UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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

Plaintiffs,

No.: 2:16-cv-04637

- against -

The NEW JERSEY STATE HEALTH BENEFITS COMMISSION; the NEW JERSEY SCHOOL EMPLOYEES' HEALTH BENEFITS COMMISSION; the STATE HEALTH BENEFITS PROGRAM PLAN DESIGN COMMITTEE; the SCHOOL EMPLOYEES' HEALTH BENEFITS PROGRAM PLAN DESIGN COMMITTEE; CHRISTOPHER S. PORRINO, *in his official capacity as Attorney General of the State of New Jersey*; RICHARD J. BADOLATO, *in his personal capacity and official capacity as Commissioner of the New Jersey Department of Banking and Insurance and member of the State Health Benefits Program Plan Design Committee and School Employees' Health Benefits Program Plan Design Committee;* FLORENCE J. SHEPPARD, *in her official capacity as Director of the New Jersey Division of Pensions and Benefits*; SUSAN CULLITON, HOLLY GAENZLE, ROBERT M. CZECH, DUDLEY BURDGE, and DEBRA DAVIS, *in their personal capacities and official capacities as members of the State Health Benefits Commission*; SONIA RIVERA-PEREZ, THOMAS GALLAGHER, CARMEN GONZALEZ-GANNON, CYNTHIA JAHN, and SERENA DIMASO, *in their personal capacities and official capacities as members of the School Employees' Health Benefits Commission*; JOHN HUTCHISON, MICHAEL ZAYNOR, KEVIN LYONS, ROBERT LITTLE, PATRICK NOWLAN, SAM VIVATINNE, HETTY ROSENSTEIN, AARON FICHTNER, and ABDUR R. YASIN, *in their personal capacities and official capacities as members of the State Health Benefits Program Plan Design Committee*; JEAN PIERCE, *in her personal capacity and official capacity as member of the School Employees' Health Benefits Program Plan Design Committee*; WENDELL STEINHAUER and KEVIN KELLEHER, *in their personal capacities and*

official capacities as members of the School Employees' Health Benefits Commission and School Employees' Health Benefits Program Plan Design Committee; and BETH SCHERMERHORN and DAVID RIDOLFINO, *in their personal capacities and official capacities as members of the State Health Benefits Program Plan Design Committee and School Employees Health Benefits Program Plan Design Committee*,

Defendants.

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MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE THIRD AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Plaintiffs are New Jersey women in same-sex relationships seeking access to infertility healthcare on an equal basis with heterosexual couples in the State. Prior to May 1, 2017, New Jersey mandated that group health insurance carriers cover "medically necessary" infertility treatments. [1] However, in violation of the United States and New Jersey constitutional guarantees of due process and equal protection, the statutory mandate categorically denied coverage for infertility treatment to women in same-sex relationships who were unable to conceive by defining "infertility" as an inability to become pregnant after unprotected intercourse with a man. Motivated by the instant suit,[2] the New Jersey Legislature amended the law, effective May 1, 2017, to provide avenues by which women in same-sex relationships who are unable to conceive may qualify as "infertile" without heterosexual intercourse.[3] The amended mandate, however, continues to impose unacceptable burdens on same-sex couples' fundamental right of procreation – burdens to which heterosexual couples are not subject.

A heterosexual woman without an affirmative diagnosis of infertility can nonetheless prove she is infertile without the treatment or monitoring of a doctor simply by averring that she had intercourse for either a year or two years (depending on her age) without conceiving. A similarly situated woman in a same-sex relationship, however, is not permitted to demonstrate infertility averring that she underwent a comparable course of unsuccessful at-home self-insemination – colloquially known as the "turkey baster" method – which has a comparable success rate to unmonitored unprotected heterosexual intercourse and represents functionally the

[1] See N.J.S.A. § 17B:27-46.1X(a).
[2] *See* Lilo H. Stainton, *LGBT Advocates Hope Expanded Infertility Coverage is Just the Start*, NJ Spotlight (Sept. 14, 2016), http://www.njspotlight.com/stories/16/09/13/lgbt-advocates-hope-fix-to-expand-infertility-coverage-is-just-the-start/ ("On Thursday, committees in both houses approved mirror versions of the bill (A-1447/S-1398), a process that Democratic staff members said was fueled in part by the emergence of the lawsuit last month").
[3] *See* P.L. 2017, c. 48 ("Chapter 48").

same process within a woman's body.[4] Instead, unless she has an infertility-linked condition such as endometriosis or polycystic ovarian syndrome, a lesbian must submit to and pay for medical intervention in order to prove infertility under the amended mandate, at considerable financial (and at times psychological) cost. In lieu of engaging in heterosexual intercourse, a "female without a male partner" must show she failed to conceive after 6 or 12 (depending on her age) failed attempts at Intrauterine Insemination ("IUI") "under medical supervision." The amended mandate therefore does not cure the statute's constitutional infirmity, because it treats infertile women in same-sex relationships who do not have an associated medical condition allowing their doctors to identify them as infertile differently – and less well – than similarly situated women in heterosexual relationships.[5]

Plaintiffs seek damages and all other appropriate relief for the injuries they suffered as a result of the application of the original discriminatory mandate to their health benefit plans. As to the amended mandate, Plaintiffs also seek declaratory and injunctive relief regarding Defendants' continued failure to comport with constitutional due process and equal protection requirements.[6]

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[4] *See infra*, Factual Background § II.

[5] California, Connecticut, Massachusetts, Maryland, and New York all have infertility coverage mandate laws that either include an affirmative nondiscrimination provision or do not include intercourse or physician supervision requirements. *See* Cal. Health & Safety Code § 1374.55; Conn. Gen. Stat. Ann. § 38a-536; Mass. Gen. Laws Ann. ch. 175, § 47H; Md. Code Ann., Ins. § 15-810; N.Y. Insurance Law §§ 3221(k)(6) and 4303(s); 11 NYCRR §§ 52.17(a)(35) and 52.18(a)(10).

[6] *See, e.g., Khodara Envtl., Inc. ex rel. Eagle Envtl. L.P. v. Beckman*, 237 F.3d 186, 194–98 (3d Cir. 2001) ("Accordingly, we hold that Counts I, II and III of Eagle's Complaint – its facial attacks on the constitutionality of the 1996 Amendment – are moot in light of that law's repeal and replacement by the 2000 Amendment… Eagle's as-applied constitutional claims against the Airport Authority and its directors, however, require a different analysis… We do not believe that the passage of the 2000 Amendment has mooted these claims. Unlike Eagle's facial constitutional challenges, which sought only prospective declaratory and injunctive relief, the due process claims set out in Count IV sought damages against the Authority and its members. A case is saved from mootness if a viable claim for damages exists… On remand, Eagle should be afforded the opportunity to amend its pleadings so that the District Court may have the opportunity to address any claims regarding the 2000 Amendment.") (internal citations and quotation marks omitted) (emphasis supplied).

PROCEDURAL BACKGROUND

Plaintiffs note that despite Defendants' aggressive, pervasive, and unsupported claims that Plaintiffs' initial complaint and the amendments that have followed contain "multiple deficiencies" that Plaintiffs have somehow refused to contend with or cure – an oft-repeated refrain with the obvious goal of characterizing Plaintiffs' prosecution of this action as somehow dilatory, frivolous, or overreaching, in complete contrast to reality – the fact remains that since its inception, Plaintiffs have never once moved to amend the Complaint.

Plaintiffs filed suit challenging the constitutionality of New Jersey's insurance mandate on August 1, 2016. (Doc. 1). After the State Legislature passed Chapter 48 in response to Plaintiffs' lawsuit, Governor Chris Christie signed Chapter 48 into law on May 1, 2017. Previously, three different bills had been introduced since the 2012-2013 session to address the facially discriminatory mandate, but only after Plaintiffs filed their lawsuit did the amendment finally pass. Plaintiffs gave serious consideration to whether, given the amendment, their job was done and it was time to close the litigation. However, because the mandate in its amended form continues to discriminate against women in same-sex relationships in the exercise of their fundamental right to procreation as compared to the similarly situated women with male partners, Plaintiffs opted to continue pursuing their suit. On June 12, 2017, Plaintiffs filed their Third Amended Complaint ("TAC"), addressing the constitutional infirmities of the amended mandate. (Doc. 51). The TAC also added as Defendants the State Health Benefits Program ("SHBP") and School Employees Health Benefits Program ("SEHBP") Plan Design Committees ("PDCs"), as well as the individual members of each PDC. *Id.*

FACTUAL BACKGROUND

For a thorough recitation of the facts of this case prior to the amendment of the New Jersey infertility mandate, please see Doc. 29-1 at 2-11.

