UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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

Plaintiffs,

- against -

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

Defendant.

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No.: 2:16-cv-04637

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

Plaintiffs in this civil rights case are New Jersey women in same-sex relationships seeking access to infertility healthcare on an equal basis with heterosexual women in the state. Although New Jersey mandates that insurance carriers cover "medically necessary" infertility treatments, because the relevant statute defines "infertility" by reference to the period of time during which a woman has had unprotected heterosexual sex without conceiving, women in same-sex relationships are categorically excluded from its protections.

Because, pursuant to *United States v. Windsor*, 133 S. Ct. 2675, 2679 (2013) and *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015), Plaintiffs – and all New Jersey women in same-sex relationships seeking insurance coverage for infertility treatment – face a clear violation of their rights as secured by the Fourteenth Amendment to the United States Constitution, because these women continue to suffer irreparable harm as a result of this violation with each passing day, and because New Jersey has no rational – let alone compelling –

justification for its discriminatory law, Plaintiffs now move pursuant to Fed. R. Civ. P. 65(a) for a preliminary injunction compelling Defendant to extend the protection of New Jersey's infertility mandate to women in same-sex relationships.

I. FACTS

A. Plaintiffs Erin and Marianne Krupa[1]

The Krupas met in college and have been in a committed and loving relationship for 15 years. Erin is 36 and Marianne is 34. 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. Marianne is also an educator, teaching second grade in Bergen County. The Krupas' move was also prompted by their desire for a more open-minded and accepting place to start their family, and it finally gave them the courage to be completely open about their sexualities and their commitment to one another, something they had withheld from family, neighbors, and colleagues amid the social pressures of the South.

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. Unfortunately, the reproductive endocrinologist informed them that Erin had several cysts on her uterus and Stage III endometriosis, but they were relieved when the doctor told them, "the cysts aren't cancerous and this type of endometriosis often leads to insurance coverage for treatment." Back in her office she explained that Stage III endometriosis is a condition linked with infertility that, as they were again told, often leads to insurance coverage. Leaving the doctor's office, they were concerned about Erin's new diagnosis, but encouraged that their insurance would provide them with the services they needed to start our family.

[1] The facts in this section are derived from the Declaration of Erin Krupa, attached hereto as Exhibit A.

Soon after the appointment, the Krupas were told Erin was denied the infertility benefits of her health insurance under the New Jersey mandate, despite the fact that she was diagnosed with a condition directly linked to infertility. A July 31, 2013 denial letter informed them Erin was denied coverage because pursuant to the New Jersey mandate, in order to be eligible for infertility coverage, a woman under 35 must fail to conceive after two years of unprotected heterosexual intercourse. 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. Moreover, the Krupas could not afford the expense of subjecting Erin to two years of out-of-pocket inseminations prior to moving on to paying for doctor-recommended infertility care. They had decided to move to a more liberal state, due in part to believing that discrimination against them was a thing of the past, only to find that New Jersey considered their infertility treatment less important than that of heterosexual couples.

Being continually denied insurance coverage was discouraging, and meant the Krupas had to elect less expensive and less effective medical treatment to become pregnant, despite the low probability given Erin's condition. The repetitive failures the Krupas experienced as a result of being forced to choose more affordable treatment options led not only to a financial burden, but also to an emotional and physical toll on Erin's body. After three failed intrauterine inseminations ("IUIs") performed by a reproductive endocrinologist, the Krupas did a cost-benefit analysis and decided to pursue in-vitro fertilization ("IVF") due to the increased success rates for women with endometriosis. Again, coverage was denied.

In five months, from Erin's initial treatment until the completion of the IVF cycle, the Krupas spent $25,305.39 in out-of-pocket medical expenses. 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 exhausting herself physically and emotionally on top of the financial burden. On December 24, 2013, however, the clinic called to say the IVF was a success and Erin was pregnant. Unfortunately, the Krupas soon found out that the IVF cycle had led to an ectopic pregnancy. For her own safety, Erin was given a type of chemotherapy to terminate the pregnancy. Her body fought to keep the pregnancy and she was given a second dose of the chemotherapy, which ultimately sent her to the emergency room unable to breathe due to a drug-induced lung condition called pleuritis. The loss of hope the Krupas felt after this event, not only for the loss of their child, but also of the loss of Erin's health, was devastating. Erin became impatient, withdrawn, and exhausted, and suffered a host of medical issues following the loss of this pregnancy.

