b)(LexisNexis 2018).

FLA. STAT. §742.15(2)(1)-(3)(2018)

ME. REV. STAT. ANN. tit. 19-A §1931(2)(2018)

750 ILL. COMP. STAT. ANN. 47/25 (LexisNexis 2018).

N.D. CENT. CODE §14-18-08 (2017)

TEX. FAM. CODE ANN. §160-754(2017)

FLA. STAT. §742.15(2)(1)-(3)(2018).

UTAH CODE ANN. § 78B-15-803(LexisNexis 2017).

Jennifer Dobner, *Utah couple heads to state Supreme Court over law that prevents married gay men from having biological children through surrogacy,* THE SALT LAKE TRIBUNE (Sept. 12, 2017), http://www.sltrib.com/news/2017/09/12/married-gay-couple-challenges-utahs-surrogacy-law-after-court-denies-petition/ (last visited Apr. 2, 2018).

Lindsay Whitehurst, *Gay Couple Denied Baby Through Surrogate Challenges Utah Law*, US NEWS, (Sept. 12, 2017), https://www.usnews.com/news/best-states/utah/articles/2017-09-12/gay-couple-denied-baby-via-surrogate-challenging-utah-law (last visited Apr. 2, 2018).

ARK. CODE ANN. § 9-10-201(b)(1)-(3) (2017).

VA. CODE ANN. §20-156(2018).

WYO. STAT. ANN. § 14-2-403(d)(2018).

MICH. COMP. LAWS SERV. §722.855 (LexisNexis 2018).

NY DOM. REL. LAW §122 (Consol. 2018).

WASH. REV. CODE ANN. § 26.26.230 (LexisNexis 2018).

D.C. CODE § 16-402(a) (2018).

The Declaration of Parentage Order, THE SURROGACY EXPERIENCE http://www.thesurrogacyexperience.com/intended-parents/the-law/the-pre-birth-parentage-order/ (last visited Apr. 2, 2018).
Gestational Surrogacy in Tennessee, CREATIVE FAMILY CONNECTIONS https://www.creativefamilyconnections.com/us-surrogacy-law-map/tennessee/ (last visited Apr. 2, 2018).

ARK. CODE ANN. § 20-18-401(f)(1) (2017).

TEX. FAM. CODE ANN. § 160-760(a)-(b) (2017).

Pavan v. Smith, 528 U.S. ____ (2017).

See Pavan v. Smith: The Supreme Court's Ruling & What it Means For You, REPRODUCTIVE FAMILY LAW CENTER June 27, 2017 https://www.kcbabylaw.com/single-post/2017/06/27/Pavan-v-Smith-The-Supreme-Courts-Ruling-What-It-Means-For-You (last visited Apr. 2, 2018).

Gestational Surrogacy in Wyoming, CREATIVE FAMILY CONNECTIONS https://www.creativefamilyconnections.com/us-surrogacy-law-map/wyoming/ (last visited Apr. 2, 2018).

Gestational Surrogacy in New York, CREATIVE FAMILY CONNECTIONS https://www.creativefamilyconnections.com/us-surrogacy-law-map/new-york/ (last visited Apr. 2, 2018).

How we regulate, HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY https://www.hfea.gov.uk/about-us/how-we-regulate/ (last visited Apr. 2, 2018).
[1] John C. Moskop, *supra* note 8 at 174-75; *citing* Gladys B. White 1998. *Crisis in assisted conception: the British approach to an American dilemma*. 7 JOURNAL OF WOMEN'S HEALTH (1998).

Gladys B. White, *Bachelor of Arts in Liberal Studies*, GEORGETOWN UNIVERSITY https://scs.georgetown.edu/programs/4/bachelor-of-arts-in-liberal-studies/faculty-bio/3596/gladys-b-white (last visited Apr. 2, 2018).

How Drugs are Developed and Approved, U.S. FOOD & DRUG ADMINISTRATION https://www.fda.gov/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ (last visited Apr. 2, 2018).

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).(Ginsburg, J., dissenting.)

Nancy Berlinger, *Conscience Clauses, Health Care Providers, and Parents, From Birth to Death and Bench to Clinic: The Hastings Center Bioethics Briefing Book for Journalists, Policymakers, and Campaigns*, ed. Mary Crowley (Garrison, NY: The Hastings Center, 2008), 35-40.