I. The Parties

Plaintiffs are New Jersey educators working at public schools and a state college who receive health care benefits through the SHBP and SEHBP (the "Programs"). As recently summarized by the New Jersey Superior Court, Defendants the State Health Benefits Commission ("SHBC") and School Employees Health Benefits Commission ("SEHBC") (together, the "Commissions") "administer the …SHBP… and …SEHBP…, respectively." *Commc'ns Workers of Am., AFL-CIO, v. State, Dep't of Treasury, Div. of Pensions & Benefits*, 421 N.J. Super. 75, 80, 22 A.3d 170, 173 (Law. Div. 2011).

The SHBP Act creates the SHBC to include five members, including "the State Treasurer" and "the Commissioner of Banking and Insurance," while SEHBP Act creates the SEHBC to include nine members, including "the State Treasurer and the Commissioner of the Department of Banking and Insurance serving *ex officio*." N.J. Stat. Ann. §§ 52:14-17.27, 17.46.3; *see also Commc'ns Workers of Am.*, 421 N.J. Super. at 84 n.7 (same). The Programs are administered in the Treasury Department "through the Division of Pensions and Benefits, and the Director of the Division of Pensions and Benefits shall be the secretary" of both the SHBC and the SEHBC, as representative of the State Treasurer. N.J. Stat. Ann. §§ 52:14-17.27, 17.46.4; *see also New Jersey Educ. Ass'n v. Beaver*, No. A-3221-09T3, 2011 WL 1485278, at *1 (N.J. Super. Ct. App. Div. Apr. 20, 2011) (same). Finally, "[t]he Attorney General shall be the legal advisor of" both the SHBC and the SEHBC. N.J. Stat. Ann. §§ 52:14-17.27, 17.46.4.

In 2011, the state legislature enacted Chapter 78, making numerous and significant changes to public employee pension and health care benefits. *See Berg v. Christie*, 436 N.J.Super. 220, 240, 93 A.3d 387 (App. Div. 2014). As part of this overhaul, the Legislature provided the SHBP and SEHBP PDCs "with the exclusive authority to design state health benefits plans – a power previously possessed by the" SHBC and SEHBC. *Rosenstein v. State, Dep't of Treasury, Div. of Pensions & Benefits*, 438 N.J. Super. 491, 494–95, 105 A.3d 1140, 1141 (App. Div. 2014). However, as Defendants, note:

> Although the PDCs have 'sole discretion' over the creation, modification, or termination of the … plan options required by law to be provided to Program participants and may modify Programs' plan design components, they are unable to implement any aspect of plan design without action being taken by the Commissions, which are charged with setting premium rates and entering contracts for the coverages determined by the PDCs.

Defendants' memorandum in support of their Motion to Dismiss the Third Amended Complaint (Doc. 52-1) ("Defts.' Memo") at 24. The remaining Defendants are the individual members of the SHBC, SEHBC, SHBP PDC, and SEHBP PDC.

II. Infertility Diagnosis

Although many women with infertility may be diagnosed as infertile without semen exposure through diagnosis with an associated condition like endometriosis or polycystic ovarian syndrome, some percentage of women, like Plaintiffs Marianne Krupa and Sol Mejias, do not have any such associated diagnoses and must be diagnosed as infertile through semen exposure. "About a third of infertility problems are due to female infertility, and another third are due to male infertility. In the remaining cases, infertility affects both partners or the cause is unclear." *Infertility in Women In-Depth Report*, NY TIMES, http://www.nytimes.com/health/guides/disease/infertility-in-women/print.html (last visited July 20, 2017); *see also Infertility*, PLANNED PARENTHOOD,

https://www.plannedparenthood.org/learn/pregnancy/infertility (last visited July 20, 2017) ("Sometimes there's no known reason for infertility – this is called unexplained infertility"). Sol's infertility, for example, was identified by way of a year of self-administered IUIs using semen donated by a male friend. *See* TAC at ¶¶ 78-81.

Intracervical insemination ("ICI"), also known as the "turkey baster" method, is the easiest and most common insemination technique and can be used in the home for self-insemination without medical practitioner assistance. *See Artificial Insemination,* WIKIPEDIA, https://en.wikipedia.org/wiki/Artificial_insemination (last visited July 21, 2017). Further, ICI is just as effective as the unsupervised sexual intercourse required of women with male partners. *Compare, e.g.*, https://www.coparents.com/insemination/home-insemination-guide.php ("If you choose intracervical insemination (ICI), often referred to as the 'turkey baster method'; the method of injecting semen into the cervix with a needleless syringe, the success rates is usually between 10 to 15 percent per menstrual cycle") *with* http://fertility.ivf1.com/blog/iui-timed-intercourse ("A recent study has shown that the chance of pregnancy following intercourse without ovulation prediction is approximately 13 percent").

III. Pre-Amendment Mandate

As Defendants note, since 2001, New Jersey has mandated that hospital service corporations, medical service corporations, health service corporations, health maintenance organizations, and group health insurance plans "provide coverage for medically necessary expenses incurred in the diagnosis and treatment of infertility." Defts.' Memo at 10 (*citing* Chapter 236 at 1). The pre-amendment mandate defined infertility as follows:

> the disease or 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 live birth.

N.J. Stat. Ann. § 17B:27-46.1x(a) (through July 20, 2017). As a result, even where her doctor was able to diagnose her as infertile without semen exposure, the only way a New Jersey woman in a same-sex relationship could plausibly demonstrate that she was "infertile" in order to qualify for coverage under the mandate was by showing that although she was able to conceive, she could not carry a pregnancy to live birth. Women in same-sex relationships who were unable to conceive had no way to qualify for coverage at all.

Importantly, at all relevant times, the NJ DIRECT health plan Member Handbook ("Handbook") applicable to those (like Plaintiffs) enrolled in the SHBP or SEHBP, the content of which Defendants concede is controlled by the Commissions and PDCs, and therefore by the individual members thereof (collectively, the "individual capacity Defendants"),[7] has unequivocally and explicitly stated that the Programs "will follow the New Jersey State Mandate for Infertility." Thus, as the State concedes, the individual-capacity Defendants as a group are directly responsible for the application of the terms of the pre-amendment infertility mandate to Plaintiffs' attempts to secure coverage for infertility treatment from the Programs via administrator Horizon. As a result of the individual capacity Defendants' application of the pre-amendment mandate to coverage provided by the SHBP and SEHBP, and Plaintiffs' resulting inability to qualify for infertility treatment coverage, Plaintiffs have suffered extreme delay in their attempts to start families, endless bureaucratic red tape, serious emotional distress, and/or significant out of pocket medical and related expenses.

IV. Amended Mandate

[7] *See infra*, Argument § III.

As noted, on May 1, 2017, Governor Christie signed the amended mandate, an amendment to the mandate, which both a) broadened the applicable definition of "infertility" such that women in same-sex relationships had two additional avenues by which they might potentially qualify as statutorily infertile effective on July 20, 2017, although it continued to treat similarly situated women in heterosexual and same-sex relationships differently, and b) included the applicability of the amended mandate to the Programs – previously contained only in the Handbook – in the text of the statute itself, effective immediately. Defts.' Memo at 11-12. The mandate is now applicable to Plaintiffs' health benefits under the Programs as a function of both the Handbook, for which the individual capacity Defendants, the Commissions, and the PDCs are responsible, and the statute, for which all Defendants other than the individual capacity Defendants are responsible.[8]

The amended mandate defines "infertility" as follows:

> the disease or condition that results in the abnormal function of the reproductive system, as determined pursuant to American Society for Reproductive Medicine practice guidelines by a physician who is Board Certified or Board Eligible in Reproductive Endocrinology and Infertility or in Obstetrics and Gynecology or that the patient has met one of the following conditions: (1) A male is unable to impregnate a female; (2) A female with a male partner and under 35 years of age is unable to conceive after 12 months of unprotected sexual intercourse; (3) A female with a male partner and 35 years of age and over is unable to conceive after six months of unprotected sexual intercourse; (4) A female without a male partner and under 35 years of age who is unable to conceive after 12 failed attempts of intrauterine insemination under medical supervision; (5) A female without a male partner and over 35 years of age who is unable to conceive after six failed attempts of intrauterine insemination under medical supervision, (6) Partners are unable to conceive as a result of involuntary medical sterility; (7) A person is unable to carry a pregnancy to live birth; or (8) A previous determination of infertility pursuant to this section.

N.J. Stat. Ann. § 17B:27-46.1x(a) (after July 20, 2017). As a result, women in same-sex relationships who are unable to conceive can now qualify as statutorily "infertile," but only if

[8] And for which, although Defendants have thus far remained mum on the issue, even they must forcibly concede *some* state official would appropriately be held responsible. *See infra*, Argument § II(B).

either a) they have a condition that allows their doctor to affirmatively diagnose them as such without semen exposure, or b) they undergo – and pay for – six months or one year of medically supervised IUI treatments, depending on the woman's age. Given the approximate cost of around $2,000 for an IUI cycle,[9] the amended mandate therefore requires women in same-sex relationships who must qualify for treatment through semen exposure to pay approximately $12,000 to $24,000 in order to access the mandate's protections, unlike women with male partners.