Because Marianne's treatment would not be covered, however, Erin was forced to continue trying to conceive. 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 was adamant that she wanted her doctor to do whatever she could do help them get coverage. 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. Erin's lack of coverage up to that point had caused serious emotional distress, anxiety, and fear, put the Krupas' financial security at risk, and resulted in the Krupas being forced to choose a less expensive and less effective treatment option than others that were available, which in turn increased the physical and emotional toll of Erin's infertility treatment significantly.

Furthermore, despite the major toll on Erin's health, because the Krupas' insurance carrier had only agreed to cover Erin's treatment, they could not afford to have Marianne step in and attempt to carry their child instead.

Unfortunately, after 6 more IVF cycles and three more miscarriages, the Krupas remain childless. Since the first cycle, 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. Erin had one final IVF cycle covered by her insurance, and the Krupas decided it would be best if Marianne carried Erin's embryo, given the dire state of Erin's physical and emotional health. It seemed like a perfect way for them both to be involved in the process, but the Krupas' insurance denied the claim several times, until Erin's doctor requested a peer-to-peer meeting and laid their entire story. Again, the Krupas' insurance carrier finally took the initiative on its own and extended coverage for the proposed treatment, despite not being compelled to do so by New Jersey law.

Sadly, when Erin's embryos were implanted in Marianne's womb, the Krupas experienced two more miscarriages, which necessitated three separate surgeries to remove the dead fetuses from Marianne's womb. Because the New Jersey mandate prevents Marianne from accessing coverage for IVF herself, the Krupas must now pay out-of-pocket for both Erin and Marianne to do egg retrievals and testing of their embryos.

B. Plaintiff Sol Mejias[2]

Sol Mejias and her wife Yanassa Hernandez live in North Bergen New Jersey, and were married in July of 2015. Sol is 39 years old and a special education teacher at a public school in

[2] The facts in this section are derived from the Declaration of Sol Mejias, attached hereto as Exhibit B.

Jersey City, New Jersey. About two years ago, Sol and her wife decided to start a family. In 2015, Sol called her insurance carrier 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. 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. Consequently, Sol and her wife decided to try IUI treatments with Sol's doctor. These treatments are not covered by Sol's insurance, because despite attempting to inseminate herself for over a year, 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, even if she exposes herself to sperm for the same amount of time.

Sol has completed one IUI cycle and is attempting another cycle in August of 2016. Not only must Sol and her wife pay for these treatments themselves, but an IUI cycle is draining, involving daily clinic visits, blood work, ultrasounds, and a materially lower rate of success than IVF treatment. At almost 40 years old, Sol is nearing the end of her childbearing years.

C. Plaintiff Sarah Mills[3]

Sarah Mills and her partner Gloria Torres reside in Union City, New Jersey, and have been in a stable, dedicated relationship since 2010. Sarah is 32 and is also a New Jersey public school teacher. Sarah and Gloria recently decided to start a family. Because (among other considerations) Gloria is beyond her likely childbearing years at age 50, Sarah is attempting to become pregnant. Sarah has been struggling with polycystic ovary syndrome ("PCOS") and anovulation for several years, which dramatically reduce a woman's chance of conceiving. As such, she booked her first consultation with an infertility specialist on March 16, 2016. At the

[3] The facts in this section are derived from the Declaration of Sarah Mills, attached hereto as Exhibit C.

consultation, the specialist confirmed that she would likely require infertility treatment in order to conceive.

On March 18, 2016, Sarah received a letter from her insurance carrier 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. 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. During the week of May 23, 2016, Sarah called her insurance carrier several times a day to inquire about the reason for the denial of coverage, but all she was told was that there was no medical necessity for the procedure and no further information was available.

Sarah requested to speak with someone who has responsibility for making determinations about this type of coverage, and was called by a Mr. Paul Krentzlin on March 25, 2016. Krentzlin informed Sarah 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, Kretzlin responded that some groups simply must pay more out of pocket in order to access infertility care. 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.

A second phone conference regarding Sarah's attempt to appeal the denial of infertility 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. To start, Sarah's fertility doctor explained that she has PCOS and ovulation problems, which inhibit her ability to become pregnant. Sarah explained that she could not have contact with sperm through sexual intercourse given the nature of her relationship, and that at-home inseminations would not be effective given her erratic ovulation and menstruation. Finally, Sarah stated that she had spoken with a nurse with HBCBS who told her that failed at-home inseminations do not count towards an infertility diagnosis. Unfortunately, there was nothing that Sarah or her doctor could say to convince the committee that Sarah needed these treatments, so the telephone conversation ended and Sarah received a phone call the following day informing her that her appeal had again been denied.

