

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

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ERIN KRUPA, MARIANNE KRUPA, SOL  
MEJIAS, and SARAH MILLS,

Plaintiffs,

No.: 16-CV-4637

- against -

RICHARD J. BADOLATO, *in both his individual  
capacity and his official capacity as Commissioner  
of the New Jersey Department of Banking and  
Insurance,*

**COMPLAINT**

Defendant.

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**PRELIMINARY STATEMENT**

1. This civil rights case is about family and the right of all New Jersey women who dream of becoming mothers to access the reproductive healthcare they need to realize that dream on an equal basis, regardless of their sexual orientation. “Rising from the most basic human needs,” parenthood “is essential to our most profound hopes and aspirations,” just like marriage. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015). In fact, as quoted by Justice Anthony Kennedy in *Obergefell*, Cicero wrote: “The first bond of society is marriage; next, children; and then the family.” *Id.* (citing *De Officiis* 57 (W. Miller transl. 1913)). Now, as presaged by Kennedy as he extended Cicero’s first bond of society to all American same-sex couples in *Obergefell*, that decision also compels states like New Jersey to treat heterosexual and same-sex couples equally with respect to Cicero’s remaining bonds of society, as well. In order to protect all women who wish to have children and start families on equal footing, as required by the

Equal Protection Clause of the Fourteenth Amendment to the United States Constitution,<sup>1</sup> because, like marriage, procreation is a fundamental right protected by the Due Process Clause of the same Amendment,<sup>2</sup> and because 42 U.S.C. § 1983 prohibits the deprivation of Plaintiffs' federal constitutional and statutory rights,<sup>3</sup> New Jersey must extend the protections of its infertility insurance mandate to women in same-sex relationships.

### **NATURE OF ACTION**

2. Plaintiffs are female New Jersey residents in same-sex relationships who wish to conceive children but, because they suffer from infertility as determined by their doctors, they have been unable to do so without access to infertility treatments such as, *inter alia*, intrauterine insemination and in vitro fertilization. Although New Jersey mandates that insurance plans operating in the state cover medically necessary expenses incurred in the diagnosis and treatment of infertility, this mandate, in relevant part, defines infertility as an inability to conceive despite engaging in unprotected sexual intercourse with a male partner for either one or two years, depending on a woman's age. N.J. Stat. Ann. § 17B:27-46.1x(a).

3. Accordingly, because Plaintiffs are women in same-sex relationships and do not engage in sexual intercourse with men, notwithstanding the fact that their doctors have

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<sup>1</sup> *Obergefell*, 135 S. Ct. at 2604 (“[T]he Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. . . . [T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.” (citing *Zablocki v. Redhail*, 434 U.S. 374, 383-88 (1978); *Skinner*, 316 U.S. at 541)).

<sup>2</sup> See, e.g., *Carey v. Population Services, Intern.*, 431 U.S. 678, 685 (1977) (“The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices.”); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, (1942) (“Marriage and procreation are fundamental to the very existence and survival of the race.”).

<sup>3</sup> “Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law[.]” 42 U.S.C. § 1983.

determined by way of noncontroversial, medically-accepted diagnostic techniques that they do indeed suffer from infertility, New Jersey law leaves them with no way to qualify as infertile for purposes of insurance coverage whatsoever. As a result, because the cost of infertility care is extremely burdensome to prohibitive for Plaintiffs to pay for out of pocket and their insurance providers are only required to cover such treatment for heterosexual women, Plaintiffs must choose between starting a family and their financial security. After *Obergefell*, it is clear that the Constitution protects them against this draconian choice.

### **JURISDICTION AND VENUE**

4. This Court has jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. §§ 1331, 1343, and 2201.

5. Venue is proper in the District of New Jersey pursuant to 29 U.S.C. § 1391(b), as the events giving rise to Plaintiffs' claims occurred in this district.

### **PARTIES**

6. Plaintiffs Erin and Marianne Krupa are a married same-sex couple who reside in Montclair, New Jersey. They have been trying to conceive a child and struggling to access coverage for infertility care since May of 2013. Erin is 36 and Marianne is 34.

7. Plaintiff Sol Mejias and her wife Yanassa Hernandez reside in North Bergen, New Jersey. She has been trying to conceive a child and struggling to access coverage for infertility care for approximately two years. Sol is 39.