STANDARD OF REVIEW

In reviewing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a district court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (internal citation omitted). The notice pleading standard of Fed. R. Civ. P. 8(a)(2) does not require "detailed factual allegations." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). It requires only that a plaintiff plead sufficient facts to "give the defendant fair notice of what the … claim is and the grounds upon which it rests." *Id.* (*quoting Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

A court may not dismiss a complaint merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits. *Phillips*, 515 F.3d at 231 (*citing Twombly*, 550 U.S. at 556). The pleading standard requires only that the complaint "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S.Ct.. 1937, 1949 (2009) (*citing Twombly*, 550 U.S. at 570). "The 'plausibility determination' will be a 'context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Fowler v.*

[9] *See* TAC at ¶ 38.

UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009) (*quoting Iqbal*, 129 S.Ct.. at 1950). The court must deny a motion to dismiss "'if, in view of what is alleged, it can reasonably be conceived that the plaintiffs … could, upon a trial, establish a case which would entitle them to … relief.'" *Phillips*, 515 F.3d at 233 (*quoting Twombly*, 550 U.S. at 563 n.8).

By contrast, a federal court may dismiss a claim under Fed. R. Civ. P. 12(b)(1) only if the claims are "insubstantial on their face." *Hagans v. Lavine*, 415 U.S. 528, 542 (1974) (*quoting Engineers v. Chicago, R.I. & P.R. Co*., 382 U.S. 423, 428 (1966)). In fact, the Third Circuit has noted that "dismissal for lack of jurisdiction is not appropriate merely because the legal theory alleged is probably false." *Kulick v. Pocono Downs Racing Ass'n*, 816 F.2d 895, 899 (3d Cir. 1987). "The threshold to withstand a motion to dismiss under Fed.R.Civ.P. 12(b)(1) is thus lower than that required to withstand a Rule 12(b)(6) motion." *Lunderstadt v. Colafella*, 885 F.2d 66, 70 (3d Cir. 1989).

In deciding motions to dismiss, a court may consider the allegations in the complaint, exhibits attached to the complaint, matters of public record, and other documents that form the basis of a claim. *Lum v. Bank of Am*., 361 F.3d 217, 221 n.3 (3d Cir. 2004); *see also Watterson v. Page*, 987 F.2d 1, 3-4 (1st Cir. 1993) (affirming the district court's consideration of certain facts set out in public documents plaintiffs attached to their opposition to a motion to dismiss and treating those documents as part of the pleadings).

ARGUMENT

I. Both the Pre-Amendment and Amended Infertility Mandates Violate the Fourteenth Amendment to the Federal Constitution and Article 1, ¶ 1 of the New Jersey Constitution

Because all forms of the infertility mandate have facially discriminated between similarly situated women in same-sex and heterosexual relationships with regard to their fundamental right

to procreate and without justification, the statute was and remains unconstitutional under both federal and state law.

A. The Infertility Mandate Violates the Due Process Clause by Restricting Same-Sex Couples' Fundamental Right of Procreation

Under both federal and New Jersey constitutional law, procreation is a fundamental right. It is a well-established principal of constitutional law that the due process principles protect citizens against laws that unjustifiably 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 v. Hodges*, 135 S.Ct. 2584, 2597-98 (2015) (*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.

The Constitution "promise[s] ... that there is a realm of personal liberty which the government may not enter." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992). The result is a right of "personal privacy, or a guarantee of certain areas or zones of privacy [.]" *Roe v. Wade*, 410 U.S. 113, 152 (1973). "The rights included within that zone are deemed 'fundamental' and include activities relating to marriage, procreation, contraception, family relationships and child rearing and education." *Alexander v. Whitman*, 114 F.3d 1392, 1403 (3d Cir. 1997) (internal citation and quotation marks omitted). "They therefore involve the most intimate and personal choices a person can make in his or her lifetime. They include choices central to the liberty protected by the Fourteenth Amendment." *Id.; see also Obergefell* 135 S.Ct. at 2590, 2599 ("choices concerning contraception, family relationships, procreation, and childrearing… are protected by the Constitution").

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); *see also Roe*, 410 U.S. at 154 (citations omitted) (holding that where fundamental rights or interests are involved, a state regulation limiting these fundamental rights can be justified only by a compelling state interest and legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. *Casey*, 505 U.S. at 929 (Blackmun, J., dissenting) (*citing Griswold*, 381 U.S. at 485 (state limitations on a fundamental right such as the right of privacy are permissible only if they survive strict constitutional scrutiny); *see also Kramer v. Union Free School District No. 15*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969). Defendants make no attempt to argue that the mandate's discrimination is justified by *any* state interest, let alone that it is narrowly tailored to achieve an important or compelling one.

The mandate also runs afoul of the federal Due Process Clause because it not only impinges on the exercise of a fundamental right, but limits a particular group's ability to effectuate that right relative to the majority. *See Carey v. Population Servs., Int'l*, 431 U.S. 678, 688 (1977). As noted in *Obergefell*, 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," their constitutional rights are abridged. *Id.* at 2604; *see also* in *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (the

federal constitution protects "personal decisions relating to marriage, procreation, contraception, family relationships, [and] child rearing" and such protection must be extended regardless of sexual orientation). This straight-forward, intuitive principle was echoed once again by the Supreme Court just this term in *Pavan*, 582 U.S. at ___ (2017), which found that the right of same-sex parents to have both their names on their child's birth certificate is protected by the Fourteenth Amendment.

Procreation is similarly a well-established, fundamental right under the New Jersey Constitution. If anything, "[w]ith regard to a woman's right to privacy and equal protection guarantees," the State Constitution's protection of fundamental rights is "more expansive" than that of the Federal Constitution and "incorporates within its terms the right of privacy and its concomitant rights, including a woman's right to make certain fundamental choices." *Sojourner A. ex rel. Y.A. v. New Jersey Dep't of Human Servs*., 350 N.J. Super. 152, 167, 794 A.2d 822, 831 (App. Div. 2002), *aff'd sub nom. Sojourner A. v. New Jersey Dep't of Human Servs*., 177 N.J. 318, 828 A.2d 306 (2003); *Planned Parenthood of Central New Jersey v. Farmer*, 165 N.J. 609, 629, 762 A.2d 620 (2000).

In *Farmer*, the plaintiffs challenged a state statute conditioning a minor's right to obtain an abortion on parental notification unless a judicial waiver was obtained, and the New Jersey Supreme Court held that the statute violated the New Jersey Constitution because the State failed to demonstrate a "real and significant relationship" between the statutory classification and the asserted State interest of protecting immature minors, fostering the family, and preserving parents' rights to rear their children. 165 N.J. at 612-13. In so holding, the Court found that "a [woman's] right to control her reproductive decisions is among the most fundamental rights she possesses…" *Id*. at 613; *see also J.B. v. M.B.*, 170 N.J. 9, 23-24, 783 A.2d 707 (2001)

(recognizing that the right of procreation is a fundamental right protected by both the Federal and State Constitutions) (*citing In re Baby M.*, 109 N.J. 396, 447, 537 A.2d 1227 (1988)). Clearly, therefore, a woman's privacy right to procreation is fundamental and constitutionally protected under New Jersey law.

Defendants do not deny that procreation is a fundamental right, or that access to fertility treatments implicates that fundamental right. Their sole relevant argument is that because the "particularized" right to infertility treatment coverage is not "clearly established law," the individual Defendants are entitled to qualified immunity. Defts.' Memo at 30-32. The *Carey* Court, however, spoke to this very argument directly, explaining that limitations on access to contraception are suspect "not because there is an independent fundamental 'right of access to contraceptives,' but because such access is essential to the exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold*, *Eisenstadt v. Baird*, and *Roe v. Wade*." 431 U.S. at 688-89. For infertile women, access to infertility treatments is no less basic than access to contraception to personal choices about reproduction, and therefore is constitutionally protected under federal and state law.