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. 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/or being required to pay for infertility treatment out of pocket.

D. The New Jersey Infertility Mandate

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). 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.

E. Medical Standards for Diagnosing Infertility

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. According to the Eunice Kennedy Shriver National Institute of Child Health and Human Development at the National Institutes of Health ("NIH"),[4] 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[.]"

According to the Mayo Clinic:[5]

> 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";

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[4] 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).

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

- 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."

F. Need for Injunction

Without an injunction, 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. These actions by Defendant deny to Plaintiffs the same status and dignity that Defendant extends to similarly situated heterosexual women and require 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. Because they must pay out of pocket for infertility care, New Jersey women in same-sex relationships are often forced to elect less expensive, less effective treatment options, which in turn increases the risk of failed treatments, the need for painful or otherwise burdensome repeat treatments, and the associated strain on the reproductive systems and physical and emotional health of infertile women in same-sex relationships.

Every day that New Jersey law continues to exclude women in same-sex relationships from the protections of the infertility mandate, these women must choose between waiting for the law to change as their childbearing years continue to slip away and paying for less expensive, less effective treatments that frequently involve significantly more strain on their emotional and

physical health. There is no amount of money that could compensate for Plaintiffs' emotional and physical suffering or their lost childbearing years, and each and every day that they are subjected to this constitutional violation and forced to make healthcare decisions based on what they can afford instead of what is best for their health and most likely to result in a successful pregnancy and delivery, that irreparable harm continues to grow.

II. ARGUMENT

A. Standard for Granting Preliminary Relief

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Ferring Pharm., Inc. v. Watson Pharm., Inc.*, 765 F.3d 205, 210 (3d Cir. 2014) (*citing Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)). "The Third Circuit has placed particular weight on the first and second prongs of the four part test, which require a reasonable likelihood of success on the merits and irreparable injury." *Wilcox v. Lakewood Twp*., No. CIV. 01-1854 (GEB), 2002 WL 32974017, at *2 (D.N.J. Feb. 22, 2002) (*citing Hoxworth v. Blinder, Robinson & Co., Inc*., 903 F.2d 186, 197 (3d Cir.1990)). Ultimately, the decision to grant or deny a motion for a preliminary injunction lies within "the sound discretion of the district judge, who must balance all of these factors in making a decision." *Kershner v. Mazurkiewicz*, 670 F.2d 440, 443 (3d Cir. 1982).

B. Plaintiffs Have a Substantial Likelihood of Success on the Merits

The first factor, one of the two most important factors to be considered in deciding whether to grant a preliminary injunction in this Circuit, weighs strongly in Plaintiffs' favor.

Based on the precedents set by the Supreme Court in *Windsor* and *Obergefell*, Plaintiffs can demonstrate a strong likelihood of success on the merits of their claims.

1. The New Jersey Infertility Mandate is Subject to Heightened Scrutiny

The infertility mandate should be evaluated under heightened constitutional scrutiny because it discriminates based on the protected characteristics of gender and sexual orientation, and because it implicates the fundamental right of procreation and parenting.

a. Gender

"'[A]ll genderbased classifications today' warrant 'heightened scrutiny.'" *United States v. Virginia*, 518 U.S. 515, 555 (1996) (*quoting J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 136 (1994)). Classifications based on gender can only stand if they are substantially related to the achievement of important government interests and the proffered justification is "exceedingly persuasive." *Id*. at 531-32. Because the New Jersey infertility mandate facially discriminates based on the gender of an infertile woman's partner, like any other gender classification, it must therefore be tested under heightened scrutiny. While physical differences can be taken into account when relevant in the application of heightened scrutiny to gender-based classifications, heightened scrutiny still applies. In *Virginia*, 518 U.S. 515, while the Court noted that sex is not a proscribed classification if based on relevant physical differences, it applied heightened scrutiny and, in fact, struck down the exclusion of women from the Virginia Military Academy because the differences in physical abilities between men and women did not satisfy the requirements of heightened scrutiny. *See also Nguyen v. I.N.S.*, 533 U.S. 53 (2001), (applying heightened scrutiny to gender-based classification). While Plaintiffs certainly recognize that because of the differences in male and female sexual biology, their own sex lives cannot provide insight into their fertility the way that the sex lives of women in heterosexual relationships can,

the existence of copious alternative clinical tools for diagnosing infertility (*see* Section (I)(E), *supra*) means that those biological differences are insufficient to logically justify the statute's gender-based discrimination.

