UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

----------x

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.

----------x

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

Grace Cathryn Cretcher
Bruce E. Menken
John A. Beranbaum
BERANBAUM MENKEN LLP
80 Pine Street, 33rd Floor
New York, New York 10005
Phone: (212) 509-1616
Fax: (212) 509-8088

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

PROCEDURAL BACKGROUND 2

FACTUAL BACKGROUND 3

I. The Parties 3

II. Infertility Diagnosis 4

III. Pre-Amendment Mandate 5

IV. Amended Mandate 6

STANDARD OF REVIEW 8

ARGUMENT 9

I. Both the Pre-Amendment and Amended Infertility Mandates Violate the Fourteenth Amendment to the Federal Constitution and Article 1, ¶ 1 of the N.J. Constitution 9

A. The Infertility Mandate Violates the Due Process Clause by Restricting Same-Sex Couples' Fundamental Right of Procreation 9

B. The Mandate Violates Same-Sex Couples' Equal Protection Rights, in its Original Form and As Amended 13

II. Plaintiffs' Claims Against the Commissions and PDCs Are Not Barred by the Eleventh Amendment 20

A. The SHBP and SEHBP Acts Insulate the State from Legal Responsibility for Adverse Judgments Against the Commissions and PDCs 21

B. The Commissions and PDCs are Independent Entities under State Law that Have Been Sued in Their Own Right 22

C. The Commissions and PDCs Retain Significant Autonomy from State Control 22

III. Plaintiffs Have Standing to Sue All Individual Capacity Defendants 23

IV. The State Defendants are Not Entitled to Qualified Immunity 25

A. The Right of Same-Sex Couples to Equal Benefits is Well Established Under New Jersey Law 26

B. The Infertility Mandate Violates Well-Established Rights Under Federal Constitutional Law 27

C. It is Well Established Under Federal Constitutional Law that the Infertility Mandate Must At Least Be Rationally Related to a Legitimate Government Interest 28

CONCLUSION 30

TABLE OF AUTHORITIES

Federal Cases

Alexander v. Whitman, 114 F.3d 1392 (3d Cir. 1997) 9
Anderson v. Creighton, 483 U.S. 635 (1987) 25
Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009) 8
Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898 (1986) 13
Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014) 19
Bassett v. Snyder, 951 F.Supp.2d 939 (E.D. Mich. 2013) 20
Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 8
Black United Fund of New Jersey, Inc. v. Kean, 593 F. Supp. 1567 (D.N.J. 1984) 12
Blake v. Kline, 612 F.2d 718 (3d Cir. 1979) 21, 23
Bowen v. Gilliard, 483 U.S. 587 (1987) 20
Bowers v. Nat'l Collegiate Athletic Ass'n, 563 F. Supp. 2d 508 (D.N.J. 2008) 15
Brosseau v. Haugen, 543 U.S. 194 (2004) 26
Bullock v. Carter, 405 U.S. 134 (1972) 13
Califano v. Goldfarb, 430 U.S. 199 (1977) 18
Carey v. Population Servs., Int'l, 431 U.S. 678 (1977) 10, 11, 12
City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432 (1985) 13, 14, 20, 30
Cmty. Servs., Inc. v. Wind Gap Mun. Auth., 421 F.3d 170 (3d Cir. 2005) 15
Conley v. Gibson, 355 U.S. 41 (1957) 8
Curley v. Klem, 499 F.3d 199 (3d Cir. 2007) 26
De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014) 20
Diaz v. Brewer, 656 F.3d 1008 (9th Cir. 2011) 12
Edelman v. Jordan, 415 U.S. 651 (1974) 21
Eisenstadt v. Baird, 405 U.S. 438 (1972) 9, 12, 29, 30
Elrod v. Burns, 427 U.S. 347 (1976) 18
Engineers v. Chicago, R.I. & P.R. Co., 382 U.S. 423 (1966) 8
Erie Cty. Retirees Ass'n v. Cty. of Erie, Pa., 220 F.3d 193 (3d Cir. 2000) 15, 16
Express Agency v. New York, 336 U.S. 106 (1949) 30
Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F.2d 655 (3d Cir. 1989) 20, 21
Gill v. Devlin, 867 F. Supp. 2d 849 (N.D. Tex. 2012) 29
Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968 (N.D. Cal. 2012) 20
Graham v. Connor, 490 U.S. 386 (1989) 26
Graham v. Richardson, 403 U.S. 365 (1971) 14
Gratz v. Bollinger, 539 U.S. 244 (2003) 12
Griswold v. Connecticut, 381 U.S. 479 (1965) 9, 10, 12
Hagans v. Lavine, 415 U.S. 528 (1974) 8
Hassan v. City of N.Y., 804 F.3d 277 (3d Cir. 2015), *as amended* (Feb. 2, 2016) 24
Hawai'i v. Trump, No. CV 17-00050 DKW-KSC, 2017 WL 1011673 (D. Haw. Mar. 15,