8. Plaintiff Sarah Mills and her partner Gloria Torres reside in Union City, New Jersey. She has been trying to conceive a child and struggling to access coverage for infertility care since March 30, 2016. Sarah is 32.

9. Defendant Robert J. Badolato is the acting Commissioner of the New Jersey Department of Banking and Insurance. In that capacity, he is responsible for overseeing the administration of all insurance-related state statutes and promulgating rules and regulations to effectuate them. *See* N.J. Stat. Ann. § 17B:27-51.10c. Defendant Badolato is sued in his official and personal capacities.

## FACTS

### **Erin and Marianne Krupa**

10. The Krupas met in college and have been in a committed and loving relationship for 15 years.

11. They moved to Montclair, New Jersey in the Fall of 2011 from North Carolina so Erin could start her career as a professor of mathematics education and in pursuit of a more open-minded and accepting place to start a family.

12. The move to New Jersey finally gave them the courage to be completely open about their sexuality and commitment to one another, something they had withheld from family, neighbors, and colleagues amid the social pressures of the South.

13. Marianne is also an educator, teaching second grade in Bergen County.

14. When the Krupas first walked into a fertility clinic in May of 2013, they were beyond happy to fulfill their dreams of motherhood. Erin exercised regularly, had little stress, and had no major health issues.

15. Unfortunately, the reproductive endocrinologist informed them that Erin had several cysts on her uterus and Stage III endometriosis, rendering her infertile.

16. They were relieved when the doctor told them, “the cysts aren’t cancerous and insurance typically covers infertility treatment for women with endometriosis.” When they left

the office they were concerned about Erin's new diagnosis, but encouraged that their insurance would provide them with the services they needed to start their family.

17. Soon after the May 2013 appointment, the Krupas were told Erin was denied the infertility benefits by her health insurance carrier, Horizon Blue Cross Blue Shield of New Jersey ("HBCBS"), under the New Jersey mandate, despite the fact that her doctor had determined that she required infertility treatment.

18. A July 31, 2013 denial letter specifically stated, in relevant part, that "[i]nfertility means the disease or condition that results in the abnormal function of the reproductive system such that: ... [a] female under 35 years of age is unable to conceive after two years of unprotected sexual intercourse," and "[t]o be labeled as having infertility and being eligible for infertility treatments, HBCBS policy based on the New Jersey mandate requires that a patient age less than 35 years fail to conceive after two years of trying."

19. Despite having a medical diagnosis of infertility, because, as a lesbian in a committed relationship, Erin could not show that she had unprotected sexual intercourse with a man for the requisite period, the Krupas were not protected by the mandate.

20. Being denied insurance coverage was discouraging, stressful, and upsetting, and it led the Krupas to begin Erin's infertility treatment by pursuing intrauterine insemination ("IUI"), a less expensive and less effective infertility treatment than other options, despite the low probability of success given Erin's condition.

21. The repetitive failures led not only to a financial burden, but also to an emotional and physical toll on Erin's body. After three failed self-funded inseminations performed by their reproductive endocrinologist, the Krupas did a cost-benefit analysis and decided to pursue costly in-vitro fertilization ("IVF") due to the increased success rates for women with endometriosis.

22. Again, coverage was denied. At the end of the three failed insemination cycles the Krupas had lost a lot of money, but they remained hopeful.

23. In five months, from Erin's initial treatment until the completion of her first IVF cycle, the Krupas spent \$25,305.39 in out-of-pocket medical expenses for infertility care.

24. During this time, on top of her regular job, Erin began tutoring high school students for extra hourly wages and started a consulting company to attempt to earn enough money to support treatments. She was extending herself physically and emotionally on top of the financial burden.

25. Unfortunately, the first IVF cycle resulted in an ectopic pregnancy that had to be terminated via two separate doses of chemotherapy, which ultimately sent her to the emergency room unable to breathe due to a drug-induced lung condition called pleuritis.

26. The Krupas experienced a devastating loss of hope after this event, not only because of the loss of their child, but also because of the exponential impact of the ectopic pregnancy on top of the emotional and physical strain caused by months of unnecessary and futile IUI treatments on Erin's physical and emotional health, as well as the loss of one of Erin's precious – and dwindling – childbearing years. Erin became impatient, withdrawn, and exhausted, and began suffering from a host of additional medical issues.