The fact that New Jersey is not required to provide infertility benefits in order to aid its citizens in realizing their fundamental right to procreate and parent children is irrelevant to the due process analysis, because "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).[10] Moreover, even an indirect burden on a

[10] *See also Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 605-06 (1967) ("the theory that [a benefit] which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has

fundamental right calls for heightened scrutiny. *See Bullock v. Carter*, 405 U.S. 134, 144 (1972) (although there is no fundamental right to run for office, applying heightened scrutiny to Texas statute requiring high filing fees from candidates because of statute's indirect impact on fundamental right to vote, tending to make it easier for those with money to vote for candidates of their choosing and more difficult for the economically disadvantaged to do so); *Lubin v. Panish*, 415 U.S. 709, 717-18 (1974) (same conclusion re: similar California statute).[11]

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been uniformly rejected"); *Zobel v. Williams*, 457 U.S. 55, 60 (1982) ("When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment."); *Black United Fund of New Jersey, Inc. v. Kean*, 593 F. Supp. 1567, 1575 (D.N.J. 1984), *rev'd on other grounds*, 763 F.2d 156 (3d Cir. 1985) ("As the Supreme Court has recently reaffirmed, when a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Access to the state payroll deduction mechanism, and the license to conduct a concomitant solicitation campaign, are clearly benefits which the State of New Jersey has conferred upon the United Way, but denied to the BUF/NJ. The statute which authorizes this differential treatment, according to the Governor's claims, as well as the Governor's actions themselves, offend the equal protection clause because they do not rationally further a legitimate state purpose.") (internal citations and quotation marks omitted) (*citing Zobel*, 457 U.S. at 60); *Sanchez v. Dep't of Human Servs*., 314 N.J. Super. 11, 25, 713 A.2d 1056, 1064 (App. Div. 1998) ("When benefits are distributed unequally, the distinctions between citizens are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment"); *WHS Realty Co. v. Town of Morristown*, 323 N.J. Super. 553, 562-63, 733 A.2d 1206, 1210 (App. Div. 1999) ("A municipality is not mandated to provide for municipal garbage removal. A municipality "*may* provide for the ... collection or disposal of solid waste, and may establish and operate a system therefor...." N.J.S.A. 40:66-1a (emphasis added)… However, once the service is provided by a municipality, there can be no invidious discrimination in limiting the service to certain classifications. There is a violation of equal protection of the laws unless the service is available to all persons in like circumstances upon the same terms and conditions. Persons situated alike shall be treated alike.") (internal citations and quotation marks omitted) (*citing Boulevard Apartments, Inc. v. Mayor of Lodi*, 110 N.J.Super. 406, 411, 265 A.2d 838 (App.Div.), *certif. denied*, 57 N.J. 124, 270 A.2d 27 (1970); *Reid Dev. Corp. v. Parsippany-Troy Hills Township*, 10 N.J. 229, 233, 89 A.2d 667 (1952)); *Gratz v. Bollinger*, 539 U.S. 244, 302 (2003) ("The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race") (emphasis supplied) (*citing United States v. Jefferson Cty. Bd. of Educ*., 372 F.2d 836, 875 (5th Cir. 1966), *on reh'g*, 380 F.2d 385 (5th Cir. 1967)); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny") (emphasis supplied); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that [fundamental rights] may be infringed by the denial of or placing of conditions upon a benefit or privilege."); *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (Equal Protection Clause implicated by "state laws that, by classifying residents according to the time they established residence, resulted in the unequal distribution of rights and benefits among otherwise qualified bona fide residents.").

[11] *See also State v. Bulu*, 234 N.J. Super. 331, 344, 560 A.2d 1250, 1256 (App. Div. 1989) (noting that in the context of federal constitutional rights, "[w]hen the legislation regulates a semi-suspect classification or affects a fundamental right in an indirect manner it is subject to intermediate scrutiny. In this situation the legislation must serve an important governmental objective and be substantially related to the achievement of that objective.") (emphasis supplied) (*citing Barone v. Dep't of Human Servs., Div. of Med. Assistance & Health Servs*., 107 N.J. 355, 365, 526 A.2d 1055, 1060 (1987)); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (applying strict scrutiny where,

Accordingly, Defendants have failed to show there is a narrowly tailored, compelling state interest justifying the mandate's placing of unnecessary additional burdens on women in same-sex relationships in attempting to realize their fundamental right to procreate on an equal basis with women with male partners in the State.

B. The Mandate Violates Same-Sex Couples' Equal Protection Rights, in its Original Form and As Amended

The Equal Protection Clause of the Fourteenth Amendment dictates that no State "deny to any person within its jurisdiction the equal protection of the laws," essentially a directive that all persons similarly situated should be treated alike. *City of Cleburne, Tex. v. Cleburne Living Ctr*., 473 U.S. 432, 439-41 (1985) (internal citations omitted). As stated in *Romer v. Evans*, "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." (internal quotations marks and citation omitted). 517 U.S. 620, 633-34 (1996) (internal quotations marks and citation omitted). "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Id*.

"If a law neither burdens a fundamental right nor targets a suspect class, [courts] will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Id.* at 632. Where a law implicates a fundamental right or discriminates against a suspect group, it is subjected to strict scrutiny and sustained only if suitably tailored to serve a compelling state interest. *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Graham v. Richardson*, 403 U.S. 365 (1971).

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just as the infertility mandate provides an affirmative advantage to women in heterosexual relationships in exercising their fundamental right to procreate, "the Ohio laws before us give the two old, established [political] parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate.").

Although the equal protection analysis under the New Jersey Constitution differs somewhat from federal standards, the New Jersey Supreme Court has recognized that the two approaches are 'substantially the same' and 'will often yield the same result.'" *Sojourner A.*, 350 N.J. Super. 152 at 167 (internal citations omitted). If anything, the New Jersey Constitution is more protective of citizens' equal protection rights than is the federal Constitution. *See Barone*, 107 N.J. at 368-69 (internal citations omitted) (noting that there "may be circumstances in which the State Constitution provides greater protections. Even under more traditional approaches, New Jersey has always required a real and substantial relationship between the classification and the governmental purpose which it purportedly serves.").

5. **The Mandate Was and Is Subject to Heightened Scrutiny Because It Discriminates Against Women in Same-Sex Relationships**

At this point in the development of constitutional jurisprudence, it is well recognized that sexual orientation is considered a suspect classification, requiring any statute that discriminates on this basis to be subjected to heightened scrutiny. *See Romer*, 517 U.S. at 620; *Windsor*, 133 S.Ct. at 2675; *Obergefell*, 135 S.Ct. at 2584. Following Supreme Court precedent, lower courts around the country have applied heightened scrutiny to equal protection claims involving sexual orientation. *See SmithKline Beecham Corp. v. Abbott Labs*., 740 F.3d 471, 481 (9th Cir. 2014) ("*Windso*r established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review"); *Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir. 2014), *cert. denied*, 135 S.Ct. 316 (2014).[12] "Notably absent from *Windsor*'s review of DOMA

[12] *See also Whitewood v. Wolf*, 992 F. Supp. 2d 410, 430 (M.D. Pa. 2014) ("Having concluded that classifications based on sexual orientation are quasi-suspect, we proceed to apply intermediate scrutiny to the Marriage Laws in consideration of their constitutionality."); *Waters v. Ricketts*, 48 F. Supp. 3d 1271, 1287 (D. Neb.), *aff'd*, 798 F.3d 682 (8th Cir. 2015) ("Under existing precedent, Nebraska's same-sex marriage ban is at least deserving of heightened scrutiny because the challenged amendment proceeds "along suspect lines," as either gender-based or gender-stereotype-based discrimination."); *cf. Evancho v. Pine-Richland Sch. Dist*., No. CV 2:16-01537, 2017 WL 770619, at *13 (W.D. Pa. Feb. 27, 2017) (intermediate scrutiny applies to classifications based on transgender status).

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).

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, 133 S.Ct. at 2675 (*citing Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *City of Cleburne*, 473 U.S. at 440-41). 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*, 992 F. Supp. 2d at 430; *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); *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).

Defendants argue, in essence, that because the text of the infertility mandate does not explicitly mention and exclude solely women in same-sex relationships from its protections in exactly so many words, it is therefore impossible for the statute to discriminate against them or run afoul of equal protection principles. As this Court has observed, however, "[c]ontrary to [Defendants'] suggestion that a policy is facially neutral if the precise name of the protected class does not appear in the text of the policy, courts have also recognized that a policy that classifies on the basis of a neutral classification that is a proxy for a protected category may also, under certain circumstances, be facially discriminatory." *Bowers v. Nat'l Collegiate Athletic Ass'n*, 563 F. Supp. 2d 508, 517-18 (D.N.J. 2008) (*citing McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992)). As the Third Circuit has explained:

> Consistent with the focus on language rather than a showing of discriminatory animus in evaluating facially discriminatory classification claims, courts have developed a "proxy" theory for such claims, recognizing that a regulation or policy cannot "use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination, such as classifications based on gray hair (as a proxy for age) or service dogs or wheelchairs (as proxies for handicapped status).

Cmty. Servs., Inc. v. Wind Gap Mun. Auth., 421 F.3d 170, 177 (3d Cir. 2005).

Under such a proxy theory, a policy will not be found to be facially discriminatory if the neutral classification merely "correlate[s]" with the protected category. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993). In distinguishing *Hazen*

Paper, the Third Circuit explained in *Erie Cty. Retirees Ass'n v. Cty. of Erie, Pa*., 220 F.3d 193, 211 (3d Cir. 2000), "Medicare eligibility does not merely correlate with age, as does years of service. Rather, …Medicare eligibility follows ineluctably upon attaining age 65." This is true despite the fact that there are individuals under the age of 65 who qualify for Medicare.