2017) 18
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 15
Heckler v. Mathews, 465 U.S. 728 (1984) 24
Hope v. Pelzer, 536 U.S. 730 (2002) 26
Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004) 29
Keyishian v. Bd. of Regents of Univ. of State of N. Y., 385 U.S. 589 (1967) 12
Khodara Envtl., Inc. ex rel. Eagle Envtl. L.P. v. Beckman, 237 F.3d 186 (3d Cir. 2001) 2
Kopec v. Tate, 361 F.3d 772 (3d Cir. 2004) 26
Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969) 10
Kulick v. Pocono Downs Racing Ass'n, 816 F.2d 895 (3d Cir. 1987) 8
Lawrence v. Texas, 539 U.S. 558 (2003) 10, 29
Lubin v. Panish, 415 U.S. 709 (1974) 13
Lum v. Bank of Am., 361 F.3d 217 (3d Cir. 2004) 9
Lunderstadt v. Colafella, 885 F.2d 66 (3d Cir. 1989) 9
Maryland v. Garrison, 480 U.S. 79 (1987) 26
Massey v. Banning Unified Sch. Dist., 256 F.Supp.2d 1090 (C.D.Cal. 2003) 29
McLaughlin v. Florida, 379 U.S. 184 (1964) 14
McWright v. Alexander, 982 F.2d 222 (7th Cir. 1992) 15
Milligan-Hitt v. Bd. of Trs. of Sheridan Cnty. Sch. Dist. No. 2, 523 F.3d 1219 (10th Cir. 2008) 29
Montanez v. Thompson, 603 F.3d 243 (3d Cir. 2010) 25
Monterey Mech. Co. v. Wilson, 125 F.3d 702 (9th Cir. 1997) 17
Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) 29
Ne. Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656 (1993) 25
Obergefell v. Hodges, 135 S.Ct. 2584 (2015) 9, 10, 19, 28
Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) 12
Park v. Trs. of Purdue Univ., No. 4:09–CV–087–JVB, 2011 WL 1361409 (N.D.Ind. Apr. 11, 2011) 29
Pavan v. Smith, 582 U.S. at ___ (2017) 10, 28
Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294 (D. Conn. 2012) 20
Pettit v. New Jersey, No. CIV. A. 09-CV-3735 N, 2011 WL 1325614 (D.N.J. Mar. 30, 2011) .. 25
Phillips v. County of Allegheny, 515 F.3d 224 (3d Cir. 2008) 8
Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) 9, 10
Pratt v. Indian River Cent. Sch. Dist., 803 F.Supp.2d 135 (N.D.N.Y. 2011) 29
Praylor v. Partridge, No. 7:03–CV–247–BD, 2005 WL 1528690 (N.D.Tex. June 28, 2005) 29
Roe v. Wade, 410 U.S. 113 (1973) 9, 10, 12
Romer v. Evans, 517 U.S. 620 (1996) ..... *passim*
Saenz v. Roe, 526 U.S. 489 (1999) 25
Saucier v. Katz, 533 U.S. 194 (2001) 26
Sherbert v. Verner, 374 U.S. 398 (1963) 12

SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014)..... 19
U.S. Department of Agriculture v. Moreno, 413 U.S. 528 (1973)..... 12, 29
United States v. Lanier, 520 U.S. 259 (1997)..... 26
United States v. Windsor, 133 S.Ct. 2675 (2013)..... 19, 20, 28
Washington v. Glucksberg, 521 U.S. 702 (1997)..... 19
Waters v. Ricketts, 48 F. Supp. 3d 1271 (D. Neb.), *aff'd*, 798 F.3d 682 (8th Cir. 2015)..... 19
White v. Pauly, 137 S. Ct. 548 (2017)..... 26
Whitewood v. Wolf, 992 F. Supp. 2d 410 (M.D. Pa. 2014)..... 19, 20
Williams v. New Jersey Div. of State Police, No. CIV. 10-3478 DRD, 2012 WL 1900602 (D.N.J. May 24, 2012)..... 25
Williams v. Rhodes, 393 U.S. 23 (1968)..... 13
Windsor v. United States, 699 F.3d 169 (2d Cir. 2012)..... 20
Zablocki v. Redhail, 434 U.S. 374 (1978)..... 10
Zobel v. Williams, 457 U.S. 55 (1982)..... 12

State Cases

Barone v. Dep't of Human Servs., Div. of Med. Assistance & Health Servs., 107 N.J. 355, 526 A.2d 1055 (1987)..... 13, 14
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)..... 22
Berg v. Christie, 436 N.J.Super. 220, 93 A.3d 387 (App. Div. 2014)..... 4
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)..... 3, 22
Garden State Equal. v. Dow, 434 N.J. Super. 163, 82 A.3d 336 (Law. Div. 2013)..... 17, 18
In re Baby M., 109 N.J. 396, 447, 537 A.2d 1227 (1988)..... 11
In re Marriage Cases, 183 P.3d 384 (Cal. 2008)..... 20
J.B. v. M.B., 170 N.J. 9, 783 A.2d 707 (2001)..... 11
Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008)..... 20
Lewis v. Harris, 188 N.J. 415, 908 A.2d 196 (2006)..... 18, 27
McDermott v. Sch. Employees' Health Benefits Comm'n, No. A-1464-14T1, 2016 WL 1048691 (N.J. Super. Ct. App. Div. Mar. 17, 2016)..... 23
Micheletti v. State Health Benefits Comm'n, 389 N.J. Super. 510, 913 A.2d 842 (App. Div. 2007)..... 23
Planned Parenthood of Central New Jersey v. Farmer, 165 N.J. 609, 762 A.2d 620 (2000)..... 11
Ragan v. Dukes, 253 N.J. Super. 246, 601 A.2d 739 (App. Div. 1992)..... 18
Rosenstein v. State, Dep't of Treasury, Div. of Pensions & Benefits, 438 N.J. Super. 491, 105 A.3d 1140 (App. Div. 2014)..... 4, 22
Sanchez v. Dep't of Human Servs., 314 N.J. Super. 11, 713 A.2d 1056 (App. Div. 1998)..... 12
Sojourner A. ex rel. Y.A. v. New Jersey Dep't of Human Servs., 350 N.J. Super. 152, 794 A.2d 822 (App. Div. 2002)..... 11, 14

State v. Bulu, 234 N.J. Super. 331, 560 A.2d 1250 (App. Div. 1989) 13
Teamsters Local 97 v. State, 434 N.J. Super. 393, 84 A.3d 989 (App. Div. 2014) 22
Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) 20
WHS Realty Co. v. Town of Morristown, 323 N.J. Super. 553, 733 A.2d 1206 (App. Div. 1999) 12, 30

State Statutes

Cal. Health & Safety Code § 1374.55 1
Conn. Gen. Stat. Ann. § 38a-536 1
Mass. Gen. Laws Ann. ch. 175, § 47H 1
Md. Code Ann., Ins. § 15-810 1
N.Y. Insurance Law § 3221(k)(6) 1
N.Y. Insurance Law § 4303(s) 1
NJSA § 10:4-12(7) 24
NJSA § 17B:27-46.1X(a) 1, 5, 7
NJSA § 52:14-17.27 3
NJSA § 52:14-17.29(A)(2) 23
NJSA § 52:14-17.33 21
NJSA § 52:14-17.46.3 3
NJSA § 52:14-17.46.4 3

Federal Rules

Fed. R. Civ. P. 12(b)(1) 8
Fed. R. Civ. P. 12(b)(6) 8
Fed. R. Civ. P. 8(a)(2) 8

State Regulations

11 NYCRR § 52.17(a)(35) 1
11 NYCRR § 52.18(a)(10) 1

Other Authorities

Artificial Insemination, WIKIPEDIA, https://en.wikipedia.org/wiki/Artificial_insemination (last visited July 21, 2017) 5
http://fertility.ivf1.com/blog/iui-timed-intercourse 5
https://www.coparents.com/insemination/home-insemination-guide.php 5
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) 4
Infertility, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/pregnancy/infertility (last visited July 20, 2017) 4