27. Nevertheless, the Krupas remained determined to expand their family. When Erin followed up with her doctor's financial coordinator, the coordinator made it very clear that if they submitted an insurance claim to pay for Erin's next round of treatment, it would get denied. Erin made an appointment with her doctor to discuss this, and she asked her doctor to do whatever she could do to help them get coverage.

28. Based on a letter written by Erin's doctor outlining the medical reasons Erin needed coverage, the Krupas' insurance carrier finally took the initiative on its own and extended infertility coverage to Erin, despite not being compelled to do so by New Jersey law.

29. Unfortunately, the Krupas continued to experience complications in the Spring and Summer of 2014, enduring a false positive pregnancy test and a miscarriage. Despite the devastating impact of months of futile IUI treatment and the stress of being forced to pay so much money out of pocket on Erin's health and well-being, Marianne was unable to step in and attempt to conceive in her place because, although HBCBS had agreed to cover Erin's treatment after almost a year of appeals by the Krupas and advocacy by Erin's doctor, infertility care for Marianne was still blocked pursuant to the New Jersey mandate.

30. In August and September of 2014, Erin did two more IVF cycles, each resulting in fewer embryos than the last, and each ending in a miscarriage.

31. In November of 2014 and January of 2015, Erin did two more IVF cycles, each resulting in fewer embryos than the last, and neither resulting in pregnancies. After the January IVF surgery, Erin was unable to walk and was sent to the emergency room with loss of sensation in her leg.

32. At this point, the Krupas determined that Erin would be unable to continue attempting to conceive without irreparable damage to her physical and emotional health. Because Erin had one final IVF cycle covered by her insurance, however, they decided to attempt to avoid wasting this coverage by having Marianne carry Erin's embryo.

33. The Krupas' insurance denied the claim several times because treatment for Marianne was not protected by the New Jersey mandate, until Erin's doctor requested a peer-to-peer meeting and laid out their entire story. Again, HBCBS took the initiative and extended

coverage for the specific proposed treatment, despite not being compelled to do so by New Jersey law. Unfortunately, when Erin's embryos were implanted in Marianne's womb, the Krupas experienced two more miscarriages.

34. Because, as a woman in a same-sex relationship, Marianne also has no way to show she is infertile under New Jersey law, the Krupas must now pay out-of-pocket for both Erin and Marianne to do egg retrievals and testing of their embryos.

35. Since her first IUI treatment, Erin's health has deteriorated. She had walked into the clinic with one prior doctor, and now has 12 specialists managing her care. She has been to the emergency room 3 times, had 10 surgeries and 3 outpatient procedures, and received diagnoses for several new diseases and conditions. Their experiences over the past three years have affected the Krupas' careers, relationships to family and friends, self-image, health, and overall well-being, wasted precious childbearing years, and delayed the building of their family.

#### **Sol Mejias**

36. Sol and her wife Yanassa Hernandez decided to start a family about two years ago.

37. They were married in July of 2015.

38. Also in 2015, Sol called her insurance carrier, HBCBS, about infertility treatments, and she was told that any such treatments would not be covered because she had insufficient proof of having attempted to conceive with a male partner.

39. Based on this information, Sol attempted to conceive at home for over a year using genetic material provided by a male friend, but was unsuccessful.

40. Consequently, Sol and her wife decided to try IUI treatments with Sol's doctor. When she requested coverage for such treatments based on her year of at-home sperm exposure,

however, she received a denial letter from HBCBS stating that although “[t]he clinical information submitted for review indicates that you underwent self home intra uterine insemination, not medically supervised for 1 year,” this was insufficient to establish “abnormal function of the reproductive system” because Sol had no male partner who could provide a “semen analysis ... that would support male infertility,” as New Jersey law does not require an insurance carrier to cover infertility treatments for a woman who is unable to conceive unless she has unprotected sex with a man for the requisite period.

41. Sol has completed one failed IUI cycle and is attempting another cycle in August of 2016. Sol and her wife are paying for these treatments out of pocket.