b. Sexual Orientation

New Jersey's infertility mandate is also subject to heightened scrutiny because it discriminates based on sexual orientation. "*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014); *accord Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014). "*Windso*r established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review." *SmithKline*, 740 F.3d at 481. "Notably absent from *Windsor*'s review of DOMA are the strong presumption in favor of the constitutionality of laws and the extremely deferential posture toward government action that are the marks of rational basis review." *Baskin*, 766 F.3d at 671 (*quoting Smithkline*, 740 F.3d at 483) (internal quotations omitted). Rather, *Windsor* held that there must be a "legitimate purpose" to "overcome[ ]" the harms that DOMA imposed on same-sex couples. *Windsor*, 133 S. Ct. at 2696. *Windsor*'s "balancing of the government's interest against the harm or injury to gays and lesbians," *Baskin*, 766 F.3d at 671, bears no resemblance to rational basis review, one of the hallmarks of which is that it "avoids the need for complex balancing of competing interests in every case." *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997).

The Seventh Circuit in *Baskin* noted that this balancing approach used in *Windsor* is consistent with the standard for equal protection heightened scrutiny the Supreme Court has used in other cases, which requires the government to show "at least that the classification serves

important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Baskin*, 766 F.3d at 656 (*quoting Virginia*, 518 U.S. at 524). Any differences between the two descriptions of heightened scrutiny are "semantic rather than substantive" because "to say that a discriminatory policy is overinclusive is to say that the policy does more harm to the members of the discriminated-against group than necessary to attain the legitimate goals of the policy…" *Id*.; *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229-30 (1995) ("The application of strict scrutiny … determines whether a compelling governmental interest justifies the infliction of [the] injury" that occurs "whenever the government treats any person unequally because of his or her race"); *City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 493 (1989) (plurality opinion) (strict scrutiny "assur[es] that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool").

Even if *Windsor* itself didn't compel the application of strict scrutiny to classifications based on sexual orientation, analysis of the traditional criteria used to determine whether government discrimination should receive heightened scrutiny also compels such a conclusion. These criteria include:

> A) whether the class has been historically "subjected to discrimination"; B) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society"; C) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group"; and D) whether the class is "a minority or politically powerless."

Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013) (*quoting Bowen v. Gilliard*, 483 U.S. 587, 602 (1987), and *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985)), *aff'd*, 133 S. Ct. 2675 (2013). Of these considerations, the first two are the most important. *See Windsor*, 699 F.3d at 181; *accord Golinski v. U.S. Office of Pers. Mgmt*., 824 F. Supp. 2d 968, 987 (N.D. Cal. 2012). Application of these factors also leads

to the conclusion that sexual orientation classifications must be recognized as suspect or quasi-suspect and subjected to heightened scrutiny. *See, e.g., Windsor*, 699 F.3d at 181-85; *Whitewood v. Wolf*, 2014 WL 2058105, at *14 (M.D. Pa. May 20, 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 650-51 (W.D. Tex. 2014); *Bassett v. Snyder*, 951 F.Supp.2d 939, 960 (E.D. Mich. 2013); *Golinski*, 824 F. Supp. 2d at 985-90; *Pedersen v. Office of Pers. Mgmt*., 881 F. Supp. 2d 294, 310-33 (D. Conn. 2012); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 986-92 (S.D. Ohio 2013), *aff'd*, 135 S. Ct. 2584 (2015); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010); *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011); *Griego v. Oliver*, 316 P.3d 865, 880-84 (N.M. 2013); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384, 441-44 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-31 (Conn. 2008).

Unequivocally, lesbians and gay men have historically been subjected to discrimination; that "is not much in debate." *Windsor*, 699 F.3d at 182. For centuries, the prevailing attitude toward lesbians and gay men has been "one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment." Richard A. Posner, SEX AND REASON 291 (1992).

Sexual orientation is irrelevant to one's ability to perform or contribute to society. "There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some respect. But homosexuality is not one of them." *Windsor*, 699 F.3d at 182. In this respect, sexual orientation is akin to race, gender, alienage, and national origin, all of which "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *City of Cleburne*, 473 U.S. at 440.