Lilo H. Stainton, *LGBT Advocates Hope Expanded Infertility Coverage is Just the Start*, NJ Spotlight, http://www.njspotlight.com/stories/16/09/13/lgbt-advocates-hope-fix-to-expand-infertility-coverage-is-just-the-start/ 1
SHBP PDC December 14, 2012 meeting agenda, *available at* http://www.state.nj.us/treasury/pensions/shbp-pd-1212.shtml 24

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, which mandates that group insurance and other health care benefit plans cover "medically necessary" infertility treatments.[1] In violation of the United States and New Jersey constitutional guarantees of due process and equal protection, the original 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. Even after the mandate's recent amendment,[2] however, which was motivated by the instant suit,[3] the mandate continues to impose unacceptable burdens on same-sex couples' fundamental right of procreation – burdens to which heterosexual couples are not subject. Despite the fact that unsupervised heterosexual intercourse and at-home self-insemination – colloquially known as the "turkey baster" method – have comparable conception rates and represent functionally the same process within a woman's body, similarly situated women in same-sex relationships must instead demonstrate infertility by paying between $12,000 and $24,000 for a requisite number of intrauterine insemination ("IUI") cycles under medical supervision.[4]

---

[1] *See* N.J. Stat. Ann. ("NJSA") § 17B:27-46.1X(a).
[2] *See* P.L. 2017, c. 48 ("Chapter 48").
[3] *See* Lilo H. Stainton, *LGBT Advocates Hope Expanded Infertility Coverage is Just the Start*, NJ Spotlight, http://www.njspotlight.com/stories/16/09/13/lgbt-advocates-hope-fix-to-expand-infertility-coverage-is-just-the-start/ (approval of amendment was "a process that Democratic staff members said was fueled in part by the emergence of the lawsuit last month").
[4] California, Connecticut, Massachusetts, Maryland, and New York all have infertility mandates 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).

Plaintiffs are seeking 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 requirements.[5]

PROCEDURAL BACKGROUND

Plaintiffs filed suit on August 1, 2016. (Doc. 1). In response to Plaintiffs' lawsuit, the State Legislature passed Chapter 48 and Governor Chris Christie signed it into law on May 1, 2017. Since the 2012-2013 session, three different bills have previously been introduced to address the discriminatory mandate, but only after this suit was filed did the amendment finally pass. Plaintiffs gave serious consideration to whether their goals were accomplished as a result of the amendment, but because the mandate 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 have 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*. Plaintiffs note that despite Defendants' aggressive, pervasive, and unsupported claims that the

[5] *See, e.g., Khodara Envtl., Inc. ex rel. Eagle Envtl. L.P. v. Beckman*, 237 F.3d 186, 194-98 (3d Cir. 2001) ("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).

initial complaint and the amendments that have followed contain "multiple deficiencies" that Plaintiffs have somehow refused to cure – an oft-repeated refrain and obvious attempt to characterize Plaintiffs' prosecution 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.

FACTUAL BACKGROUND

I. The Parties

Plaintiffs are New Jersey educators working at public schools and a state college who receive health benefits through the SHBP and SEHBP (the "Programs"). As Defendants note, the State Health Benefits Commission ("SHBC") and School Employees Health Benefits Commission ("SEHBC") (together, the "Commissions") are responsible for the operation of the Programs. *See* Doc. 34-2 at 4; *see also 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). Horizon Blue Cross and Blue Shield of New Jersey ("Horizon") is responsible for administration of benefits under the Programs. *See* Doc. 34-2 at 6.

The SHBC has five members, including "the State Treasurer" and "the Commissioner of Banking and Insurance," while the SEHBC has nine members, including "the State Treasurer and the Commissioner of the Department of Banking and Insurance serving *ex officio*." NJSA §§ 52:14-17.27, 17.46.3. The Director of the Division of Pensions and Benefits is the secretary of both Commissions, as representative of the State Treasurer. NJSA §§ 52:14-17.27, 17.46.4. Finally, the Attorney General is the legal advisor of both Commissions. NJSA §§ 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" Commissions. *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 may be diagnosed as infertile without semen exposure through diagnosis with an associated condition like endometriosis or polycystic ovarian syndrome ("PCOS"), 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.[6]

[6] *See 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) ("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."); *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 for at-home insemination without medical practitioner assistance.[7] Further, ICI is just as effective as the unsupervised sexual intercourse required of women with male partners.[8]

III. Pre-Amendment Mandate

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.