42. Although insurance coverage would have allowed Sol to proceed directly to IVF treatment, the extreme financial burden of committing to such treatment has compelled her to attempt the significantly more affordable but significantly less likely to be successful medically-supervised IUI cycles, which are stressful and draining and involve daily clinic visits, blood work, and ultrasounds.

43. Should her second medically-supervised IUI cycle also fail, provided she and her wife are able to come up with the money to pay for it, Sol will pursue IVF, in which case her lack of protection under the New Jersey mandate will have led her to waste money on futile IUI treatments on the off chance that she and her wife could have protected their financial security by avoiding the debilitating cost of more intensive and effective treatment.

#### **Sarah Mills**

44. Sarah and her partner Gloria have been in a stable, dedicated relationship since 2010.

45. They recently decided to start a family, deciding that Sarah would be the one to become pregnant.

46. Because Sarah has been struggling with polycystic ovary syndrome and anovulation for several years, which dramatically reduce a woman's chance of conceiving, she booked her first consultation with an infertility specialist on March 16, 2016. At the consultation, the specialist confirmed that she would likely require infertility treatment in order to conceive.

47. On March 18, 2016, Sarah received a letter from her insurance carrier, HBCBS, stating that any such infertility treatment would not be covered unless she could prove infertility by having unprotected intercourse with a man for two years.

48. Even if at-home insemination for the requisite period were sufficient to meet the requirements of the New Jersey infertility mandate, which it is not, Sarah's doctor informed her that her conditions, and the associated irregular, unpredictable ovulation cycle and need for thyroid level monitoring, rendered any such at-home attempts functionally pointless.

49. More importantly, in addition to confirming a patient's engagement in unprotected heterosexual sex – the only option provided for under the New Jersey mandate – or insemination for 1-2 years, depending on her age, there are a number of other professionally-accepted diagnostic tools a doctor can use to establish infertility from a medical perspective (see ¶¶ 58-60, *infra*).

50. During the week of May 23, 2016, Sarah called HBCBS several times a day to inquire about the reason for the denial of coverage, during which period an HBCBS nurse informed Sarah that failed at-home insemination attempts do not count toward a diagnosis of infertility.

51. Sarah was ultimately able to speak with HBCBS medical director Paul Krentzlin on March 25, 2016. Krentzlin informed her that unless she tried to get pregnant through regular unprotected sexual intercourse, she would not be able to show that her infertility treatments were medically necessary. When Sarah responded that this placed an unfair financial burden on women with female partners, Krentzlin responded that some groups simply must pay more out of pocket in order to access infertility care.

52. Sarah's doctor was shocked when she heard that Sarah's coverage had been denied, stating that her patients are normally covered in this situation.

53. A second phone conference regarding Sarah's attempt to appeal the denial of coverage was held on Wednesday, June 15th, 2016 at around 12:20 p.m. Present on the phone were a Dr. Napoli, who works for HBCBS, a committee of HBCBS employees, Sarah's fertility specialist, and Sarah. The call was unavailing, and Sarah received a follow-up call the next day informing her that her appeal had again been denied.

54. Sarah is currently seeing a psychotherapist to deal with the psychological and emotional impacts of this situation, as well as the strain it places on her relationship with Gloria.

55. Being denied coverage for infertility treatment has caused Sarah significant mental anguish and anxiety, and will likely impact her fertility success due to the added stress of attempting to secure coverage and being required to pay out of pocket, as well as the loss of the portion of her childbearing years associated with the delay necessitated by these efforts.

### **The New Jersey Infertility Mandate**

56. The New Jersey infertility mandate requires that any insurance policy that covers more than 50 people and provides pregnancy-related benefits must also cover the costs related to infertility diagnosis and fertility treatments, including IVF. N.J. Stat. Ann. § 17B:27-46.1x(a).

57. The mandate states:

For purposes of this section, “infertility means the disease of condition that results in the abnormal function of the reproductive system such that a person is not able to: impregnate another person; conceive after two years of unprotected intercourse if the female partner is under 35 years of age, or one year of unprotected intercourse if the female partner is 35 years of age or older or one of the partners is considered medically sterile; or carry a pregnancy to life birth.