In the exact same way that Medicare eligibility follows ineluctably upon attaining age 65, not having a male partner follows ineluctably upon entering a lesbian relationship. In the exact same way that the fact that some individuals under the age of 65 qualify for Medicare did not change the facially discriminatory nature of the policy at issue in *Erie Cty Retirees Ass'n*, the fact that some heterosexual women are also denied the benefits of the infertility mandate does not change the fact that it discriminates against women in same-sex relationships on its face.

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.[13]

6. **The Pre-Amendment Mandate Was Facially Discriminatory**

As noted, prior to May 1, 2017, although the mandate protected any woman who could not carry a pregnancy to term, it provided no way that women in same-sex relationships who were unable to conceive could qualify as "infertile" and receive the benefits of the statute. The fact that *some* women in same-sex relationships could qualify as infertile (i.e. those who could conceive but could not carry their pregnancies to term) does not save the mandate, and Defendants provide no explanation or authority for the proposition that it does. Instead, as the Supreme Court has observed, equal protection principles are "essentially a direction that all

[13] A separate reason to apply heightened scrutiny is that the mandate makes classifications based on gender as well as sexual orientation. *See* Doc. 38 at 17-18.

persons similarly situated should be treated alike." *City of Cleburne*, 473 U.S. at 439. As between similarly situated women in heterosexual and same-sex relationships – in this case, those who are unable to conceive – the pre-amendment mandate was clearly discriminatory on its face.

7. **The Amended Mandate Is Facially Discriminatory**

As further noted, since May 1, 2017, the mandate has protected a) any woman who cannot carry a pregnancy to term and b) any woman with a medical diagnosis of infertility. Although this amendment grants protection to a greater percentage of women in same-sex relationships than did the prior version, it continues to facially discriminate as between similarly situated women in heterosexual and same-sex relationships. Women in heterosexual relationships who are unable to conceive and do not have a medical diagnosis of infertility need only engage in heterosexual intercourse for a requisite period. Although the comparably-effective option of requiring an equal period of attempted self-insemination exists (*see supra*, Factual Background § II), similarly situated women in same-sex relationships are instead required to pay between approximately $12,000 and $24,000[14] for a requisite number of medically-supervised IUI cycles in order to qualify as infertile and receive the benefits of the mandate.

The amended mandate is no less a violation of Equal Protection than the original mandate simply because fewer same-sex couples may be discriminated against. *See, e.g., Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 712 (9th Cir. 1997) ("we can find no authority, and appellees have cited none, for a *de minimis* exception to the Equal Protection Clause. The Supreme Court has held that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal

[14] *See* TAC at ¶ 38.

treatment under the strictest judicial scrutiny. We conclude that there is no *de minimis* exception to the Equal Protection Clause. Race discrimination is never a 'trifle.'") (internal citation omitted) (*citing Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995)); *see also Garden State Equal. v. Dow*, 434 N.J. Super. 163, 215–16, 82 A.3d 336, 367 (Law. Div. 2013) ("*Lewis* counsels that committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples. Not a sizeable amount of the benefits, but all of the same benefits. Every day that the State does not allow same-sex couples to marry, plaintiffs are being harmed, in violation of the clear directive of *Lewis*.") (internal citations and quotation marks omitted); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that the loss of First Amendment freedoms, even for a short period of time, "unquestionably constitutes irreparable injury")); *Califano v. Goldfarb*, 430 U.S. 199, 208 (1977) ("But under § 402(f)(1)(D) female insureds received less protection for their spouses solely because of their sex. Mrs. Goldfarb worked and paid social security taxes for 25 years at the same rate as her male colleagues, but because of § 402(f)(1)(D) the insurance protection received by the males was broader than hers. Plainly then § 402(f)(1)(D) disadvantages women contributors to the social security system as compared to similarly situated men.").

Defendants would be hard pressed to argue that limiting same-sex couples' access to group health insurance for infertility treatments serves any rational – much less compelling – State purpose, and indeed, as noted, they fail to argue that either form of the mandate serves a compelling state interest. New Jersey's infertility mandate continues to discriminate against women in same-sex relationships notwithstanding its amendment, and the fact that the New Jersey legislature unsuccessfully attempted to correct its discriminatory law does not insulate it

from liability.[15] Defendants attempt to argue otherwise – which contains zero citations to caselaw whatsoever (*see* Defts.' Memo at 15-17) – is utterly unavailing.

8. **The Programs Were and Are Facially Discriminatory**

Defendants further argue that because Plaintiffs are covered by the Programs, because the applicability of the mandate to the Programs was not contained in the statute itself until May 17, 2017, and because they claim the amended mandate is nondiscriminatory, Plaintiffs cannot allege they have suffered any discrimination. In reality, however, Plaintiffs have at all times pled and maintained the clearly discriminatory nature of the benefits provided by the Programs as outlined in the Handbook, first and foremost through the clear, explicit, unqualified, and unequivocal statement therein that the Programs "will follow the infertility mandate."[16] Despite Defendants' wholly inaccurate claims to the contrary, Defendants' attempts to characterize the Handbook's paraphrasing of the mandate's discriminatory language as some kind of alternative, materially different, nondiscriminatory standard are completely unsupported by the very language

[15] *See, e.g., Ragan v. Dukes*, 253 N.J. Super. 246, 250, 601 A.2d 739, 741 (App. Div. 1992) ("The federal courts directly applied the *Bendix* holding to the New Jersey tolling statute in *Robinson v. Visual Packaging, Inc*., 705 F.Supp. 216 (D.N.J. 1989). There, the District Court held "that New Jersey's statute is indistinguishable for constitutional purposes from the Ohio statute in *Bendix*, and that under *Bendix* N.J.Stat.Ann. § 2A:14-22 is unconstitutional under the Commerce Clause of the Constitution." 705 F.Supp. at 219 (footnote omitted). The District Court reasoned that while the 1984 amendment to the tolling statute eliminated the 'forced licensure' infirmity of the pre-amended statute, the statute nonetheless still placed a burden on foreign corporations that the *Bendix* court held unconstitutional… Careful analysis of the foregoing cases and the principles discussed therein compels the conclusion that the amended tolling statute, N.J.S.A. 2A:14-22," is unconstitutional); *Hawai'i v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 1011673, at *4, *16 (D. Haw. Mar. 15, 2017) (finding plaintiffs had strong likelihood of success in showing that the second version of Trump's "travel ban" (issued in "response to the Ninth Circuit's finding in *Washington v. Trump*," 847 F.3d 1151 (9th Cir. 2017), that plaintiffs had a strong likelihood of success in showing the initial travel ban was unconstitutional) remained unconstitutional despite defendants' claim it "clarifies and narrows the scope of Executive action regarding immigration, extinguishes the need for emergent consideration, and eliminates the potential constitutional concerns identified by the Ninth Circuit."); *cf. Garden State Equality*, 434 N.J. Super. at 204 ("The court … holds that the State engaged in state action when it created a statutory structure that, due to a change in federal law, now disadvantages civil union partners in New Jersey. It is that action – creating a statutory scheme that does not offer same-sex couples the right to civil marriage – that has been challenged by plaintiffs, and it will be analyzed for its validity under equal protection principles below.").

[16] Plaintiffs certainly agree with Defendants that the Court "may and should consider" the Handbook as "integral to or explicitly relied upon in the complaint." Defts.' Memo at 29 (*citing Lum*, 361 F.3d at 222 n.3).

Defendants themselves quote, which is discriminatory on its face (most obviously through its reference to "the female partner," which necessarily assumes the other partner is male). Defts.' Memo at 28. They are also explicitly belied by the fact that Plaintiffs themselves allege they have repeatedly been denied coverage by administrator Horizon, which has both implicitly and explicitly predicated those denials on the infertility mandate itself. No amount of vociferous attorney argument changes the Handbook's full-throated adoption of the mandate in absolutely explicit terms.

II. Plaintiffs' Claims Are Not Barred by the Eleventh Amendment

C. The Commissions and PDCs Are Not Arms of the State

In *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989), the Third Circuit explained that, in determining whether immunity extends to a state entity, courts should consider: (1) whether the money that would pay any judgment against the entity would come from the State; (2) the status of the entity under state law, including its treatment under the law and whether the entity is separately incorporated, whether the entity can sue or be sued in its own right, or is immune from state taxation; and (3) the entity's degree of autonomy from the State. The "most important" of the factors is "whether the judgment would be paid by state funds." *Id*. at 664 (holding that the New Jersey Transit Corporation is not an arm of the State, in large part because it was not wholly funded by the State).

Although Plaintiffs believe that, as described below, the relevant statutory language is quite clear, should the Court disagree and find this to be a "close case," then Third Circuit precedent dictates that evidence beyond the mere statutory language is required and summary disposition of the Eleventh Amendment issue is inappropriate. *Blake v. Kline*, 612 F.2d 718, 726 (3d Cir. 1979). Finally, Defendants attempt to argue, without citation, that because in response to

Defendants' Motion to Dismiss the Second Amended Complaint, Plaintiffs conceded that based on the facts at their disposal at that time, sovereign immunity attached to the Commissions, they are now barred from arguing that the Commissions (and apparently by implication, the PDCs) do not constitute arms of the state for purposes of the Eleventh Amendment, but this argument is unavailing. *See* Defts.' Memo at 5, 19. Defendants do not identify what rule or doctrine would supposedly function to prevent Plaintiffs from changing a position that was never relied on by a court, within a single action and in good faith, based on the discovery of additional facts, presumably because no such rule or doctrine exists.