NJSA § 17B:27-46.1x(a) (through July 20, 2017). As a result, a New Jersey woman in a same-sex relationship could not qualify as infertile either a) by attempting at-home self-insemination, the equivalent of heterosexual intercourse, or b) even where her doctor was able to confirm her infertility through diagnosis with a related condition. The only way such an individual could

---

[7] *See Artificial Insemination*, WIKIPEDIA, https://en.wikipedia.org/wiki/Artificial_insemination (last visited July 21, 2017).

[8] *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").

plausibly 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 Member Handbook ("Handbook") outlining the health benefits available to those (like Plaintiffs) enrolled in the Programs has unequivocally and explicitly stated that the Programs "will follow the New Jersey State Mandate for Infertility." Defendants concede that the content of the Handbook is controlled by the Commissions and PDCs, and therefore by the individual members thereof (collectively, the "individual capacity Defendants").[9] Thus, the State impliedly concedes that the individual capacity Defendants as a group are 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, which is borne out by Horizon's explicit predication of its refusals to extend coverage to Plaintiffs on the terms of the mandate.[10] As a result of the application of the pre-amendment mandate to coverage provided by the Programs, 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

As noted, on May 1, 2017, Governor Christie signed the amended 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

[9] *See infra*, Argument § III.
[10] *See* TAC ¶¶ 55, 77, 79, 88, and 93.

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.[11]

> In relevant part, 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: …(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…

NJSA § 17B:27-46.1x(a) (after July 20, 2017). As a result, although a New Jersey woman in a same-sex relationship can now qualify as infertile if she has a related condition like endometriosis or PCOS, absent such a diagnosis she is still barred from demonstrating infertility through attempted at-home self-insemination, the relevant equivalent of unsupervised heterosexual intercourse. Unlike women with male partners, she must instead pay for six months or one year of medically supervised IUI treatments, depending on her age. Given the cost of around $2,000 for an IUI cycle,[12] the amended mandate therefore requires her to pay approximately $12,000 to $24,000 to access its protections, unlike women with male partners.

---

[11] And for which even Defendants must forcibly concede *some* state official would appropriately be held responsible. *See infra*, Argument § II(B).

[12] *See* TAC at ¶ 38.

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 "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 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" under 12(b)(6). *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).

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

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 well-established that 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 Federal 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); *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 fundamental right, it is subject to heightened scrutiny, and 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).[13]

In fact, the mandate runs further 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 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 v. Smith*, 582 U.S. at ___ (2017), which recognized same-sex parents' constitutional right to have both their names on their children's birth certificates.

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

[13] *See also Roe*, 410 U.S. at 154; *Casey*, 505 U.S. at 929; *Griswold*, 381 U.S. at 485; *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969).

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 interests 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.[14]

Defendants do not deny that procreation is a fundamental right, or that this right is implicated by access to fertility treatments. 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

[14] *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)).

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 to personal choices about reproduction than access to contraception, and thus 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, 538 (1973).[15] Moreover, even an indirect burden on a

[15] *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 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 [equal protection] scrutiny"); *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) ("[There 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); *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 [constitutional] scrutiny"); *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. …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); *Gratz v. Bollinger*, 539 U.S. 244, 302 (2003) ("To avoid conflict with the equal protection clause, a classification that denies a benefit… must not be based on race"); *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… benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (unconstitutional statute not saved "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

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 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).[16]

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 is 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*.

(1986) ("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" implicate equal protection).

[16] *See also Lubin v. Panish*, 415 U.S. 709, 717-18 (1974) (same conclusion re: similar California statute); *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.") (*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, just as the mandate provides an advantage to women with male partners in realizing their fundamental right to procreate, the "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.").

"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). 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).[17]

1. The Pre-Amendment Mandate Was Facially Discriminatory, Including as Applied to Plaintiffs by the Handbook

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 for women in same-sex relationships who were unable to conceive to 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 persons similarly situated should be treated alike." *City of Cleburne*, 473 U.S. at 439. As between similarly

[17] As noted *supra*, Argument § I(A), the State 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 "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.").

situated women in heterosexual and same-sex relationships, the pre-amendment mandate was clearly discriminatory on its face.