*Id.*

### **Medical Standards for Diagnosing Infertility**

58. Despite the text of the mandate, however, there are a number of professionally-accepted diagnostic methods by which infertility can be medically established without requiring a patient to engage in heterosexual sex.

59. According to the Eunice Kennedy Shriver National Institute of Child Health and Human Development at the National Institutes of Health (“NIH”),<sup>4</sup> female infertility may be clinically diagnosed via:

- “ask[ing] specific questions about [a woman’s] health history,” including inquiries about prior pregnancies and miscarriages, the regularity of her menstrual period, the presence of pelvic pain, the presence of abnormal vaginal bleeding or discharge, and any history of pelvic infection or surgery;
- “a physical exam including a pelvic exam, a Pap test, and blood tests”; and
- “laboratory tests and evaluations[.]”

60. According to the Mayo Clinic:<sup>5</sup>

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<sup>4</sup> Eunice Kennedy Shriver National Institute of Child Health and Human Development, *How is infertility diagnosed?*, <https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/Pages/diagnosed.aspx> (last reviewed July 2, 2013).

<sup>5</sup> Mayo Clinic, *Infertility Diagnosis*, <http://www.mayoclinic.org/diseases-conditions/infertility/diagnosis-treatment/diagnosis/dxc-20228774> (last accessed July 27, 2016).

Fertility for women relies on the ovaries releasing healthy eggs. [A woman's] reproductive tract must allow an egg to pass into her fallopian tubes and join with sperm for fertilization. The fertilized egg must travel to the uterus and implant in the lining. Tests for female infertility attempt to determine whether any of these processes are impaired.

These tests include:

- ovulation testing, which “measures hormone levels to determine whether [a woman is] ovulating”;
- hysterosalpingography, which “evaluates the condition of [a woman's] uterus and fallopian tubes and looks for blockages or other problems”;
- ovarian reserve testing, which “helps determine the quality and quantity of the eggs available for ovulation”;
- other hormone tests, which “check levels of ovulatory hormones, as well as pituitary hormones that control reproductive processes”;
- imaging tests and procedures, such as pelvic ultrasounds, hysterosonographies, hysteroscopies, and laparoscopies, which can “identify endometriosis, scarring, blockages or irregularities of the fallopian tubes, and problems with the ovaries and uterus”; and
- genetic testing, which “helps determine whether there's a genetic defect causing infertility.”

### **Need for Injunction**

61. Defendant will continue to deny Plaintiffs due process and equal protection under the law by mandating that the infertility care of heterosexual women be covered by their insurance carriers but failing to mandate that the same infertility care be covered for women in same-sex relationships.

62. These actions by Defendant deny to Plaintiffs the same protections, status, and dignity that Defendant extends to similarly situated heterosexual women.

63. These actions by Defendant require infertile women in same-sex relationships to pay thousands of dollars out of pocket for the infertility care they need to start families, expenses that are covered for heterosexual women as a matter of law, putting the financial stability of women in same-sex relationships and their families at ongoing, escalating risk, and denying some the opportunity to have children at all.

64. Because they must pay out of pocket for infertility care, New Jersey women in same-sex relationships are often forced to forgo infertility treatment altogether or to elect less expensive, less effective treatment options, which in turn increases the amount of time they must spend attempting to conceive, the associated risk for emotionally devastating false positives and miscarriages, and the resulting loss of viable childbearing years and strain on their reproductive systems and physical and emotional health.

65. Every day that New Jersey law continues to exclude women in same-sex relationships from the protections of the infertility mandate, these women must either wait for the law to change as their childbearing years continue to slip away or, if they have any available resources, bankrupting themselves and their families in order to pay for fertility care that is automatically covered for straight women.

66. The public interest and the balance of equities favor Plaintiffs, as there is no legitimate state interest in excluding women in same-sex relationships from protections the state has determined it is in its interest to provide to similarly situated women in relationships with men. Denying equal government protections and privileges to persons because they are not in heterosexual relationships is not a legitimate governmental interest.

67. There is no adequate remedy at law. Plaintiffs and all other New Jersey women in same-sex relationships seeking infertility treatment are suffering ongoing, exponential, irreparable harm to their financial, physical, and emotional health, as well as their future chances for bearing healthy children.