The limited ability of gay people as a group to protect themselves in the political process, although not essential for recognition as a suspect or quasi-suspect class, *see Windsor*, 699 F.3d at 181, also weighs in favor of heightened scrutiny. In analyzing this factor, "[t]he question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination." *Id*. at 184. The political influence of lesbians and gay men stands in sharp contrast to the political power of women in 1973, when a plurality of the Court concluded in *Frontiero v. Richardson* that sex-based classifications required heightened scrutiny. 411 U.S. 677, 688 (1973). Congress had already passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, both of which protected women from discrimination in the workplace. *See id*. at 687-88. In contrast, there is still no express federal ban on sexual orientation discrimination in employment, housing, or public accommodations, and 29 states have no such protections either. *See Golinski*, 824 F. Supp. 2d at 988-89; *Pedersen*, 881 F. Supp. 2d at 326-27. Over the past 20 years, more than two-thirds of ballot initiatives that proposed to enact (or prevent the repeal of) basic antidiscrimination protections for gay and lesbian individuals have failed. Indeed, gay people "have seen their civil rights put to a popular vote more often than any other group." Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 257 (1997); *see also* Donald P. Haider-Markel *et al*., *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 POL. RESEARCH Q. 304 (2007).

Finally, sexual orientation is an "immutable or distinguishing" characteristic that "calls down discrimination when [the characteristic] is manifest." *Windsor*, 699 F.3d at 183. The Supreme Court has noted that "sexual orientation is both a normal expression of human sexuality and immutable." *Obergefell*, 135 S. Ct. at 2596. That view is consistent with a broad medical and

scientific consensus, *see Perry*, 704 F. Supp. 2d at 966; *accord Golinski*, 824 F. Supp. 2d at 986; *Pedersen*, 881 F. Supp. 2d at 320-24.

Accordingly, based on *Windsor, Smithkline, Baskin*, and a review of the traditional factors considered in determining whether to apply heightened scrutiny to a particular classification, classifications based on sexual orientation are appropriately subject to a heightened scrutiny analysis.

c. Procreation and Parenting

The Due Process Clause of the Fourteenth Amendment protects citizens against state laws that encroach on their fundamental liberties, which extend to "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell*, 135 S. Ct. at 2597-98 (*citing Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965)). These protected choices include "the decision whether to bear or beget a child." *Eisenstadt*, 405 U.S. at 453. When legislation burdens the exercise of a right deemed to be fundamental – as the infertility mandate does – it is subject to heightened scrutiny such that the government must show that the intrusion "is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

"[T]he same test must be applied to state regulations that burden an individual's [exercise of a fundamental right] by substantially limiting access to the means of effectuating that decision as is applied to state statutes" that foreclose the exercise of the right entirely. *Carey v. Population Servs., Int'l*, 431 U.S. 678, 688 (1977). Moreover, although New Jersey is not compelled to mandate infertility coverage for its citizens, "when a state chooses to provide such benefits, it may not do so in an arbitrary or discriminatory manner that adversely affects

particular groups that may be unpopular." *Diaz v. Brewer*, 656 F.3d 1008, 1013 (9th Cir. 2011) (*citing U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 93 (1973)).

Accordingly, because it implicates a fundamental right recognized by the Supreme Court, the New Jersey infertility mandate is appropriately evaluated with heightened constitutional scrutiny, and the government must provide a sufficiently compelling and adequately tailored justification for excluding Plaintiffs from its protection.

2. The New Jersey Infertility Mandate Violates Plaintiffs' Fourteenth Amendment Rights

As established in *Obergefell*, building on the conclusions reached in *Windsor*, the Due Process and Equal Protection Clauses of the Fourteenth Amendment "are connected in a profound way," working together to further "our understanding of what freedom is and must become." 135 S.Ct. at 2603. Where "challenged laws burden the liberty of same-sex couples, … it must be further acknowledged that they abridge central precepts of equality," and where "same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right," both their Due Process and Equal Protection rights are abridged. *Id.* at 2604. Here, just like the relevant states in *Obergefell*, New Jersey has established a law protecting certain benefits for its heterosexual citizens that are denied to those in same-sex relationships. Although the infertility mandate helps protect heterosexual women's fundamental right to bear children, Plaintiffs and other New Jersey women in same-sex relationships receive no such protection, and no sufficiently-compelling state interest exists to justify that discrimination at any level of constitutional scrutiny.

Accordingly, Plaintiffs can demonstrate a strong likelihood of success in demonstrating that the New Jersey infertility mandate violates the Due Process and Equal Protection Clauses of

the Fourteenth Amendment, without sufficient justification, and thus this factor weighs in favor of the granting of a preliminary injunction.