Defendants argue 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. 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 (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.[18]

Defendants further argue that because Plaintiffs are covered by the Programs and the applicability of the mandate to the Programs was not contained in the statute itself until May 17, 2017, 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." Defendants' attempts to characterize the Handbook's additional paraphrasing of the mandate's discriminatory language as some kind of alternative, materially different, nondiscriminatory standard are completely unsupported by the very language Defendants quote, which is discriminatory on its face.[19] Defts.' Memo at 28. They are also belied by the fact that Plaintiffs themselves allege they have repeatedly been denied coverage by administrator Horizon, which has explicitly predicated those denials on the mandate itself. That the pre-amendment mandate did not compel the Programs to adopt it is irrelevant given the

[18] 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.

[19] Most obviously through its reference to "the female partner," which necessarily assumes the other partner is male.

Programs' own decision to expressly do so. No amount of vociferous attorney argument changes the Handbook's explicit terms.

2. 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, however, similarly situated women in same-sex relationships are instead required to pay for a requisite number of medically supervised IUI cycles in order to receive the benefits of the mandate.

The amended mandate is no less unconstitutional than its predecessor 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 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).[20]

[20] *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

Defendants would be hard pressed to argue that limiting same-sex couples' access to infertility treatments serves any rational – much less compelling – State interest, and indeed, they fail to argue that either form of the mandate serves any such interest. New Jersey's amended infertility mandate continues to discriminate against women in same-sex relationships, and the fact that the New Jersey legislature unsuccessfully attempted to correct its discriminatory law does not insulate it from liability.[21] Defendants attempt to argue otherwise – which contains zero citations to caselaw whatsoever (*see* Defts.' Memo at 15-17) – is utterly unavailing.

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

---

the benefits, but all of the same benefits.") (internal citations and quotation marks omitted) (*citing Lewis v. Harris*, 188 N.J. 415, 908 A.2d 196 (2006)); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that even short term loss of First Amendment freedoms "unquestionably constitutes irreparable injury")); *Califano v. Goldfarb*, 430 U.S. 199, 208 (1977) ("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.").

[21] *See, e.g.*, *Ragan v. Dukes*, 253 N.J. Super. 246, 250, 601 A.2d 739, 741 (App. Div. 1992) (finding new jersey tolling statute amended to remove unconstitutional provision remained unconstitutional for other reasons); *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.").

It is now well recognized that sexual orientation is a suspect classification, requiring any statute that discriminates on this basis to be subjected to heightened scrutiny.[22] Following Supreme Court precedent, lower courts around the country have applied heightened scrutiny to sexual orientation claims. *See SmithKline Beecham Corp. v. Abbott Labs*., 740 F.3d 471, 481 (9th Cir. 2014) ("*Windsor* 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).[23] "Notably absent from *Windsor*'s review of DOMA are the strong presumption in favor of the constitutionality of laws and the extremely deferential posture toward government action that are the marks of rational basis review." *Baskin*, 766 F.3d at 671 (*quoting SmithKline*, 740 F.3d at 483). 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 this conclusion was not compelled by *Windsor* itself, analysis of the

[22] *See Romer*, 517 U.S. at 620; *United States v. Windsor*, 133 S.Ct. 2675 (2013); *Obergefell*, 135 S.Ct. at 2584.

[23] *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"); *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.").

traditional criteria used to evaluate the applicability of heightened scrutiny also demonstrates that such classifications are suspect or quasi-suspect and must be subjected to heightened scrutiny.[24]

II. Plaintiffs' Claims Against the Commissions and PDCs Are Not Barred by the Eleventh Amendment

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

[24] *See, e.g., Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir. 2012) 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." 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); *see also 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); *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).

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).[25]

A. 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, 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." NJSA § 52:14-17.33. This provision disclaims any obligation on New Jersey's part to pay money judgments entered against any of the relevant entities. 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.

[25] Defendants claim, without citation, that Plaintiffs are barred from arguing that the Commissions (and apparently by implication, the PDCs) do not constitute arms of the state for sovereign immunity purposes because Plaintiffs conceded, based on the facts at their disposal at that time, that sovereign immunity attached to the Commissions in response to a prior motion to dismiss. *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.