68. There is no harm to New Jersey government in granting a declaratory judgment and an injunction requiring Defendant to ensure that infertile women in same-sex relationships can qualify as “infertile” for purposes of the infertility mandate.

**FIRST CAUSE OF ACTION:**  
**Discrimination on the Basis of Sex and Sexual Orientation in Violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (28 U.S.C. § 2201 and 42 U.S.C. § 1983)**

69. Plaintiffs incorporate by reference the allegations in each of the preceding paragraphs as if fully set forth herein.

70. Defendant, acting in his individual capacity under color of law, has violated the right to equal protection under the laws secured to Plaintiffs by the Fourteenth Amendment to the United States Constitution.

71. There is a controversy between Plaintiffs and Defendant regarding whether Defendant, in his official capacity as representative of the State of New Jersey, may deny equal protection of the laws to infertile women in same-sex relationships by excluding them from coverage for infertility treatments under the State’s coverage mandate. As this controversy is real and substantial, it demands specific relief through a decree of a conclusive character.

72. Despite the existence of copious medically-accepted diagnostic techniques for identifying infertility, because infertile women in same-sex relationships do not engage in sexual intercourse with men, they are left with no way to qualify as “infertile” under the statute and its

implementing regulations in order to trigger the mandate that their insurance carriers cover their infertility care.

73. Classifications based on sex and sexual orientation demand heightened scrutiny.

74. Lesbians and gay men are members of a discrete and insular minority that has suffered a history of discrimination in New Jersey and across the United States.

75. Sexual orientation bears no relation to an individual's ability to perform or contribute to society.

76. Sexual orientation is a core, defining trait that is so fundamental to one's identity that a person may not legitimately be required to abandon it (even if that were possible, which it is not) as a condition of equal treatment.

77. Prejudice against lesbians and gay men continues to seriously curtail the operation of the political process preventing this group from obtaining redress through legislative means.

78. Lesbians and gay men have far fewer civil rights protections at the state and federal level than women and racial minorities had when sex and race classifications were declared to be suspect or quasi-suspect. They have been targeted through the voter initiative process more than any other group.

79. Although classification based on sexual orientation should be reviewed under heightened scrutiny, New Jersey's exclusion of women in same-sex relationships from its infertility coverage mandate cannot survive under any level of constitutional scrutiny. It is not rationally related to any legitimate governmental interest. All it does is disparage and injure these women and their families by denying them the protections afforded to heterosexual couples.

80. Defendant acted with malice toward or reckless disregard for Plaintiffs' rights.

81. Defendant' exclusion of New Jersey women in same-sex relationships from the coverage of the mandate based on the sex of their partners, and the associated need to pay for infertility care out of pocket, has forced these women to forego such treatment or choose less costly, less effective treatment options, making them less likely to conceive and more likely to endure extended, painful or otherwise burdensome treatment processes, resulting in more health complications and emotional distress.

82. Plaintiffs seek compensatory and punitive damages from Defendant for the damages they sustained as a result of Defendant's violation of their rights.

83. Plaintiffs are entitled to a declaratory judgment that the New Jersey infertility mandate violates their right to equal protection secured by the 14<sup>th</sup> Amendment to the United States Constitution.

**SECOND CAUSE OF ACTION:**

**Discrimination on the Basis of Sex and Sexual Orientation in Violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution  
(28 U.S.C. § 2201 and 42 U.S.C. § 1983)**

84. Plaintiffs incorporate by reference the allegations in each of the preceding paragraphs as if fully set forth herein.

85. Defendant, acting in his individual capacity under color of law, has violated the right to due process of law secured to Plaintiffs by the Fourteenth Amendment to the United States Constitution.

86. There is a controversy between Plaintiffs and Defendant regarding whether Defendant, in his official capacity as representative of the State of New Jersey, may deny substantive due process of law to infertile women in same-sex relationships by excluding them

from coverage for infertility treatments under the State's coverage mandate. As this controversy is real and substantial, it demands specific relief through a decree of a conclusive character.

87. The New Jersey infertility coverage mandate is subject to heightened scrutiny because it burdens the fundamental right of New Jersey women in same-sex relationships to bear children and create a family. The Supreme Court has long recognized that reproduction is a fundamental right and that choices about pregnancy, conception, and parenthood are a central part of the liberty protected by the Due Process Clause.