Declaration of Geneva, WORLD MEDICAL ASSOCIATION https://www.wma.net/wp-content/uploads/2016/11/Decl-of-Geneva-v2006.pdf (last visited Apr 2, 2018).

What is a Doctors Duty of Care, FINDLAW http://injury.findlaw.com/medical-malpractice/what-is-actionable-medical-malpractice.html (last visited Apr. 2, 2018).

Tom L. Beauchamp & James F. Childress, *Principles of Biomedical Ethics* 104 (6th ed. 2009)

Udo Schuklenk, *Conscientious Objection In Medicine: Private Ideological Convictions Must Not Supersede Public Service Obligations,* 29 BIOETHICS 5 (2016). https://onlinelibrary.wiley.com/doi/epdf/10.1111/bioe.12167 (last visited Apr. 2, 2018).

Abby Phillip, *Pediatrician refuses to treat baby with lesbian parents and there's nothing illegal about it*, THE WASHINGTON POST Feb. 19, 2015 https://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it/?utm_term=.5e2f880a1616 (last visited Apr. 2, 2018).

Teryn Bouche & Laura Rivard *America's Hidden History: The Eugenics Movement* SCITABLE BY NATURE EDUCATION (Sept. 18, 2014). https://www.nature.com/scitable/forums/genetics-generation/america-s-hidden-history-the-eugenics-movement-123919444 (last visited Apr. 27, 2018).

CAL. CIV. CODE § 51(b) (2018).

Church of Lukumi Babulu Aye, Inc. v. Hialeah, 508 U.S. 520, 531 (1993).

Non-Discrimination Laws, MAP: MOVEMENT ADVANCEMENT PROJECT http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Apr. 2, 2018).

HHS Announces New Conscience and Religious Freedom Division, HHS.GOV Jan 18, 2018 https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html (last visited Apr. 2, 2018).

HHS Takes Major Actions to Protect Conscience Rights and Life, HHS.GOV Jan. 19, 2018 https://www.hhs.gov/about/news/2018/01/19/hhs-takes-major-actions-protect-conscience-rights-and-life.html (last visited Apr. 2, 2018).

Robbie Gonzalez, *How the 'Religious Freedom Division' Threatens LGBT Health and Science*, WIRED Jan. 23, 2018 https://www.wired.com/story/how-the-religious-freedom-division-threatens-lgbt-healthand-science/ (last visited Apr. 2, 2018).

Trump Administration's Religious Refusal Actions Threaten Access to Healthcare by LGBT People, FENWAY HEALTH http://fenwayhealth.org/trump-administrations-religious-refusal-actions-threaten-access-to-healthcare-by-lgbt-people/ (last visited Apr. 2, 2018).

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, No. 16-111 (S. Ct. argued Dec. 5, 2017).

Judith Palfrey, MD, *Conscientious Refusal or Discrimination against Gay Parents*, 17 AMA JOURNAL OF ETHICS 10 (2015). http://virtualmentor.ama-assn.org/2015/10/ecas1-1510.html (last visited Apr. 2, 2018).

J.P. Moreland. *The Difference Between Negative Rights and Positive Rights*, WHAT'S BEST NEXT, Jan 30, 2009. https://www.whatsbestnext.com/2009/01/the-difference-between-negative-rights-and-positive-rights/ (last visited Apr. 2, 2018).

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

What are Reproductive Rights?, FINDLAW, http://family.findlaw.com/reproductive-rights/what-are-reproductive-rights-.html (last visited Apr. 2, 2018).

Skinner v. Oklahoma, 316 U.S. 535 (1942).

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

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

Bragdon v. Abbott, 524 U.S. 624, 638 (1998).

Lawrence v. Texas, 539 U.S. 558 (2003).

Ben Shapiro, *Health Care is a Commodity, Not a Right*, NATIONAL REVIEW Jan. 11, 2017 https://www.nationalreview.com/2017/01/health-care-markets-government-commodity-human-right/ (last visited Apr. 2, 2018).

U.S. CONST. art. 5

Constitutional Amendment Process, NATIONAL ARCHIVES https://www.archives.gov/federal-register/constitution (last visited Apr. 2, 2018).

About us, HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY https://www.hfea.gov.uk/about-us/ (last visited Apr. 2, 2018).

Code of Practice, HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY https://www.hfea.gov.uk/code-of-practice/29#section-header (last visited Apr. 2, 2018).