4. The SHBP and SEHBP Acts Insulate the State from Legal Responsibility for Adverse Judgments Against the Commissions and PDCs

As the Third Circuit observed in *Fitchik*, the conclusion that the funding factor is most important "is supported by the Supreme Court's identification of the amendment's central goal as the prevention of federal court judgments that must be paid out of the state's treasury." 873 F.3d at 659-60 (*citing Edelman v. Jordan*, 415 U.S. 651 (1974)). Although Defendants cite a laundry list of state statutory provisions in addressing the funding factor, tellingly, they never address the provision in the SHBP and SEHBP Acts that speaks clearly and directly to the core *Fitchik* issue of whether the entity in question is "wholly funded by the state": "No obligation of the State shall be incurred under [the SHBP or SEHBP Acts] except within the limits of available appropriations." N.J. Stat. Ann. § 52:14-17.33. This provision disclaims any obligation on New Jersey's part to pay money judgments entered against any of the entities created under the relevant statutes. In fact, as Defendants themselves admit, the Commissions hold funds collected from employers and employees in trust "for the payment of claims and expenses of the Programs," and even the administrative costs of the Programs themselves are partially funded by local employers. Defts.' Memo at 21 (emphasis added). Thus, not only are the Commissions and

PDCs not wholly funded by the state, just like New Jersey Transit Corporation in *Fitchik*, but Defendants themselves have conceded as much.

5. The Commissions and PDCs are Independent Entities under State Law that Have Been Sued in Their Own Right

Again, contrary to Defendants' claims, the Commissions and PDCs are independent entities under state law that may be – and have been – sued in their own right. These entities have repeatedly been parties to suits in New Jersey courts outside the context of judicial review of final agency action. *See, e.g., Commc'ns Workers of Am., AFL-CIO, v. State, Dep't of Treasury, Div. of Pensions & Benefits*, 421 N.J. Super. 75, 22 A.3d 170 (Law. Div. 2011) (SHBC as defendant); *Bd. of Educ. of Newark v. New Jersey Dep't of Treasury, Div. of Pensions*, 279 N.J. Super. 489, 653 A.2d 589 (App. Div. 1995), *aff'd*, 145 N.J. 269, 678 A.2d 660 (1996) (same; plaintiff is also a state-affiliated entity); *Teamsters Local 97 v. State*, 434 N.J. Super. 393, 84 A.3d 989 (App. Div. 2014) (both SHBC and SEHBC as defendants).

In fact, the New Jersey Superior Court, Appellate Division has entertained a suit brought by two members (including the co-chair) of the SHBP PDC, on behalf of the interests of the PDC itself and against the State of New Jersey. *Rosenstein*, 438 N.J. Super. at 491. Although the PDC was not an official party to this case, it nevertheless demonstrates that the PDCs are independent entities under state law that may well have legal interests that conflict with the Division of Pensions and Benefits (and therefore the State of New Jersey itself).

6. The Commissions and PDCs Retain Significant Autonomy from State Control

As described *supra*, under state law, both the Commissions and the PDCs are intentionally established as independent entities with memberships reflecting both state employer and union/employee interests. The SEHBC is equally weighted between state and private

interests, and the SHBC and both PDCs – the bodies with "the sole discretion to create, modify, or terminate any plan or component" – are made up of more union representatives than representatives of the state. *Teamsters Local 97*, 434 N.J. Super. at 416-17. The fact that the entities with the greatest control over the benefits offered to members of the SHBC and SEHBC are controlled by union representatives demonstrates that at a minimum, significant disputed issues of fact exist and this is a "close case" as described in *Blake*, and thus is not subject to summary dismissal on this issue. 612 F.2d at 726.

D. **Plaintiffs' Claims Against State Officials Are Appropriate Under the Eleventh Amendment**

An individual may sue a state official in his or her official capacity to remedy an ongoing violation of federal law. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989) (*citing Ex parte Young*, 209 U.S. 123, 159-60 (1908)). Where the connection between state officials and federal constitutional claims "is highly attenuated," the state officials may not "be conscripted as proxies for the state to attach liability to them." *1st Westco Corp. v. School Dist. of Phila.*, 6 F.3d 108, 112 (3d Cir. 1993). Just like the New Jersey Transit Corporation in in *Fitchik*, although the Commissions and PDCs are not "arms of the state" for sovereign immunity purposes, they are state-created and state affiliated entities, and as outlined *supra*, Factual Background § I, all state officials named as Defendants are closely involved in their operation. Accordingly, a far cry from "conscripted proxies," these Defendants play central roles in the functioning of the Commissions, and thus directly share direct responsibility for the coverage extended by the Programs.

Finally, Plaintiffs again note that in their prior briefing, Defendants attempt to twist the doctrine of *Ex parte Young* past its breaking point, just as in *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 832 F.3d 389 (3d Cir. 2016). In that case, the Third Circuit noted that

various New Jersey officials named as defendants (the "New Jersey Enjoined Parties") were "subject to suit under the *Ex parte Young* exception to Eleventh Amendment immunity, which "permit[s] the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Id.* at 395 n.3 (*quoting Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984)). In a passage as applicable to this case as it was to that one, the Court explained, prior to rehearing *en banc*:

> The New Jersey Enjoined Parties are not arguing that other state officials should have been named instead of them; they are arguing that *no* state official can be sued regarding the [applicable statute]. We disagree. The [plaintiffs] named the state officials who are most closely connected to the [applicable statute.] …The [plaintiffs] did not name officials who bear no connection whatsoever to the [applicable statute]. *See Young*, 209 U.S. at 156, 28 S.Ct. 441 (explaining that plaintiffs cannot name just any state official, such as a "state superintendent of schools" simply "to test the constitutionality" of a law). *See also Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir.1988) (noting that a suit against the governor would be appropriate when challenging a "self-enforcing statute" because "[t]he plaintiff would have been barred from challenging the statute by the eleventh amendment unless it could name the Governor as a defendant").

Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 799 F.3d 259, 264 n.3 (3d Cir. 2015), *reh'g en banc granted, opinion vacated on other grounds* (Oct. 14, 2015), *on reh'g en banc*, 832 F.3d 389 (3d Cir. 2016).

Despite arguing that Plaintiffs' claims cannot be maintained against *any* Defendant, in citing *Rode*, 845 F.2d at 1209, for the proposition that where a plaintiff has failed to name the state officials most directly responsible for the administration or enforcement of a given statute, the *Young* doctrine functions to bar suit against the officials with more attenuated connections, because naming the most relevant officials instead will allow the plaintiff to challenge the statute's constitutionality, Defendants implicitly acknowledge that their *Ex parte Young*-based arguments are predicated on the idea that Plaintiffs claims would be appropriately maintained against some different state defendant(s). *See* Doc. 34-1 at 17. Accordingly, based on the

foregoing, including this implicit admission that the Eleventh Amendment cannot function to insulate the infertility mandate itself against any and all constitutional challenge whatsoever, the Defendant state officials are also appropriate Defendants in this case.

III. Plaintiffs Have Standing to Sue All Individual-Capacity Defendants

As a preliminary matter, Plaintiffs note that because all their claims are predicated on either the United States or New Jersey Constitution, the doctrine of administrative exhaustion does not apply to this case. *See, e.g., Gray v. Serruto Bldrs., Inc*., 110 N.J.Super. 297, 306, 265 A.2d 404 (Ch.Div.1970) (discrimination suit based on New Jersey Constitution maintainable where Plaintiff ignores available administrative procedures); *Steffel v. Thompson*, 415 U.S. 452, 472 (1974) (no exhaustion of state judicial or administrative remedies required when federal claim is premised on 42 U.S.C. § 1983).[17] Furthermore, because the denial of Plaintiffs' claims for fertility coverage is premised openly and directly on the infertility mandate's definition of "infertility," administrative exhaustion would be futile, and thus is also not required here on that independent basis. *See, e.g., Wiesenfeld v. Sec'y of Health, Educ. & Welfare*, 367 F. Supp. 981, 985 (D.N.J. 1973), *aff'd sub nom. Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

Notwithstanding their tortured logic to the contrary, information and documents referred to in and included with Defendants' briefing itself confirm that in attributing decisions made about the operation of the Programs to the Defendant members of the Commissions and PDCs (collectively, the "individual-capacity Defendants"), Plaintiffs have accurately and more then adequately alleged injury-in-fact directly and proximately attributable to these individuals. The state itself acknowledges that the Programs are governed by, *inter alia*, the Handbook. *See* Doc. 34-1 at 6. The state further acknowledges that the Handbook unequivocally states a) that the

[17] *See also Monroe v. Pape*, 365 U.S. 167 (1961); *McNeese v. Board of Education*, 373 U.S. 668 (1963); *Damico v. California*, 389 U.S. 416 (1967); *King v. Smith*, 392 U.S. 309 (1968); *Houghton v. Shafer*, 392 U.S. 639 (1968); *Wilwording v. Swenson*, 404 U.S. 249 (1971); *Preiser v. Rodriguez*, 411 U.S. 475 (1973) (all same).