88. Although New Jersey law protects this fundamental right for infertile women in heterosexual relationships by mandating that New Jersey insurance carriers cover their infertility treatment, infertile women in same-sex relationships have no way to qualify as "infertile" under the statute and its implementing regulations because they do not engage in sexual intercourse with men.

89. New Jersey can demonstrate no important interest to justify burdening Plaintiffs' fundamental right. Indeed, it cannot demonstrate that the exclusion is tailored to any legitimate interest at all.

90. Defendant acted with malice toward or reckless disregard for Plaintiffs' rights.

91. Defendant's exclusion of New Jersey women in same-sex relationships from the coverage of the mandate based on the sex of their partners, and the associated need to pay for infertility care out of pocket, has forced these women to forego such treatment or choose less costly, less effective treatment options, making them less likely to conceive and more likely to endure extended, painful or otherwise burdensome treatment processes, resulting in more health complications and emotional distress.

92. Plaintiffs seek compensatory and punitive damages from Defendant for the damages they sustained as a result of Defendant's violation of their rights.

93. Plaintiffs are entitled to a declaratory judgment that the New Jersey infertility mandate violates their right to due process secured by the 14<sup>th</sup> Amendment to the United States Constitution.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court:

- a. Issue a declaratory judgment that the New Jersey Insurance Mandate discriminates based on sex and sexual orientation in violation of the Equal Protection Clause of the United States Constitution by mandating infertility coverage for infertile women in heterosexual relationships but not for infertile women in same-sex relationships;
- b. Issue a declaratory judgment that the New Jersey Insurance Mandate violates the Due Process Clause of the United States Constitution by denying to infertile women in same-sex relationships the same assistance in creating a family that is provided to infertile women in heterosexual relationships;
- c. Issue a preliminary and permanent injunction requiring Defendant to expand the mandate to allow infertile women in same-sex relationships to qualify as infertile under the law and access insurance coverage for fertility treatments deemed medically necessary by their doctors;
- d. Award Plaintiffs compensatory damages, including damages for mental anguish and pain and suffering;
- e. Award Plaintiffs reasonable attorneys' fees and costs; and

f. Award Plaintiffs such other relief as this Court deems necessary and proper.

**DEMAND FOR TRIAL BY JURY**

Pursuant to FRCP 38(b), Plaintiffs demand a trial by jury.

Dated: New York, New York  
August 1, 2016

Respectfully submitted,

By:



John A. Beranbaum

Grace Cathryn Cretcher (*admitted in NY only*)

Bruce E. Menken (*admitted in NY only*)

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JS 44 (Rev. 07/16)

**CIVIL COVER SHEET**

16-CV-4637

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**

ERIN KRUPA, MARIANNE KRUPA, SOL MEJIAS, and SARAH MILLS

**DEFENDANTS**

NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE, RICHARD J. BADOLATO, COMMISSIONER

(b) County of Residence of First Listed Plaintiff Essex County  
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant \_\_\_\_\_  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys (Firm Name, Address, Email and Telephone Number)  
John A. Beranbaum, Grace Cathryn Cretcher, and Bruce E. Menken  
BERANBAUM MENKEN LLP  
80 Pine St., 33rd Floor, New York, New York 10005

Attorneys (If Known)

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   |                            |                            |   |                            |                            |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
|   | PTF                        | DEF                        |   | PTF                        | DEF                        |
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input checked="" type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS			
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

**V. ORIGIN** (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation - Transfer
- 8 Multidistrict Litigation - Direct File

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
28 U.S.C. § 2201 and 42 U.S.C. § 1983

Brief description of cause:  
NJ infertility treatment coverage mandate violates 14th Amendment due process and equal protection rights

**VII. REQUESTED IN COMPLAINT:**

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ \_\_\_\_\_ CHECK YES only if demanded in complaint:  
JURY DEMAND:  Yes  No

**VIII. RELATED CASE(S) IF ANY**

(See instructions): JUDGE \_\_\_\_\_ DOCKET NUMBER \_\_\_\_\_

DATE  
08/01/2016

SIGNATURE OF ATTORNEY OF RECORD

*John A. Beranbaum*

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_