C. Plaintiffs Are Experiencing Irreparable Harm

Furthermore, Plaintiffs can also make a strong showing that their exclusion from the mandate continues to cause them irreparable harm, the other of the two most important factors to consider in determining the appropriateness of issuing a preliminary injunction. The Third Circuit has found that where a Plaintiff can show that they "have to forego medical care because of the heightened costs" associated with the challenged state action, the presence of irreparable harm has been established. Here, Plaintiffs have testified that despite their doctors' conclusions that they were infertile and that infertility treatment was medically necessary for them, Plaintiffs' insurance carriers nevertheless denied them coverage for such treatment, forcing them to forego the more expensive and more effective treatment options recommended by their doctors, or to forego treatment altogether. Those Plaintiffs who have elected less effective treatment options have in turn suffered the detriments to their physical and emotional health associated with longer, more stressful courses of treatment, suffering failed attempt after failed attempt and the resulting toll on their bodies, minds, and hearts. Finally, these extended, harrowing courses of treatment necessitated by Plaintiffs' inability to afford more expensive and effective options – or their inability to pursue treatment at all – continue to irreversibly whittle away at their childbearing years, day after day.

Additionally, "[t]his Circuit recognizes that the violation of a fundamental right … "for even minimal periods of time unquestionably constitutes irreparable injury." *Stilp v. Contino*, 743 F. Supp. 2d 460, 466 (M.D. Pa. 2010) (*citing Swartzwelder v. McNeilly*, 297 F.3d 228, 241 (3d Cir. 2002); *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (internal quotation marks omitted).

Accordingly, the burden of their exclusion from the protection of the infertility mandate on Plaintiff's fundamental right to bear children constitutes irreparable harm *per se*. Further, although the denial of a Plaintiff's equal protection rights does not similarly qualify as irreparable injury "even for minimal periods of time," such a denial may constitute irreparable injury depending on the circumstances of the case. *Constructors Ass'n of W. Pennsylvania v. Kreps*, 573 F.2d 811, 820 n.33 (3d Cir. 1978). Here, where the denial has lasted 15 years and counting, since the passage of the mandate in 2001, and where it is accompanied by the additional harms described herein, the extended and consequential denial to Plaintiffs of the equal protection of New Jersey law constitutes irreparable harm as well.

Accordingly, Plaintiffs can demonstrate that they are experiencing irreparable harm as a result of their exclusion from the protection of the New Jersey infertility mandate, and thus, this factor weighs in favor of the granting of a preliminary injunction.

D. The Balance of Equities and the Public Interest Favor Issuance of an Injunction

Finally, the remaining factors to be considered in determining whether to grant a preliminary injunction also counsel in favor of granting such an injunction in this case. The balance of equities strongly favors Plaintiffs, as including women in same-sex relationships in the coverage of the infertility mandate will have a dramatically positive impact on Plaintiffs and other women in same-sex relationships seeking infertility treatment in the State, allowing them to build their families in the fastest, most effective, and healthiest way possible and maximizing their chances of conceiving and delivering a healthy child. On the other hand, granting women in same-sex relationships access to the protections of the infertility mandate will have a negligible impact on insurance carriers in the state, which are already required to cover infertility treatments for the majority of New Jersey women, and no material impact on the State

whatsoever. Finally, the public interest is served by maximizing healthcare access and coverage for all residents of New Jersey in as equitable a way as possible.

Therefore, all relevant factors, including the balance of the equities and the public interest, counsel in favor of granting a preliminary injunction.

III. CONCLUSION

Accordingly, based on the foregoing, Plaintiffs respectfully request that their motion be granted and that Defendant be enjoined from excluding New Jersey women in same-sex relationships from the protections of the New Jersey infertility coverage mandate.

Dated: New York, New York
August 1, 2016

Respectfully submitted,

By: _____

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EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

----------x

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

Plaintiffs,

- against -

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

Defendant.

----------x

No.: 2:16-cv-04637

DECLARATION OF ERIN KRUPA

I, Erin Krupa, declare, upon personal knowledge and under penalty of perjury, pursuant to 28 U.S.C. Section 1746, that the following is true and correct:

1. I am a Plaintiff in this case, and this declaration is offered in support of a motion for preliminary injunction.

2. I am 36 years old.

3. My wife Marianne and I met in college and have been in a committed and loving relationship for 15 years.

4. We moved to Montclair, New Jersey in the Fall of 2011 from North Carolina so I could start my career as a professor of mathematics education.

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

6. Our move was also prompted by our desire for a more open-minded and accepting place to start our family, and it finally gave us the courage to be completely open about our sexualities and our commitment to one another, something we had withheld from family, neighbors, and colleagues amid the social pressures of the South.

7. When we first walked into a fertility clinic in May of 2013, we were beyond happy to fulfill our dreams of motherhood. I exercised regularly, had little stress, and had no major health issues.