Programs will follow the infertility mandate, and b) that the Programs "publish and annually update" the Handbook. *Id.* at 6, 22. Defendants do not contest that the respective Commission Members are responsible for the operation of the Programs. *Id.* at 4.[18] As the state acknowledges, the handbook governs "services to be covered and those which are excluded" applicable to decisions made by Horizon Blue Cross and Blue Shield of New Jersey in its function as administrator of the Programs. *Id.* at 7. Finally, as Defendants explicitly concede:

> Although the PDCs have 'sole discretion' over the creation, modification, or termination of the … plan options required by law to be provided to Program participants and may modify Programs' plan design components, they are unable to implement any aspect of plan design without action being taken by the Commissions, which are charged with setting premium rates and entering contracts for the coverages determined by the PDCs.

Defts.' Memo at 24. As such, the individual-capacity Defendants as a group are directly responsible for the application of the terms of the infertility mandate to Plaintiffs' attempts to secure coverage for infertility treatment from the Programs via administrator Horizon.

Defendants also argue that because the PDCs' meeting minutes are allegedly available to the public and the TAC "fails to identify the meetings" in which the PDC members "took any affirmative action with respect to the Infertility Mandate or coverage of infertility treatment under the Programs," Plaintiffs have failed to state a claim against the PDC members. In fact, however, a review of the Commissions' Plan Design Committee Archives demonstrates that not only are minutes not available for every meeting identified therein, but the PDCs also retreated to confidential "executive session" during the majority of these meetings "to discuss matters falling within the attorney client privilege, and/or matters in which litigation is pending or anticipated,

[18] *See also Micheletti v. State Health Benefits Comm'n*, 389 N.J. Super. 510, 520, 913 A.2d 842, 848–49 (App. Div. 2007) ("the State Health Benefits Program… for which the SHBC has exclusive authority under *N.J.S.A.* 52:14–17.29(A)(2) to set the terms of coverage for State employees"); *McDermott v. Sch. Employees' Health Benefits Comm'n*, No. A-1464-14T1, 2016 WL 1048691, at *2 (N.J. Super. Ct. App. Div. Mar. 17, 2016) ("Benefits under contracts purchased or authorized by the SEHBP may be subject to such limitations, exclusions, or waiting periods as the [C]ommission finds to be necessary or desirable").

pursuant to N.J.S.A. 10:4-12(7)." *See, e.g.*, SHBP PDC December 14, 2012 meeting agenda, *available at* http://www.state.nj.us/treasury/pensions/shbp-pd-1212.shtml. Plaintiffs therefore do not have access to a complete record of the PDCs' activities, but have nevertheless more than adequately pled these entities responsibility for and control over the application of the infertility mandate's provisions to the benefits extended to SHBP and SEHBP members, as explicitly outlined in the SHBP and SEHBP Acts.

"Unequal treatment is a type of personal injury that has long been recognized as judicially cognizable, and virtually every circuit court has reaffirmed – as has the Supreme Court – that a discriminatory classification is itself a penalty, and thus qualifies as an actual injury for standing purposes, where a citizen's right to equal treatment is at stake." *Hassan v. City of N.Y.*, 804 F.3d 277, 289–90 (3d Cir. 2015), *as amended* (Feb. 2, 2016) (internal citations and quotation marks omitted) (*citing Heckler v. Mathews*, 465 U.S. 728, 738 (1984); *Saenz v. Roe*, 526 U.S. 489 (1999)); *see also Ne. Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.") (*citing Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Turner v. Fouche*, 396 U.S. 346, 362 (1970)); *Monterey Mech. Co.*, 125 F.3d at 712)). Furthermore, the extreme delay, endless bureaucratic red tape, serious emotional distress, and significant out of pocket medical and related expenses represent additional injuries-in-fact that are directly and proximately attributable to the

individual-capacity Defendants' ongoing inclusion of the infertility mandate in the Handbook. *See* Doc. 29-1 at 2-11.

IV. The State Defendants are Not Entitled to Qualified Immunity

"Qualified immunity is an affirmative defense in actions pleaded under the Constitution and laws of the United States, including Section 1983… designed to shield government officials from actions insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Williams v. New Jersey Div. of State Police*, No. CIV. 10-3478 DRD, 2012 WL 1900602, at *13 (D.N.J. May 24, 2012) (*citing Montanez v. Thompson*, 603 F.3d 243, 249-50 (3d Cir. 2010)). "[T]he defense of qualified immunity is appropriate to claims arising under the NJCRA," *id.* at *15, and this Court interprets § 1983 and the NJCRA analogously. *See, e.g., Pettit v. New Jersey*, No. CIV. A. 09-CV-3735 N, 2011 WL 1325614, at *3 (D.N.J. Mar. 30, 2011). The qualified immunity defense is not available, however, with regard to Plaintiffs' claim for a declaratory judgment pursuant to 28 U.S.C. § 2201.

Notwithstanding Defendants' argument to the contrary, a showing that a constitutional right is "clearly established" does not require a plaintiff to demonstrate that "the very action in question has previously been held unlawful," but simply "that in the light of pre-existing law the unlawfulness [is] apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Defendant's citation to *White v. Pauly*, 137 S. Ct. 548, 552 (2017), which concerned the qualified immunity analysis in the Fourth Amendment context, does not dictate otherwise, as the Fourth Amendment

> reasonableness inquiry requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. The analysis requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing

> governmental interests at stake. The balancing must be conducted in light of the facts that were available to the officer. It is, in other words, a 'totality of the circumstances' analysis.

Curley v. Klem, 499 F.3d 199, 207 (3d Cir. 2007) (internal citations and quotation marks omitted) (*citing Graham v. Connor*, 490 U.S. 386, 396 (1989); *Maryland v. Garrison*, 480 U.S. 79, 85 (1987). The Court in *United States v. Lanier*, 520 U.S. 259 (1997) explained that "general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though0 the very action in question has not previously been held unlawful[.]" *Id.* at 271 (internal citations and quotation marks omitted).

Here, Defendants were on notice that under federal and State law, procreation is a fundamental liberty and the denial of benefits to same-sex couples without a compelling interest violated due process and equal protection principles. *See Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) ("in an obvious case, these standards [referred to in *White*] can "clearly establish" the answer, even without a body of relevant case law"); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier*, we expressly rejected a requirement that previous cases be 'fundamentally similar.' Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding."); *Kopec v. Tate*, 361 F.3d 772, 785 (3d Cir. 2004) ("the salient question is whether the state of the law [at the time of the alleged § 1983 violation] gave [defendants] fair warning that their alleged treatment of [plaintiffs] was unconstitutional.") (emphasis in original) (internal citations and quotation marks omitted) (*citing Hope*, 536 U.S. at 741); *cf. Saucier v. Katz*, 533 U.S. 194, 205 (2001) ("The concern of the immunity inquiry is to

acknowledge that reasonable mistakes can be made as to the legal constraints on particular [state] conduct. It is sometimes difficult for an [official] to determine how the relevant legal doctrine… will apply to the factual situation the [official] confronts. An [official] might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular [action] is legal in those circumstances. If the [official]'s mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.").

D. **The Right of Same-Sex Couples to Equal Benefits is Well Established Under New Jersey Law**

Same-sex couples' right to receive benefits from the state equal to those provided to heterosexual couples has been an established principle of New Jersey constitutional law for over a decade. Eleven years ago, the Supreme Court of New Jersey noted:

> Today, in New Jersey, it is just as unlawful to discriminate against individuals on the basis of sexual orientation as it is to discriminate against them on the basis of race, national origin, age, or sex. *See* N.J.S.A. 10:5-4. Over the last three decades, through judicial decisions and comprehensive legislative enactments, this State, step by step, has protected gay and lesbian individuals from discrimination on account of their sexual orientation.

Lewis, 188 N.J. at 444. The court held

> that denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee of Article I, Paragraph 1 [of the New Jersey Constitution]. To comply with this constitutional mandate, the Legislature must either amend the [relevant] statutes to include same-sex couples or create a parallel statutory structure, which will provide for, on equal terms, the rights and benefits enjoyed and burdens and obligations borne by [heterosexual] couples.

Id. at 423.