IVF – Availability, NHS http://www.nhs.uk/Conditions/IVF/Pages/Availability.aspx (last visited Apr. 2, 2018).

Free NHS IVF treatment to be offered to gay couples in North Staffordshire, THE SENTINEL (Dec. 28, 2013) http://www.stokesentinel.co.uk/free-ivf-treatment-offered-gay-couples-north/story-20372381-detail/story.html

What We Do, U.S. FOOD & DRUG ADMINISTRATION https://www.fda.gov/AboutFDA/WhatWeDo/ (last visited Apr. 2, 2018).

About the ULC, UNIFORM LAW COMMISSION http://www.uniformlaws.org (last visited Apr. 2, 2018).

CAL. HEALTH & SAFETY CODE § 125325(a) (2018).

Gestational Surrogacy in California, CREATIVE FAMILY CONNECTIONS https://www.creativefamilyconnections.com/us-surrogacy-law-map/california/ (last visited Apr. 2, 2018).

CAL. FAM. CODE § 7633 (2018).

Frequently Asked Questions, UNIFORM LAW COMMISSION http://www.uniformlaws.org/Narrative.aspx?title=Frequently%20Asked%20Questions (last visited, Apr. 2, 2018).

Twenty-seventh Amendment, ENCYLOPAEDIA BRITANNICA https://www.britannica.com/topic/Twenty-seventh-Amendment (last visited Apr. 2, 2018).

Hollingsworth v. Perry, 570 U.S. 693 (2013).

Standing, LEGAL INFORMATION INSTITUTE https://www.law.cornell.edu/wex/standing (last visited Apr. 2, 2018).

The case against 8, HBO.COM https://www.hbo.com/documentaries/the-case-against-8/synopsis (last visited Apr. 2, 2018).

Hollingswroth v. Perry (formerly known as Perry v. Borwn and Perry v. Schwarzeneggar) LAMBDA LEGAL https://www.lambdalegal.org/in-court/cases/perry-v-schwarzenegger (last visited Apr. 2, 2018).

Amicus Curiae Briefs, PUBLIC HEALTH LAW CENTER, http://www.publichealthlawcenter.org/documents/resources/amicus-curiae-briefs (last visited Apr. 2, 2018).

U.S. Const. art. III, § 2.

How Do Cases Reach the Supreme Court, THOUGHTCO. https://www.thoughtco.com/how-do-cases-reach-supreme-court-4113827 (last visited Apr. 2, 2018).

United States v. Windsor, 570 U.S. 744 (2013).

APPENDIX

Appendix A: Egg Donation laws and the UPA

Follows UPA	Addresses Sperm Donation but not Egg	Fails to address sperm or egg donation	Only discusses for insurance purposes	Modified UPA: written consent of both intended parents (husband and wife) as well as relinquishing of donor rights:
Alabama	Alaska	Arizona	Arkansas	Oklahoma
Colorado	Georgia	Washington D.C.	Hawaii	
Connecticut	Idaho	Indiana	Illinois	
Delaware	Kansas	Iowa	Maryland	
Florida	Minnesota	Kentucky		
New Mexico	Missouri	Maine		
New York	Montana	Massachusetts		
North Dakota	Nevada	Michigan		
Texas	New Jersey	Mississippi		
Utah	North Carolina	Nebraska		
Washington	Oregon	Pennsylvania		
Wyoming	Wisconsin	Rhode Island		
		South Carolina		
		South Dakota		
		Vermont		
		West Virginia		

Appendix B: Egg Donation laws and the UPA pt. 2[257]

Prohibits the Sale of, may allow for free donation	(Modified UPA) Birth Mother is the natural mother, not the donor	(Modified UPA) Egg donation allowed with proper screening and consent by intended parents	Modified UPA requires legally binding contract and acknowledgement of risks prior to donation
Louisiana	Ohio	New Hampshire	California
	Virginia	Tennessee	

[257] *Id.*

Appendix C: No surrogacy law, or law prohibiting surrogacy[258]