8. Unfortunately, the reproductive endocrinologist informed us that I had several cysts on my uterus and Stage III endometriosis, but we were relieved when the doctor told us, "the cysts aren't cancerous and this type of endometriosis often leads to insurance coverage for treatment." Back in her office she explained that Stage III endometriosis is a condition linked with infertility that, as we were again told, often leads to insurance coverage. Leaving the doctor's office, we were concerned about my new diagnosis, but encouraged that our insurance would provide us with the services we needed to start our family.

9. Soon after the appointment, however, we were told I was denied the infertility benefits of my health insurance under the New Jersey mandate. A July 31, 2013 denial letter informed us I was denied coverage because pursuant to the New Jersey mandate, in order to be eligible for infertility coverage, a woman under 35 must fail to conceive after two years of unprotected heterosexual intercourse.

10. I could not afford the expense of subjecting myself to two years of out-of-pocket medical treatments in order to move on to doctor-recommended infertility care.

11. Being continually denied insurance coverage was discouraging, and meant we had to elect less expensive and less effective medical treatment, despite the low probability of success given my condition.

12. The repetitive failures we experienced as a result of being forced to choose more affordable treatment options led not only to a financial burden, but also to an emotional and physical toll on my body.

13. After three failed inseminations performed by a reproductive endocrinologist, we did a cost-benefit analysis and decided to pursue in-vitro fertilization ("IVF") due to the increased success rates for women with endometriosis. Again, coverage was denied.

14. In five months, from my initial treatment until the completion of the IVF cycle, we spent $25,305.39 in out-of-pocket medical expenses.

15. During this time, on top of my regular job, I began tutoring high school students for extra hourly wages, and started a consulting company to attempt to earn enough money to support treatments. I was physically and emotionally exhausted, on top of the financial burden.

16. On December 24, 2013, the clinic called to say the IVF was a success and I was pregnant. Unfortunately, we soon found out that the IVF cycle had led to an ectopic pregnancy. For my own safety, I was given a type of chemotherapy to terminate the pregnancy. My body fought to keep the pregnancy and I was given a second dose of the chemotherapy, which ultimately sent me to the emergency room, unable to breathe due to a drug-induced lung condition called pleuritis.

17. The loss of hope we felt after this event, not only for the loss of our child, but also of the loss of my health, was devastating. I became impatient, withdrawn, and exhausted, and suffered a host of medical issues following the loss of this child.

18. Because Marianne's treatment would not be covered, however, I was forced to continue trying to conceive.

19. When I followed up with my doctor's financial coordinator, the coordinator made it very clear that if we submitted an insurance claim to pay for my next round of treatment, it would get denied. I made an appointment with my doctor to discuss this, and I was adamant that I wanted my doctor to do whatever she could do help us get coverage.

20. Based on a letter written by my doctor outlining the medical reasons I needed coverage, our insurance carrier finally extended coverage to me.

21. Sadly, after 6 more IVF cycles and 3 more miscarriages, we remained childless.

22. Since the first cycle, my health has deteriorated. I had walked into the clinic with one prior doctor, and now have 12 specialists managing my care. I have been to the emergency room 3 times, had 10 surgeries and 3 outpatient procedures, and received diagnoses for several new diseases and conditions.

23. I had one final IVF cycle covered by my insurance, and we decided it would be best if Marianne carried my embryo. It seemed like a perfect way for us both to be involved in the process, but our insurance denied the claim several times, until my doctor requested a peer-to-peer meeting and laid our entire story. Again, our insurance carrier finally took the initiative on its own and extended coverage for the proposed treatment.

24. Unfortunately, when my embryos were implanted in Marianne's womb, we experienced two more miscarriages, which necessitated three separate surgeries to remove the dead fetuses from Marianne's womb.

25. Because the New Jersey mandate prevents Marianne from accessing coverage for IVF herself, we must now pay out-of-pocket for both me and Marianne to do egg retrievals and testing of our embryos.

26. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: Montclair, New Jersey
July _8_, 2016

Erin E. Krupa

Erin Krupa

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

----------x

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

Plaintiffs,

- against -

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

Defendant.