Noting that the New Jersey Constitution "provides our citizens with greater rights to privacy, … and equal protection than those available under the United State Constitution, the court further held that "in light of plaintiffs' strong interest in rights and benefits comparable to

those" granted to married heterosexual couples, New Jersey had "failed to show a public need for disparate treatment" sufficient to justify denying those rights and benefits to same-sex couples. *Id.* at 457.

Particularly given that, as discussed in detail below, the New Jersey Constitution has been interpreted to require that heterosexual and same-sex couples have access to all the same benefits for over a decade, the unlawfulness of mandating infertility coverage for heterosexual couples while requiring same-sex couples to pay for such treatment out of pocket is objectively clear.

E. The Infertility Mandate Violates Well-Established Rights Under Federal Constitutional Law

Although the process has been more gradual in federal jurisprudence, equal treatment on the basis of sexual orientation is now also a well-established right under the United States Constitution. Legislation that unjustifiably discriminates on the basis of sexual orientation was first recognized as violating the Equal Protection Clause of the Fourteenth Amendment by the United States Supreme Court in *Romer*, 517 U.S. at 620. Writing for the majority, Justice Anthony Kennedy noted – in words compellingly evocative of the case at hand – that "disqualification of a class of persons from the right to seek specific protection from the law" has no rational relationship to any legitimate state interest. *Id.* at 633.

In *Windsor*, 133 S. Ct. at 2675, the Court applied a heightened scrutiny analysis to claims that the federal Defense of Marriage Act ("DOMA") violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Once again writing for the majority, Justice Kennedy evaluated the legitimacy of the state interests underlying DOMA and ruled them inadequate to justify the law, noting that DOMA's "differentiation demeans the [same-sex] couple, whose moral and sexual choices the Constitution protects[.]" *Id.* at 2694. Finally, the

Court ruled unequivocally in *Obergefell*, 135 S. Ct. at 2584, that laws pursuant to which "[s]ame-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right" violate the Fourteenth Amendment because they "burden the liberty of same-sex couples, and they abridge central precepts of equality," noting that "choices concerning contraception, family relationships, procreation, and childrearing… are protected by the Constitution." *Id.* at 2590, 2599; *see also Pavan*, 582 U.S. at ___.

Accordingly, it is a well-established principle of federal constitutional law that where a statute or policy implicates a fundamental right recognized by the Supreme Court, its comportment with the Due Process Clause is appropriately evaluated under heightened constitutional scrutiny, and thus that Defendants must provide a sufficiently compelling and adequately tailored justification for excluding Plaintiffs from the mandate's protection.

F. **It is Well Established Under Federal Constitutional Law that the Infertility Mandate Must At Least Be Rationally Related to a Legitimate Government Interest**

Even if the infertility mandate's comportment with the Fourteenth Amendment were appropriately reviewed under the rational basis standard, the mandate would nevertheless fail to pass constitutional muster, and it is clearly a well-established principle of federal constitutional law for qualified immunity purposes that a state must have a rational basis to discriminate between citizens based on their sexual orientation. *See, e.g.*, *Gill v. Devlin*, 867 F. Supp. 2d 849, 857 (N.D. Tex. 2012) ("After *Romer* and *Lawrence*, federal courts began to conclude that discrimination on the basis of sexual orientation that is not rationally related to a legitimate governmental interest violates the Equal Protection Clause. …The Court concludes that in 2009,

…the unconstitutionality of sexual-orientation discrimination lacking a rational relationship to a legitimate governmental aim was clearly established.").[19]

Plaintiffs do not contest that cost-related interests may provide a rational basis for laws differentiating between particular groups of citizens or implicating due process of law, but Defendants must further demonstrate that such interests represent a rational basis on which the particular, specific distinction made in the statute being challenged may be predicated. *See, e.g.*, *Eisenstadt*, 405 U.S. at 443, 454 (finding no rational basis to distinguish between married and unmarried individuals regarding possession of contraceptives because state interests cited by defendant could not "reasonably be regarded as legislative aims" of the challenged statute, based on lack of rational relationship between statute and proffered interests); *Heffner v. Murphy*, 745 F.3d 56, 79 (3d Cir.), *cert. denied*, 135 S.Ct.. 220 (2014) (under the rational basis test, "a statute withstands a substantive due process challenge if the state identifies a legitimate state interest that the legislature could rationally conclude was served by the statute").

In addition to the explicitly discriminatory text of the infertility mandate itself, which even now requires same-sex couples to pay for medical treatment not required of similarly situated heterosexual couples, the Handbook also discriminates against same-sex couples explicitly and on its face by providing multiple avenues by which couples with a single "female partner" who are unable to conceive may demonstrate infertility, but zero avenues by which couples with multiple female partners may do the same. Because at-home self-insemination is as

[19] *See also Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Nabozny v. Podlesny*, 92 F.3d 446, 456 (7th Cir. 1996); *Pratt v. Indian River Cent. Sch. Dist*., 803 F.Supp.2d 135, 153 n.12 (N.D.N.Y. 2011); *Massey v. Banning Unified Sch. Dist*., 256 F.Supp.2d 1090, 1094 (C.D.Cal. 2003); *Park v. Trs. of Purdue Univ*., No. 4:09–CV–087–JVB, 2011 WL 1361409, at *7 (N.D.Ind. Apr. 11, 2011); *Praylor v. Partridge*, No. 7:03–CV–247–BD, 2005 WL 1528690, at *3 (N.D.Tex. June 28, 2005); *cf. Milligan–Hitt v. Bd. of Trs. of Sheridan Cnty. Sch. Dist. No. 2*, 523 F.3d 1219, 1233–34 (10th Cir.2008) (holding unconstitutionality of sexual-orientation discrimination not clearly established before *Lawrence* in June 2003); *see generally* 2 L. Camille Hebert, Employee Privacy Law § 9:5 (2011); Todd A. DeMitchess et al., *Sexual Orientation and the Public School Teacher*, 19 B.U. Pub. Int. L.J. 65, 82–97 (2009).

effective as unsupervised sexual intercourse, requiring women in same-sex relationships to pay up to approximately $24,000 for physician supervision in order to qualify as infertile, when no such supervisory requirement applies to heterosexual couples' attempts to conceive through unmonitored sexual intercourse constitutes arbitrary and irrational discrimination in implementing a requirement that "persons must demonstrate that they are infertile in order to obtain coverage for that specific disease state." Doc. 34-1 at 29. As such, although cost-related interests may provide a rational basis for requiring citizens to make such a demonstration, they do *not* provide a rational basis – or any basis whatsoever – for the statute and Handbook's distinction between heterosexual couples and women in same-sex relationships in limiting how such a demonstration may be made.

As noted, although the rational basis test is a modest standard, a state nevertheless must demonstrate a logical connection between the provisions of the statute in question and the state interest or interests being proffered to justify them. *See Moreno*, 413 U.S. at 534 (finding Food Stamp Act amendment violated the Equal Protection Clause by differentiating between related and unrelated individuals in defining the term "household" for purposes of assistance eligibility, because distinction had no rational or logical relationship to any proffered state interest). Here, as in *Eisenstadt*, "[i]n each case the evil, as perceived by the State" (here, prohibitive costs associated with mandating infertility coverage without proof of infertility) "would be identical," whether the individuals receiving coverage without such proof were heterosexual or in same-sex relationships, "and the underinclusion [is therefore] invidious." 405 U.S. at 454. As the Court observed:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens

> the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Id. (*citing Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring) (identifying the selective application of legislation to a small group as violative of the equal protection clause even under rational basis review)).[20]

Thus, even when reviewed merely for a rational basis, the infertility mandate fails to satisfy the requirements of the Equal Protection or Due Process Clauses, and it is well established that laws making distinctions between citizens must be rationally related to a legitimate government interest.

CONCLUSION

Accordingly, based on the foregoing, Plaintiffs respectfully request that Defendants' Motion to Dismiss the Third Amended Complaint be denied in its entirety.

Dated: New York, New York

[20] *See also WHS Realty Co*., 323 N.J. Super. at 562 ("The parties agree that, since the Town's ordinance does not implicate a suspect class or fundamental right, the rational basis test applies. Therefore, plaintiff has the burden of demonstrating that classification by the ordinance lacks a rational basis… However, a governmental agency may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives ... are not legitimate state interests.") (internal citations and quotation marks omitted) (*citing Taxpayers Ass'n of Weymouth Township, Inc. v. Weymouth Township*, 80 N.J. 6, 40, 364 A.2d 1016 (1976); *Doe v. Poritz*, 142 N.J. 1, 92, 662 A.2d 367 (1995)); *City of Cleburne*, 473 U.S. at 450 (finding zoning ordinance excluding group homes for the mentally retarded from permitted uses in zoning district fails rational basis test where "[t]he City never justifies its apparent view that other people can live under such "crowded" conditions when mentally retarded persons cannot. In the courts below the city also urged that the ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit. So, too, the expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home such as 201 Featherston for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.") (internal citations and quotation marks omitted). *Romer*, 517 U.S. at 632-33 ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority… A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

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Respectfully submitted,

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