No Law governing surrogacy	No Law but courts favor agreements	Prohibited	Neither expressly permit or prohibit
Kansas	Wisconsin	New Jersey – prohibits traditional and does not favor compensated in the court system	New Mexico NM Stat. Ann §40-11A-801
Kentucky	Alaska	New York – NY Code §8-122 "surrogate __ ___ are hereby declared contrary to public policy of this state, and are void and unenforceable"	Tennessee Simply defines Tenn. Code Ann §36-1-102(50)
Montana	Colorado	Michigan	Wyoming Wyo. Stat. § 14-2-403
	Connecticut	Nebraska	
	Georgia	Arizona	
	Hawaii	Indiana	
	Idaho	Washington – allow uncompensated Wash Rev. Code §26.26-210	
	Iowa		
	Maryland		
	Massachusetts		
	Minnesota		
	Mississippi		
	Missouri		
	North Carolina		
	Ohio		
	Oklahoma		
	Oregon		

[258] *Surrogacy Laws*, THE SURROGACY EXPERIENCE http://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html, *Gestational Surrogacy Laws Across the United States*, CREATIVE FAMILY CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/ (both of these sources used in conjunction with one another, as well as Lexis to confirm statutory law)

	Pennsylvania		
	Rhode Island		
	South Carolina		
	South Dakota		
	Vermont		
	West Virginia – if married		

Appendix D: State laws on parentage orders[259]

Pre-Birth Parentage order allowed for homosexual couples	**Post birth parentage order allowed for homosexual couples**	**Post both parentage order allowed for homosexual couples but requires marriage**	**Pre-Birth parentage order allowed for homosexual couples but requires marriage**
California – but not effective until the birth	New York – but only lesbian couples	Florida	Colorado
Connecticut	Oklahoma		Kentucky
Maine – so long as it meets all statutory requirements			Massachusetts
New Hampshire			Ohio
Nevada			North Carolina
Oregon			Pennsylvania
Rhode Island			Utah
Georgia – but requires documentation of the legal rights to embryos during IVF			Texas – statute requires marriage, some courts may not though
Maryland			West Virginia
Missouri – likely but not tested			Alabama – but depends on county, some do not allow at all
North Dakota			Arkansas
New Mexico			
South Dakota			
Vermont – marriage not required but helps			
Washington			

[259] *Gestational*, *supra* note 17.

Delaware – but not effective until the birth			
Wisconsin – likely but not tested			
Alaska			

Appendix E: State laws on parentage orders pt. 2.[260]

Post-birth parentage order where only the biological parent can be declared, the other parent must go through adoption proceedings.	**Pre-birth parentage order where only the biological parent can be declared, the other parent must go through adoption proceedings.**	**Bypass parentage order completely**	**No parentage order allowed for homosexual couples**
Hawaii	New Jersey – with a 72 hour requirement for gestational surrogate mother to relinquish parental rights	Illinois- can go straight to vital records and have intended parents names placed on birth certificate so long as all statutory requirements are met	Montana – not tested but unlikely
Nebraska	Tennessee – however second father after adoption will still be listed as mother regardless of his sex	Virginia – 2 options: 1) court approval of of a contract with a home study and court hearing, 2) 3 days after birth file joint surrogate consent and birth form with birth registrar	Wyoming – but will honor one from another state for heterosexual couples, not tested on homosexual couples
	Kansas		Washington D.C.
	Minnesota		Idaho
	Arizona		Michigan
	Iowa		Mississippi
	South Carolina		Indiana
			Louisiana

[260] *Id.*

CURRICULUM VITAE

EDUCATION

Juris Doctorate
Wake Forest University, Winston Salem, NC, May 2018

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Bachelor of Science, Polymer & Color Chemistry
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ACADEMIC AWARDS AND HONORS

Wake Forest University School of Law: W. Fred Williams Scholarship

Wake Forest University School of Law: Law Dean's Scholarship – 18

Wake Forest University: Bioethics Scholarship

North Carolina State University: Centennial Scholarship

INTERNSHIPS AND SCHOLARLY WORK

Legal Intern – Wake Forest University Baptist Medical Center
May 23, 2016 – June 23, 2016; May 22, 2017 – August 3, 2017

- Developed and enhanced legal research skills through creating an internal investigation manual
- Enhanced knowledge of contracts through editing, analyzing, and drafting various contracts.
- Gained experience working with clients (employees) on various employment issues such as discrimination, wage & hour, confidentiality, and contractual arrangements.
- Interacted with outside counsel and hospital personnel on various employment law issues through meetings, research, and drafting documents.

Legal Intern – Department of Veterans Affairs, Winston Salem Regional Council
February 2017 – April 20, 2017

- Created a summary of North Carolina medical malpractice law for use by VA attorneys across the country
- Investigated, researched, and sought expert opinions for various medical malpractice claims