B. 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.[26] 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).

C. 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 <u>at a minimum</u>, significant disputed

[26] *See, e.g., Commc'ns Workers of Am.,* 421 N.J. Super. 75 (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).

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.

III. Plaintiffs Have Standing to Sue All Individual Capacity Defendants

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 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 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.[27] As the state acknowledges, the handbook governs "services to be covered and those which are excluded" applicable to decisions made by Horizon 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.

[27] *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").

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, not only are minutes not available for every meeting identified in the Plan Design Committee Archives, but the PDCs also retreated to confidential "executive session" during the majority of meetings "to discuss matters falling within the attorney client privilege, and/or matters in which litigation is pending or anticipated, pursuant to N.J.S.A. 10:4-12(7)."[28] Plaintiffs therefore cannot 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.

[28] *See, e.g.*, SHBP PDC December 14, 2012 meeting agenda, *available at* http://www.state.nj.us/treasury/pensions/shbp-pd-1212.shtml.

489 (1999)).[29] 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).[30]

Notwithstanding Defendants' argument to the contrary, a showing that a constitutional right is "clearly established" does not require 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.*

[29] *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 …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.") (internal citations and quotation marks omitted).

[30] This defense is inapplicable, however, to Plaintiffs' claim pursuant to 28 U.S.C. § 2201.

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)).[31] 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.

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

[31] *See also United States v. Lanier*, 520 U.S. 259, 271 (1997) ("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 though the very action in question has not previously been held unlawful") (internal citations and quotation marks omitted); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) ("in an obvious case, [general] standards 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, …we [have] expressly rejected a requirement that previous cases be 'fundamentally similar.'"); *Kopec v. Tate*, 361 F.3d 772, 785 (3d Cir. 2004) ("the salient question is whether the state of the law gave [defendants] fair warning that their alleged treatment of [plaintiffs] was unconstitutional.") (emphasis in original) (internal citations and quotation marks omitted); *cf. Saucier v. Katz*, 533 U.S. 194, 205 (2001) ("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.").

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 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]… 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 423, 444.

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 heterosexual couples, the State 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 out of pocket is objectively clear.

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

Equal treatment on the basis of sexual orientation is now also a well-established right under the Federal Constitution. Legislation that unjustifiably discriminates on the basis of sexual orientation was first recognized as unconstitutional by the 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, because 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, Defendants must provide a sufficiently compelling and adequately tailored justification for excluding Plaintiffs from the mandate's protection.

C. 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.[32] 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.[33]

Because at-home self-insemination is as effective as unsupervised sexual intercourse and heterosexual couples attempting to conceive through intercourse are not subjected to any medical supervision requirements, forcing women in same-sex couples to pay for such supervision constitutes arbitrary and irrational discrimination. 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

[32] *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."); *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).

[33] *See, e.g.*, *Eisenstadt*, 405 U.S. at 443, 454 (no rational basis to distinguish between married and unmarried individuals regarding possession of contraceptives because state interests cited could not "reasonably be regarded as legislative aims" of the challenged statute, based on lack of rational relationship between them); *Moreno*, 413 U.S. at 534 (law unconstitutionally differentiated between related and unrelated people in defining the term "household" for benefits eligibility purposes, because distinction had no logical relationship to any proffered interest).

may be made. Here, as in *Eisenstadt*, "[i]n each case the evil, as perceived by the State" (in this case, 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 (*citing Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring) (no rational basis exists for the selective application of legislation to a small group)).[34] Thus, it is well established that in order to make distinctions between citizens, a law 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
July 27, 2017

Respectfully submitted,

By: /s/ John A. Beranbaum

John A. Beranbaum
Grace Cathryn Cretcher (*admitted in NY only*)
Bruce Menken (*admitted in NY only*)
BERANBAUM MENKEN LLP
80 Pine Street, 33rd Floor
New York, New York 10005
Ph: (212) 509-1616;
Fax: (212) 509-8088

[34] *See also WHS Realty Co*., 323 N.J. Super. at 562 (a state "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."); *City of Cleburne*, 473 U.S. at 450 (ordinance excluding homes for the mentally retarded from zoning district failed rational basis test without justification for why "other people can live under such 'crowded' conditions when mentally retarded persons cannot."); *Romer*, 517 U.S. at 632-33 (even under "the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained… 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.").