----------x

No.: 2:16-cv-04637

DECLARATION OF SOL MEJIAS

I, Sol Mejias, declare, upon personal knowledge and under penalty of perjury, pursuant to 28 U.S.C. Section 1746, that the following is true and correct:

1. I am a Plaintiff in this case, and this declaration is offered in support of a motion for preliminary injunction.

2. I am 39 years old.

3. My wife Yanassa Hernandez and I live in North Bergen NJ, and were married in July of 2015.

4. I am a special education teacher at a public school in Jersey City, NJ.

5. About two years ago, Yanassa and I decided to start a family.

6. In 2015, I called her insurance carrier about infertility treatments, and I was told that any such treatments would not be covered because I had insufficient proof of having attempted to conceive with a male partner.

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

8. As a result, we decided to try intrauterine insemination ("IUI") treatments with my doctor.

9. These treatments are not covered by my insurance, because despite attempting to inseminate myself for over a year, 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.

10. I have completed one IUI cycle and am attempting another cycle in August of 2016. My wife and I must pay for these treatments out of pocket.

11. An IUI cycle is draining, involving daily clinic visits, blood work, ultrasounds, and I understand that IUI has a lower rate of success than in vitro fertilization treatment, which we cannot afford.

12. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: Montclair, New Jersey
July 14, 2016

Sol Mejias
Sol Mejias

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

----------x

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

Plaintiffs,

- against -

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

Defendant.

----------x

No.: 2:16-cv-04637

DECLARATION OF SARAH MILLS

I, Sarah Mills, declare, upon personal knowledge and under penalty of perjury, pursuant to 28 U.S.C. Section 1746, that the following is true and correct:

1. I am a Plaintiff in this case, and this declaration is offered in support of a motion for preliminary injunction.

2. I am 32 years old.

3. My partner Gloria Torres and I reside in Union City, NJ, and have been in a stable, dedicated relationship since 2010. Gloria is 50.

4. I am a New Jersey public school teacher.

5. Gloria and I recently decided to start a family, and that I would be the one to become pregnant.

6. I have been struggling with polycystic ovary syndrome ("PCOS") and anovulation for several years. Because these conditions lower your chance of conceiving, I booked my first consultation with an infertility specialist on March 30, 2016. At the consultation, the specialist confirmed that I would likely require infertility treatment in order to conceive.

7. On May 18, 2016, I received a letter from my insurance carrier, Horizon Blue Cross and Blue Shield of New Jersey ("HBCBS") denying coverage unless I could prove infertility by having unprotected sex with a man for two years.

8. My doctor informed me that my conditions, and the associated irregular, unpredictable ovulation cycle and need for thyroid level monitoring, meant that any at-home attempts at inseminating myself would be pointless.

9. During the week of May 23, 2016, I called HBCBS several times a day to inquire about the reason for the denial of coverage, but all I was told was that there was no medical necessity for the procedure and no further information was available.

10. I asked to speak with someone who had responsibility for making determinations about this type of coverage, and was called by a Mr. Paul Krentzlin on May 25, 2016. Krentzlin told me that unless I tried to conceive through regular unprotected sexual intercourse, I would not be able to show that infertility treatments were medically necessary. When I said 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.

11. My doctor was shocked when she heard that my coverage had been denied, stating that her patients are normally covered in this situation.

12. A second phone conference regarding my attempt to appeal the denial of my 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, my fertility specialist, and myself.

13. To start, my fertility doctor explained that I have PCOS and ovulation problems, which inhibit my ability to become pregnant. Dr. Napoli argued that the fact that contact with

sperm is necessary to determine fertility status, and I explained that I could not have contact with sperm given the nature of my relationship, and that at-home inseminations would not be effective given my erratic ovulation and menstruation.

14. Finally, I stated that I had spoken with a nurse with HBCBS who told me that failed at-home inseminations do not count towards an infertility diagnosis. I thought this to be very confusing, since Dr. Napoli stated that my infertility was due to lack of contact with sperm.

15. There was nothing else that my doctor or I could say to convince the committee that I needed these treatments, so the telephone conversation ended and I received a phone call the following day informing me that my appeal had again been denied.

16. During the June 15th phone conversation, Dr. Napoli said that to prove infertility, I need to have undergone 12 rounds of failed doctor-supervised IUI procedures. With the cost of sperm being around $1,800 for one round of insemination, plus the procedure cost, we could be $31,200 in debt before I am deemed infertile.

17. I am currently seeing a psychotherapist to deal with the psychological and emotional impacts of this situation, as well as the strain it places on my relationship with Gloria.

18. Being denied coverage for infertility treatment has caused me significant mental anguish and anxiety, and will likely impact my fertility success due to the added stress of attempting to secure coverage or being required to pay for infertility treatment out of pocket.

19. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: Union City, New Jersey
July 21, 2016

Sarah Mills